

UPPER TRIBUNAL (LANDS CHAMBER)



Neutral citation number: [2022] UKUT 108 (LC)

Case No: LC-2021-563

Royal Courts of Justice, Strand, London WC2A

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – PRACTICE AND PROCEDURE – documents disclosed in redacted form without previous permission – “unless” order requiring disclosure in unredacted form – application for direction permitting redaction and request for further time for compliance not determined by date fixed for compliance – proceedings struck out for non-compliance – request for reinstatement refused – rules 3, 9 and 17, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

**AN APPEAL AGAINST A DECISION OF
THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN:

Mr Graham Porteous Bishop

Appellant

-and-

Mrs Margaret Jaques

Respondent

Re: The Avenue, North Trade Road, Battle

Martin Rodger QC, Deputy Chamber President

22 April 2022

The appellant made written representations on his own behalf
Mr Simon Williams, instructed by Donaldson Dunstall, Solicitors made written representations
on behalf of the respondent

© CROWN COPYRIGHT 2022

The following case is referred to in this decision:

Mitchell v News Group Newspapers Ltd [2014] 1 WLR 795

Introduction

1. In June 2020 the appellant, Mr Bishop, applied to the Land Registry for the determination of the boundary between land at North Trade Road in Battle belonging to him and adjoining land belonging to the respondent, Mrs Jaques. His application was referred to the First-tier Tribunal (Property Chamber) (the FTT) but on 27 August 2021 it was automatically struck out because Mr Bishop had failed to comply with an order requiring him to give disclosure of documents and warning him that if he did not do so the proceedings would be dismissed. At the time the proceedings were struck out the FTT had not yet considered two applications by Mr Bishop for further directions in relation to disclosure, and for an extension of the time for compliance with the unless order, one of which had been made fourteen days before the deadline, the other seven days before. The FTT subsequently dismissed a request by Mr Bishop that it review its decision and reinstate the appeal.
2. The narrow issue in this appeal, for which permission was given by this Tribunal, is whether the FTT acted within the proper limits of judicial discretion when on 14 October 2021 it refused Mr Bishop's request to reinstate the proceedings without first having considered the merits of his outstanding application for further directions in relation to disclosure and for additional time to comply with the unless order. But that decision was only the last in a series of case management decisions in this case and the broader issue is whether the FTT's approach to case management, and in particular to securing compliance with its procedural directions, has been consistent with its overriding objective of dealing with cases fairly and justly.
3. The Tribunal directed that the appeal be determined on the basis of written representations. Mr Bishop is not professionally represented and made representations on his own behalf. Grounds of opposition to the appeal were settled on behalf of Mrs Jaques by Mr Simon Williams.

The background

4. In 1992 Mr Bishop purchased North Lodge, a large house in substantial grounds on the north side of the A271 North Trade Road, in Battle. Immediately to the west of North Lodge is Beacon Cottage which has belonged to the respondent, Mrs Jaques, since 1982. To the west of Beacon Cottage is a narrow strip of land which also belongs to Mr Bishop and which provides access from North Trade Road to his land at the rear of North Lodge. That strip of land is referred to as "the Avenue".
5. These proceedings arise because of a disagreement between Mr Bishop and Mrs Jaques over the location of the boundary between Beacon Cottage and the Avenue (which Mr Bishop refers to as "line A1"). That disagreement is significant because part of Mr Bishop's land to the rear of North Lodge may be suitable for housing; that land is referred to as "the Field". If the boundary between Beacon Cottage and the Avenue lies where Mrs Jaques says it does (west of line A1), the Avenue may not be wide enough to provide sufficient access to the Field to enable it to be developed.
6. In 2007 Mr Bishop transferred part of the land at North Lodge to his wife, Mrs Bishop, whose title was registered in 2012. In March 2019 Mr Bishop sold North Lodge itself, but

retained the Field, the Avenue, and a parcel of land lying between them. Access between the Field and North Trade Road is only available along the Avenue.

7. The dispute between the parties over the position of the boundary was not resolved by agreement and on 14 May 2020 Mr Bishop applied to the Land Registry under section 60, Land Registration Act 2002 asking it to determine the exact line of the boundary between Beacon Cottage and the Avenue. Mrs Jaques objected to the application and the Land Registry referred the dispute to the FTT for determination.

The FTT's procedural rules

8. Three of the FTT's procedural rules (the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013) are of specific relevance to this appeal.
9. Rule 3 explains that the overriding objective of the Rules is to enable the FTT to deal with cases fairly and justly. Rule 3(3) requires the FTT to seek to give effect to that objective when it exercises any power under the Rules. As rule 3(2) explains, dealing with cases fairly and justly includes avoiding unnecessary formality and seeking flexibility in the proceedings, and ensuring, so far as practicable, that the parties are able to participate fully. That explanation is different in some respects from the text of rule 1.1 of the Civil Procedure Rules (to which the FTT had referred); the FTT's Rules refer specifically to the need for flexibility, while the courts' overriding objective identifies "enforcing compliance with rules, practice directions and orders" as an aspect of dealing with cases justly. Of course, the objectives of the two procedural codes are not different, with each seeking to achieve the fair resolution of disputes. But the non-exhaustive lists selected by the respective procedure committees to illustrate what the achievement of those objectives entails in their respective spheres, are not accidental. The FTT Rules, and those of other tribunals which they mirror, reflect the key structural principles identified in the 2001 Leggatt Report and the 2003 Law Commission Report on Land, Valuation and Housing Tribunals: The Future, including their emphasis on the fact that tribunals exist to serve tribunal users, and need to be readily accessible to those users (Law Com No. 281, para. 3.27). The resulting differences in tone and emphasis were no doubt intended to reflect those principles.
10. No specific examples are given in the Rules of the sort of unnecessary formality which the FTT is to avoid, nor of the flexibility it is to seek, nor how it is to ensure parties are able to participate fully in the proceedings. That responsibility is left to the good sense of the individual judge or panel each time they exercise a power given to them by the Rules, as rule 3(3) makes clear.
11. Rule 9 is also engaged in this appeal, as it provides the source of the FTT's power to strike out a case without deciding its merits. The order which led to the dismissal of the proceedings in this case was made under rule 9(1) which provides that a case will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings. Rule 9(5) allows an applicant whose case has been struck out to apply for the case to be reinstated and that is what the applicant did in this case, although he couched his application in terms of the FTT's separate power under rule 51 to set aside and remake a decision which disposes of proceedings if it is in the interests of

justice to do so provided there has been some procedural irregularity in the proceedings. The power under rule 51 is narrower, or at least more specific, than that under rule 9(5).

12. Rule 17 is concerned with the prevention of disclosure or publication of documents and information. Mr Bishop relied on it when he asked the FTT for permission to disclose documents in redacted form. It allows the FTT to make an order prohibiting the disclosure or publication of specified documents or information relating to proceedings; a separate limb deals with non-disclosure of the identity of any person. In each case rule 17(2) requires that the FTT must be satisfied that disclosure of the document or information would be likely to cause “serious harm” to some person and that, having regard to the interests of justice, it is proportionate to give such a direction.
13. Rule 17 does not refer specifically to the redaction of documents as part of an exercise in disclosure, but it is certainly capable of being used for that purpose if the exacting conditions in rule 17(2) are met. Its importance in this appeal is that Mr Bishop believed that it was the proper route for requesting permission to provide disclosure in redacted form, and for that reason he followed the procedure laid down by rules 17(3) and (5). Ordinarily, a party applying for procedural directions must first send a copy of the proposed application to every other party and must confirm to the FTT that they have done so (rule 7(4)). But an application for a direction under rule 17 takes a different procedural course. Rule 17(3) requires that an applicant:

“must –

exclude the relevant document or information from any documents that will be provided to the second party; and

provide to the Tribunal the excluded document or information, and the reason for its exclusion, so that the Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).”
14. Rule 17(4) gives the FTT a distinct power to direct that documents or information may be disclosed to it on the basis that it will not disclose them to other persons. Rule 17(5) provides in relation to such an application that:

“A party making an application for a direction under paragraph (4) may withhold the relevant documents or information from other persons, or the specified other persons, until the Tribunal has made a decision on the application.”
15. The permission in rule 17(5) for a party to “withhold the relevant documents” until the FTT has considered an application for permission to do would appear to apply to documents which a party would otherwise be under an obligation to supply to some other person (for example, to another party to the proceedings as part of the application itself). If that was not so there would be no need for specific permission.
16. Quite separately from the powers in rule 17, and free of its restrictive conditions, the FTT has a general power to regulate its own procedure (rule 6(1)) which may be relied on in an appropriate case to permit documents to be disclosed in a redacted form. Rule 18(2), dealing with disclosure, also permits the FTT to provide for the disclosure and inspection

of documents “to any extent which it considers relevant to the issues in dispute” and could be used to permit disclosure of documents in part only, or in redacted form.

The FTT proceedings

17. Mr Bishop submitted his statement of case to the FTT on 13 November 2020, together with attachments running to 68 pages. On 6 January 2021 the FTT gave general directions for the conduct of the reference, including a direction for disclosure of all relevant documents in either party’s possession or control. On 27 April Mrs Jaques’ solicitors applied for disclosure of four specific categories of documents comprising Mr Bishop’s correspondence with the Land Registry, and the conveyancing files and any documents relating to (i) his 1992 purchase of North Lodge, (ii) the transfer of part to Mrs Bishop in 2007, and (iii) his sale of North Lodge and retention of the Avenue in 2019.
18. On 11 May the FTT made an order requiring Mr Bishop either to disclose the documents requested of him by 25 May or to file a witness statement explaining what efforts had been made to locate the documents and why they were not available. The order warned that any failure to comply might lead to the striking out of the proceedings and the cancellation of his application for determination of the boundary. The order did not explain to Mr Bishop what compliance with its direction to disclose conveyancing files meant in practice, nor had any such explanation been given in the FTT’s original directions of 6 January.
19. Mr Bishop responded to the order on 21 May in two separate emails with attachments both of which were sent to the FTT and to Mrs Jaques’ solicitors. To the first email he attached 55 pages of scanned material relating to his 1992 purchase of North Lodge. He explained that the material “contains much sensitive personal and financial information so I have redacted such details as they have no relevance whatsoever to the location of the boundary line”.
20. The second of Mr Bishop’s emails dealt with the disclosure requested in the remaining paragraphs of the order of 11 May. He first explained that he did not have any documents relating to the 2007 transfer of part of the land to his wife (as these had been handed over to the Official Receiver in 2013, and Mr Bishop had subsequently been informed that they had been destroyed). He then attached 34 pages of scanned material relating to the sale of North Lodge and the retention of the Avenue and explained that, once again, parts of this material had been redacted because “the transfer contained information that is extremely relevant to our potential planning applications and could be used to my disadvantage.” He had redacted those parts “as they have no bearing whatsoever on the location of the boundary line A1 with Beacon Cottage”. Finally, he disclosed an earlier draft of his application to the Land Registry together with correspondence rejecting it because he had used the wrong form.
21. Each of Mr Bishop’s emails of 21 May concluded with a section headed “witness statement” in which Mr Bishop stated that the text of the email and its attachments contained all the available documents which he had been requested to disclose by the order of 11 May. Each declaration was followed by a statement of truth.
22. Mrs Jaques’ solicitors considered that Mr Bishop’s response was inadequate, and on 18 June they complained to the FTT that its order of 11 May had been “flouted”. Mr Bishop disputed that suggestion in a response on 21 June in which he explained that he had

disclosed all the information in his own possession about the 1992 and 2019 transactions and added that if the FTT wanted him to obtain a copy of his previous solicitors' files he would be happy to do so.

23. The FTT made a further order on 13 July informing Mr Bishop that it intended to strike the proceedings out but giving him the opportunity to make representations before it did so. The order did not refer to the material which Mr Bishop had disclosed, nor to the fact that parts of that material had been redacted. Instead the FTT stated that “no disclosure has been made in accordance with these directions and neither the respondent nor the Tribunal have received the statement of explanation as required.” If the Judge has seen the emails sent to the FTT and to Mrs Jaques' solicitors on 21 May it is difficult to understand how that statement could have been made, since Mr Bishop had provided disclosure of the documents in his possession and had explained why he had chosen to redact some of them and why he had been unable to disclose others, supporting his explanation with a statement of truth as he had been directed to do.
24. Two other features of the order of 13 July are notable. First, the FTT stated that the order was being made under rule 9(3)(e) of its Rules, which permits it to strike out the whole or any part of the proceedings in a case if it considers there is no reasonable prospect of the case succeeding. That seems to have been a mistake, and the judge probably intended to refer to rule 9(3)(a) which allows the FTT to strike out proceedings if a party has failed to comply with a direction which warned that might be the consequence of non-compliance (as the order of 11 May had done). Secondly, the FTT acknowledged that Mr Bishop may have failed to appreciate that its original direction related not only to documents in his own custody, but also to those which may have been retained by the solicitors who had acted for him in the relevant conveyancing transactions. That explanation had been missing from the original order. It is important that tribunal directions are clear, and all the more so where they threaten a sanction for non-compliance. It might be thought that the FTT did not make its directions sufficiently clear to be understood by someone unfamiliar with litigation practice until it supplied clarification of its intentions on 13 July.
25. Mr Bishop was shocked when he received the order of 13 July telling him that the FTT considered that his case had no reasonable prospect of success. He responded on 30 July with a very long email which sought both to argue the merits of the dispute and to answer the suggestion that he had provided no disclosure in response to the FTT's 11 May directions. He pointed out that he had provided extensive disclosure on 21 May and had believed that the FTT's requirements had been completely met. He explained that he had now asked his former solicitor to examine their files to see if they held anything relevant concerning the Avenue. He had also contacted the solicitors who had acted for him on his purchase in 1992 but had been told their practice was to destroy files after six years. He said that in 2015, before he had made his application to the Land Registry, his own purchase file had been read by counsel then advising him who had told him there was nothing in it of relevance other than a warranty by the vendor that she was not aware of any boundary disputes. He was nevertheless “very willing” to provide the FTT with unredacted copies of the material he had already supplied in redacted form. The email concluded with a signed statement that Mr Bishop believed the facts stated in it were true. In a separate email of the same date he provided further copies of his email exchanges with the Land Registry.

26. Having considered the representations made in response to its order of 13 July the FTT made a further order on 6 August giving Mr Bishop until 27 August to provide unredacted copies of all documents in the categories identified in the order of 11 May and which were in his possession, custody or control, including those held by his former solicitors. If he failed to do so his case would automatically be struck out and the FTT would require the Land Registry to cancel his original application.
27. The “unless” order of 6 August explained the FTT’s reasons for making it. These acknowledged that on 21 May Mr Bishop had disclosed material relating to the 1992 purchase, had provided an explanation why he held no documents relating to the 2007 transfer, and had disclosed material relating to the sale of North Lodge, some of it in redacted form. It was nevertheless apparent, the FTT said, that Mr Bishop had not fully complied with the order of 11 May because he had disclosed only those documents which he had determined were relevant, and “he had also, without seeking permission to do so, redacted parts of the documentation that he had disclosed”. Moreover, he had failed to appreciate that his duty to disclose extended to documents held by his former solicitors, but had now asked for additional time to obtain material from them and had stated that he would provide unredacted copies of the disclosure he had already given, if requested. The FTT said that in view of the significant amount of disclosure he had already provided, supported by statements of truth, it would not strike Mr Bishop’s case out but would now require him to provide full disclosure to comply with the order of 11 May, in particular of documents held by former solicitors and unredacted copies of all the documents which he had so far redacted.
28. On 13 August Mr Bishop responded to the unless order. He explained that Herringtons, the solicitors who had acted for him on the sale of North Lodge in 2019, were retrieving all of the documents which he had not yet supplied; he did not anticipate any impediment to complying with the deadline of 27 August. He referred to the FTT’s statement of reasons criticising him for redacting documents “without seeking permission to do so”. He referred specifically to rule 17 of the FTT’s Rules and apologised for his “error and unintended discourtesy” in overlooking its requirement to request a direction authorising the withholding of material. He explained that the documents he had redacted had no bearing on the location of the boundary line A1, but related to a “commercially sensitive” agreement concerning the design of houses to be built on the retained land, which was 100 metres from that boundary. He requested a retrospective direction that those items could remain redacted. He sent the unredacted documents to the FTT alone, and not to the respondent, and said he was doing so “pending a decision on this application”. He also applied prospectively for a direction to prohibit publication of some of the material which would come from his solicitors concerning his personal finances and the disposition of the 2019 sale proceeds, which he believed could have no possible bearing on the location of the disputed boundary.
29. On 20 August, in support of his application, Mr Bishop sent the FTT, by email, unredacted copies of what he called a “massive body of material” relating to the 2019 sale of North Lodge which he had obtained from Herringtons. Each of four emails to which this material was attached was headed “Not to be sent to the respondent until the Tribunal has considered a direction for redaction/exclusion”. A further email to the FTT, and which was copied to the solicitors for Mrs Jaques, was headed “unredacted disclosure for the Tribunal ONLY – pending a direction on my requests of 13 August”. Mr Bishop explained that the material

he was now disclosing comprised all the information held by his former solicitors other than what had previously been disclosed. He pointed out that the unredacted material did not contain a single reference to the boundary between the Avenue and Beacon Cottage, which was more than 30 metres from the land being sold. He continued:

“I note – as expected – that there is much discussion about redemption of my mortgage and other personal details that manifestly cannot bear at all on the location of the boundary line A1. Therefore, I reiterate my request to the Tribunal to agree that I redact/exclude all these details.

Further, there is substantial discussion about my potential application for planning permission in the part of the retained land that is at least 50m from the boundary line A1. Again, this cannot possibly have any bearing on the determination of line A1 but is commercially sensitive for anyone who might be minded to oppose future planning application. Therefore I re-iterate my request to the Tribunal to agree that I redact all these details.

It will take me perhaps a day to redact whatever the Tribunal sees fit to agree that I redact so, if necessary, I request an extension of the deadline of 5pm on 27 August by enough time to allow me to undertake this redaction after the Tribunal’s response to my requests.”

30. No further material exchanges took place before the deadline of 27 August. The FTT did not consider or respond to Mr Bishop’s application for permission to supply documents in redacted form, or his request to extend time for compliance with the unless order until that application had been determined. Mr Bishop did not provide any further documents to the respondent.
31. On 8 September the FTT made an order directing the Land Registry to cancel Mr Bishop’s application for a determined boundary and setting a timetable for any costs application by Mrs Jaques. It recorded in its statement of reasons that the application had automatically been struck out on 27 August because Mr Bishop had not complied with the order of 6 August. Referring to the material supplied on 20 August and the request for permission to supply material in redacted form, the Judge said that the FTT had already considered an application for redaction of documents in the sequence of orders which it had previously made, and by the order of 6 August which was said to have decided that question against the appellant.
32. The FTT commented in two places on the procedure adopted by Mr Bishop. At paragraph 7 of its reasons it said this:

“If the applicant intended to make application to vary or appeal the order made on 6 August then he should have filed and served on the Tribunal and the respondent a properly argued application. He did not do so. Instead he opted, at risk of breaching the clear terms of Judge Dovar’s order, to ask the Tribunal alone for what might reasonably be characterised as a second bite of the cherry. It is true that he did send the documents to the Tribunal on 20 August, but he made no formal application which was notified to the respondent.”
33. At paragraph 9, referring to the email of 30 July, it reiterated:

“If that letter of 30 July is also read as a request to the Tribunal to re-consider or vary the order dated 13 July (as stated by the applicant), then it is precisely what Judge Dovar did, and yet the applicant still failed to observe the directions, seeking to challenge the order yet again but failing to make a proper application and certainly not one that was referred to judiciary before the relevant time limit expired with the consequences explained above.”

34. These passages from the FTT’s order of 8 September cannot be passed over without referring to rule 3(2) of the FTT’s Rules and in particular to the FTT’s duty, when exercising its case management powers, to further the overriding objective of dealing with cases fairly and justly including by “avoiding unnecessary formality and seeking flexibility in the proceedings.” It is not clear what the FTT envisaged ought to have been included in a “properly argued application” which would have elevated the applications of 13 and 20 August to requests which it would have been prepared to consider. If its concern was simply that the applications had not been served on the respondent that was factually incorrect.
35. On 28 September Mr Bishop asked the FTT to review its decision to strike out his case. In his request he suggested that the FTT had acted unfairly by not determining his application for permission to redact documents, and his application for an extension of the unless order until it had done so, and it referred to the application as having been made under rule 17 of the FTT’s Rules. Amongst the other material he referred to was the FTT’s published performance standards promising to respond to communications within 14 days.
36. In a decision issued on 14 October the FTT refused the request to review the order of 8 September; it then treated the request for a review as an application for permission to appeal and refused that application.
37. The FTT’s decision of 14 October included a lengthy review of the proceedings and commentary on Mr Bishop’s conduct. In particular, at paragraph 22 it referred to his application of 13 August and to his complaint that it had not been dealt with before time for compliance with the order of 6 August had expired. Mr Bishop was said by the FTT to have “compounded” his default because he had sent the unredacted conveyancing file only to the FTT and not to the respondent (although that would obviously have defeated the purpose of making the application). He had “deliberately excluded the respondent from a process that should have included her” and the FTT “was under no obligation to deal with any application which was not served on the respondent as basic procedural fairness would require that”. As a result “it was not procedurally unfair for the Tribunal not to deal with these applications prior to 27 August (had it been administratively possible)” in view of the emphatic directions given on 6 August. As for the FTT’s published performance standards, they “do not apply to case management by judiciary”. Referring to the fact that Mr Bishop was acting without legal representation, the FTT pointed to the Civil Procedure Rules which govern the conduct of litigation in the courts system and to “the authorities which stress that litigants in person are not a privileged class of litigant, but expected to familiarise themselves with procedural rules.”

The grounds of appeal

38. Mr Bishop’s underlying complaint is that he has been unfairly treated by the FTT. To him its management of his case was confusing and contradictory, first emphasising the

importance of moving quickly to a final hearing, then threatening to strike out his application as having no prospect of success. He had tried conscientiously to comply with the FTT's directions, and believed he had done so, but repeatedly found he was expected to take some additional, previously unexplained step – to obtain documents from a solicitor instructed almost 30 years previously, for example, or to make a procedural request by formal application. Then, having faithfully though belatedly followed the procedure laid down by the FTT's Rules to obtain permission to redact by supplying unredacted copies to it but not to the respondent, he was told he had compounded his default and ought to have followed a wholly different procedure. He contrasted the way his application had been managed with material published by the FTT which had led him, as an unrepresented party, to expect guidance on procedure from the Judge.

39. In granting permission to appeal this Tribunal focused on the suggested unfairness of the FTT's failure to consider Mr Bishop's applications of 13 and 20 August for permission to redact documents. The FTT's suggestion, in its refusal to review the striking out of the case, that Mr Bishop's application had already been determined against him on 6 August seemed to the Tribunal when it granted permission to appeal at best to be questionable.
40. Mrs Jaques opposes the appeal and in grounds of opposition prepared by Mr Williams she maintained that striking out the proceedings was the right and just response to Mr Bishop's consistent failure to comply with the FTT's orders. He had disclosed only a fraction of the documents ordered on 11 May and had failed to file a witness statement explaining why others were unavailable. Instead of complying with the unless order he had asked for permission to redact documents which he had already been ordered to provide in unredacted form.

Discussion and disposal

41. As Mr Williams correctly submitted, an appellate court or tribunal should not lightly interfere with a case management decision by a first instance judge. That principle was emphasised by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 at [52] and this Tribunal regularly applies it to uphold robust but fair case management. But case management decisions, like any discretionary decision, must be based on relevant matters and not on irrelevant matters.
42. Fair case management requires that the tribunal take seriously the difficulties which inexperienced lay people have in conducting complex legal proceedings without professional assistance. Those difficulties place a burden on tribunal judges and require that they be sensitive to the parties' limitations and alive to the potential for misunderstanding. The judge was quite correct to say that those who appear before tribunals without professional representation are not a privileged class of litigant; all litigants are entitled to expect that their cases will be dealt with fairly, including the confused, the verbose and even the insufferable. It is also reasonable, as the Judge said, to expect that parties will familiarise themselves with procedural rules, but it is unreasonable to assume that all parties will conduct proceedings to the same standard as professional litigators and unfair to treat honest mistakes as if they were wilful acts of defiance.
43. The FTT's Rules, and in particular rule 9, provide it with flexible case management powers enabling it to respond proportionately to any failure of compliance. Some of the difficulties in this appeal stem from a premature resort to sanctions which escalated to the unless order

of 6 August which took away the FTT's discretion and led to the striking out of the case automatically without consideration of Mr Bishop's last two applications. The FTT could have made a less draconian order containing the threat of a sanction while retaining the discretion to determine whether the dismissal of the whole case was justified. In retrospect the unless order was not justified because it assumed a degree of non-compliance which was absent. The original direction of 11 May had contained a warning that a failure in compliance might lead to the proceedings being struck out, but it did not unambiguously explain what Mr Bishop had to do. The order of 13 July initiated the threatened sanction, but it ignored the steps which had been taken to comply with the original order or was made in ignorance of them and treated Mr Bishop as having been in default of an order which was not clear. Mr Bishop was making efforts to comply with that order and had explained when he expected to receive documents from his former solicitors, and there was no reason to put his case under the threat of automatic dismissal on 6 August as if he had already been in default for several months. If, administratively, it was not going to be possible for the FTT to consider an application made 14 days before the automatic sanction took effect for an extension of time, or for variation of the order, there was every reason not to make the order in that form.

44. In this case the FTT refused on 14 October to reinstate Mr Bishop's case because it considered that the issue of redaction of what to him appeared to be irrelevant but sensitive material had already been determined on 13 July and 6 August. As the FTT explained, "The question of redaction and disclosure was the subject of explicit directions by two different tribunal judges." His applications for permission to redact made retrospectively on 13 and 20 August therefore appeared to the Judge to be defiant attempts to take a second or third bite of the cherry.
45. That interpretation of what occurred is not consistent with the steps taken by Mr Bishop or the reasons given by the FTT in its orders of 13 July and 6 August.
46. The order of 13 July informing Mr Bishop that the FTT intended to strike out his proceedings under rule 9(3)(e) did not refer to the disclosure given by Mr Bishop in his two emails of 21 May, or to the fact that some of the documents disclosed had been redacted. It referred instead only to the application made by Mrs Jaques' solicitors on 18 June in which they had said that the disclosure orders had been flouted. The FTT stated in terms that no disclosure had been given and that the required statement of explanation had not been provided; while that was the state of affairs asserted by Mrs Jaques' solicitors, it also appears to have been accepted as true by the FTT. It was not true, as the emails of 21 May demonstrate. Mr Bishop had given substantial but incomplete disclosure, and he had explained clearly which category of documents he did not have and why, supporting that explanation with a statement of truth as the FTT had required. The order of 13 July did not say that the judge had treated the emails of 21 May as if they were an application for permission to redact the disclosed material, and gave no reasons dismissing any such notional application. On the contrary, the impression given by the order is that the Judge was unaware of the form or the extent of the disclosure which had already taken place.
47. Mr Bishop made no application for permission to redact parts of the documents he had disclosed until 13 August. He was prompted to do so by the FTT when, in its unless order of 6 August, it identified the extent of his non-compliance with the order of 11 May: "Further, he had also, *without seeking permission to do so*, redacted parts of the documentation that he had disclosed." In its order the FTT reproduced in full the text of

Mr Bishop's emails of 21 May in which he had explained his reasons for having redacted "sensitive personal and financial information" and material "relevant to our potential planning applications and [which] could be used to my disadvantage" from the accompanying documents. But the FTT made no comment on his explanation and gave no reasons of its own why his approach was unacceptable. In particular, it did not say that it was treating the 21 May emails as if they were an application for permission to redact and dismissing that application. Contrary to the submissions of Mr Williams, it is quite clear that it was not treating them in that way, since if it had done so it would have given its reasons for refusing the application. The FTT's sole relevant observation was that the redaction had taken place without permission.

48. Mr Bishop was therefore correct to assume that the FTT had not dismissed an application by him for permission to redact documents. That plank of the FTT's refusal of his application for reinstatement of his case was unsound.
49. The FTT also misunderstood what Mr Bishop was attempting to do when he applied retrospectively for permission to redact the documents he had already disclosed and prospectively to redact parts of those which were not yet in his possession (and which he subsequently disclosed on 20 August). It was clear from his application of 13 August that he was following the procedure laid down by rule 17, to which he specifically referred. He requested "a direction to send all the correspondence to the Tribunal and exclude those dealing with my personal finances in the package to be sent to the respondent". As required by rule 17(3) ("the first party must (a) excluded the relevant documents ...") he sent them in unredacted form only to the FTT on 13 and 20 August. Rule 17(5) appeared to authorise that withholding of material "until the Tribunal has made a decision on the application."
50. This approach was treated by the FTT as exacerbating Mr Bishop's previous default, but it reached that conclusion without relating what he had done to the procedural rule he had identified as the basis for doing it. Had it done so the FTT would have appreciated that, far from deliberately excluding the respondent from a process that should have included her, Mr Bishop was following the far from straightforward procedure prescribed by rule 17.
51. This misunderstanding is important, as the FTT considered that it could not deal with the applications of 13 and 20 August because they had not been served on Mrs Jaques. The FTT said of the failure to provide full copy to Mrs Jaques: "The Tribunal was under no obligation to deal with any application which was not served on the respondent as basic procedural fairness would require" and later "it was not unfair for the Tribunal not to deal with these applications prior to 27 August (had it been administratively possible to do so)". In fact, the applications of 13 and 20 August had both been sent to Mrs Jaques' solicitors, without the unredacted documents disclosed to the FTT. That was the procedure envisaged by rule 17 and, whatever it made of the undetermined applications themselves, the FTT was wrong to treat the suggested failure to send them to the respondent as an explanation why they had not been determined and the parties informed of the outcome.
52. The FTT did not say whether the applications of 13 and 20 August had been considered by a Judge before the expiry of the unless order on 27 August, although they certainly had been by the time the order of 8 September was made directing the Land Registry to cancel the defined boundary application. In my judgment the fact that an application to vary an unless order leading to the striking out of the proceedings without further judicial

consideration was not determined in the period of 14 days from the making of the application to the expiry of the order would itself have justified the grant of a short extension of time to enable the application to be determined and the parties notified. I do not base that conclusion in the FTT's published performance standards (which Mr Bishop was not to know applied only to administrative and not to judicial tasks) but to the substance and consequences of the application itself. Whether they were considered and left undetermined, or whether (as the decision of 14 October implied) it had not been administratively possible for them to be considered, the applications were plainly relevant. They were relevant to compliance with the unless order itself, because it was unclear how that order and the direction in rule 17(5) that a party may withhold documents until an application under rule 17(4) is determined related to each other. They were relevant also to the exercise of the FTT's discretion when dealing with Mr Bishop's application for reinstatement (whether it be treated as having been made under rule 9(5) or rule 51).

53. Had the FTT appreciated that Mr Bishop's applications were made under rule 17 it could not have considered, consistently with the overriding objective of dealing with cases fairly and justly, that it was just too bad that they had not been determined in time to enable him to know how he should comply with the unless order. It might very fairly be said that he took a risk and should have assumed that meticulous compliance was the only safe approach until he was told otherwise, but rule 17(5) appears to give the necessary permission to withhold material from the respondent until the application had been determined. It is not necessary to reach a conclusion on the relationship between the rule and the expiry of an unless order because it is clear that the FTT did not consider its relevance at all, whereas Mr Bishop interpreted it as requiring him to deal with the application in the way he did.

Disposal

54. In my judgment the FTT's refusal to reinstate the proceedings was flawed and its decision of 14 October 2021 must be set aside because it treated the substance of the applications of 13 and 20 August as having already been determined, when they had not been, and because it did not take into account the justification which rule 17 appeared to provide for the way in which Mr Bishop dealt with notifying Mrs Jaques of the applications and limiting the disclosure he made prior to the determination of the application.
55. No purpose would be served by remitting the application for reinstatement of the proceedings to the FTT for further consideration. I am satisfied that Mr Bishop acted in good faith and has attempted to comply with the FTT's directions as he understood them. His original default (if it can be regarded as a default at all) was attributable to a lack of clarity in the FTT's orders. His later failing was not the result of a wilful refusal to comply but was the consequence of his application for variation of the order going undetermined. No purpose would be served by allowing his case to remain struck out, as that would contribute nothing to the resolution of the underlying dispute. Indeed, I have no doubt he would make another application to the Land Registry for a determination of the boundary and the parties would find themselves back before the FTT. The futility of striking out the proceedings without some resolution on the merits should be apparent to all.
56. Instead I will accede to the application for reinstatement, but I must also consider on what terms I should do so. That requires me to address the substance of Mr Bishop's applications of 13 and 20 August for a variation of the order of 6 August to permit him to

redact the documents being disclosed. I have considered his sensitivity to the publication of information which would ordinarily be confidential and I have read those parts of the disclosure which he has highlighted as of concern. However, none of the earlier material relating to the 1992 purchase of North Lodge can possibly be of any continuing commercial or personal sensitivity. As for the more recent material relating to the 2019 sale, the details of restrictive covenants in the transfer of part are a matter of record and Mr Bishop's fear that they may be used against him in relation to a future planning application is not an independent ground for refusing disclosure.

57. That is not to say the material in these files includes anything of relevance to the dispute and from my perusal of them it seems likely that Mr Bishop is correct in maintaining that they have nothing to do with the location of the contested boundary. Usually relevance would be a critical consideration in directing disclosure and Mr Bishop has explained at considerable length why he considers the original order for disclosure was inappropriate. But the FTT considered that issue when it identified the categories of document that were to be disclosed. It no doubt took into account that Mr Bishop acts without representation and may not always appreciate what is or is not be of potential significance. Additionally, and exceptionally in this case, the way in which Mr Bishop has presented the material and the chaotic and disorganised series of applications he has made (only some of which I have referred to) are likely to have created in the mind of the respondent an impression that something is being concealed. The documents disclosed by Mr Bishop by 20 August run to almost 1200 pages. The fact that Mr Bishop acts without the assistance of a solicitor means that no person owing professional obligations to the Tribunal has satisfied themselves that the whole of that material contains nothing which might advance the respondent's case or damage Mr Bishop's. It is neither reasonable nor practicable for either the FTT or this Tribunal to satisfy itself on the issue of relevance. If Mrs Jaques' advisers consider that to be an exercise worth undertaking, which clearly they do, fairness and transparency require in this case that they be permitted to do so.
58. Mr Williams has suggested that Mr Bishop is in default by not disclosing documents relating to the 2007 transfer of part to his wife, but he satisfied the requirements of the FTT's order of 11 May in that regard on 23 May when he explained why he no longer had any such documents and supported that explanation with a statement of truth. Mrs Jaques' solicitors have repeatedly expressed their scepticism about that explanation, but they have suggested no good reason for doubting it.
59. I therefore allow the appeal and reinstate Mr Bishop's application before the FTT on condition that within 14 days of the publication of this decision Mr Bishop provides to Mrs Jaques' solicitors full and unredacted copies of the material which he has already disclosed to the FTT and to this Tribunal relating to the 1992 purchase and the 2019 sale. If he complies with that condition, he should at the same time apply in writing to the FTT for further directions.
60. Three final points. First, Mr Bishop has asked that, in the event the appeal is successful, the substantive proceedings should be transferred to this Tribunal for determination. That is a matter, in the first instance, for the FTT under rule 25 of its procedural Rules and I express no view on it.
61. Secondly, in a number of its decisions the FTT has suggested to Mr Bishop that he might consider seeking professional representation, not least because of the financial

consequences of the dispute. I reiterate that suggestion. The way in which Mr Bishop has presented this appeal has demonstrated the difficulty he has in seeing the wood from the trees. There is a risk that the clarity which he sees in his case will suffer from the additional layers of complexity in which it is becoming buried. There is only so much the FTT will be able to do to guide him. Even if he decides to act as his own advocate, as he is entitled to do, he should at least consider whether the assistance and advice of a professional person familiar with litigation and detached from the issues might enable him to identify and organise the relevant material at a preparatory stage so that it can be presented effectively.

62. Finally, when after an appeal the Upper Tribunal has set aside a decision of the FTT and has chosen to remit the case to it for reconsideration, the Tribunal has power under section 12(3)(a), Tribunals, Courts and Enforcement Act 2007 to direct that the members of the FTT who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside. In this case I have not remitted the decision of 14 October 2021 to the FTT for reconsideration; I have instead exercised the power under section 12(2)(b)(ii) to re-make the decision myself. For that reason section 12(3)(a) does not apply, and the choice of which tribunal judge will have the continuing conduct of these proceedings is a matter for the FTT itself. I nevertheless suggest that it would be appropriate for the case management and determination of this case to be assigned to a different judge.

Martin Rodger QC,
Deputy Chamber President

22 April 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.