

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2021] UKUT 130 (LC)
UTLC Case Numbers: LC-2021-242

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – COSTS – appeal from a costs decision of the First-tier Tribunal following an appeal – costs in the discretion of the judge at first instance – appeal fails

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

THORNHAM PARISH COUNCIL

Appellant

-and-

MR JOCELYN PATRICK

Respondent

Re: Land at Thornham

**Upper Tribunal Judge Elizabeth Cooke
Determination on written representations**

Mr Andrew Gore for the appellant, instructed by Kenneth Bush
Mr Paul Letman for the respondent, instructed by Hayes and Storr

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The following cases are referred to in this decision:

Inhenagwa v Onyeneho [2017] EWHC 1871 (Ch)

Patrick v (1) Thornham Parish Council (2) Stephen Bett (3) John Gethin [2020] UKUT 36 (LC)

Introduction

1. This is an appeal from a costs decision made by the First-tier Tribunal (“the FTT”) following its decision on two references to the FTT by HM Land Registry of an application for first registration. The appeal is brought with the permission of the FTT.
2. It has been determined under the Tribunal’s written representations procedure. Written submissions were made by Mr Andrew Gore of counsel for the appellant, and by Mr Paul Letman of counsel for the respondent, and I am grateful to them both. I have determined that the appeal fails and that the costs decision made by the FTT stands, for the reasons set out below.

The background

3. The application for first registration was made by Mr Patrick, the respondent to this appeal. He sought to register his title to a field close to the sea in the village of Thornham in Norfolk. There were two references to the FTT because two different parties had objected to the application: Thornham Parish Council on the one hand and the trustees of local common land (Mr Betts and Mr Gethin, together “the trustees”) on the other. The two references were case managed and heard together by the FTT, and the costs decision likewise was a decision in the two references.
4. There were two controversies about Mr Patrick’s application for first registration. All concerned were content for him to be registered with title to the field, but the objections related to the position of the eastern and southern boundaries. The FTT directed the registrar to give effect to the application for first registration, save that the title plan should not include a strip of land along the eastern boundary which Mr Patrick said should be included. That direction did not make the eastern boundary anything other than a general, and therefore imprecise, boundary but it had the effect that the title plan indicated the position of the general boundary more accurately than Mr Patrick’s plan had done. The FTT found as a fact that Mr Patrick did not own the ditch running along the southern boundary, but that finding had no effect on its direction to the registrar.
5. Mr Patrick appealed the substantive decision to this Tribunal, with the permission of the FTT; his appeal, obviously, was not about the direction to give effect to his application for first registration but about the FTT’s decisions about the southern and eastern boundaries. The Tribunal decided a preliminary issue as to whether the FTT had made an appealable decision in relation either to the eastern boundary or as to the southern boundary; see *Patrick v (1) Thornham Parish Council (2) Stephen Bett (3) John Gethin* [2020] UKUT 36 (LC).
6. The Tribunal decided, unsurprisingly, that the FTT had had jurisdiction to make decisions about the position of boundaries when deciding a reference arising from an application for first registration. However, as to the southern boundary the FTT’s decision about the ditch, although made with jurisdiction, did not create an issue estoppel (for the reasons explained in paragraphs 66 to 78 of the decision) and was therefore, in the absence of any special circumstances that might have made it an appealable decision, not appealable (in line with the reasoning of Morgan J in *Inhenagwa v Onyeneho* [2017] EWHC 1871 (Ch)). By contrast, the decision about the eastern boundary was appealable.
7. Following that decision on the preliminary issue, which left the appeal to proceed as regards the eastern boundary only, Mr Patrick withdrew his appeal. The Tribunal subsequently made a costs order.

The costs order in the FTT

8. At that stage proceedings in the FTT were not yet over because the FTT had not yet made a costs order; it did so on 2 February 2021. By then the judge knew the outcome of the appeal proceedings, and he was therefore able to summarise the effect of the proceedings in the FTT and on appeal. He said at paragraph 34 of the costs decision that Mr Patrick had been unsuccessful as regards the eastern boundary and therefore Thornham Parish Council and the trustees should have their costs as regards the eastern boundary; at paragraph 40 he concluded that Mr Patrick had been successful as regards the southern boundary (because he obtained first registration of exactly what he applied for, namely the field with the general boundary in the position for which he had applied) and should have his costs. At paragraph 41, in order to avoid a complex and expensive assessment process, he set off the two liabilities against each other and made no order for costs.
9. That set-off rests on the premise that both objectors objected to first registration as regards both boundaries. The judge explained:

“13. The dispute between Mr Patrick and the parish council was given reference REF/2017/0458 by the tribunal. The dispute between Mr Patrick and the trustees was given reference REF/2017/0459 by the tribunal. Both references were case managed and heard together, Mr Gore representing both the parish council and the trustees.

14. It seems to me that in the circumstances it would be artificial to treat the respondents other than as both opposing the claim in respect of both boundaries.”

The grounds of appeal and Mr Patrick’s response

10. Thornham Parish Council appeals the costs decision on the basis that in fact it was concerned only with the eastern boundary; it was successful in the FTT and should have its costs without those costs being set off against a liability to Patrick in respect of the southern boundary with which it had no concern. It points out that it was the FTT’s decision to case manage and hear the two references together, and that because there was no conflict of interest between the Parish Council and the trustees it made sense for them to be represented together and indeed that they might have been penalised in costs had they not been.
11. In his grounds of opposition Mr Patrick argues that the reasoning of the FTT in paragraphs 13 and 14 of the costs decision was correct; he also points out that although the Parish Council made its objection to HM Land Registry only in relation to the eastern boundary, on 26 June 2016 in a letter to HM Land Registry it said that it supported the trustees’ object in relation to the southern boundary.
12. The FTT gave permission to appeal its costs decision on 4 May 2021. The judge noted that the Tribunal’s costs order relating to the appeal had ordered Mr Patrick to pay the Parish Council’s and the trustees’ costs relating to the eastern boundary, and ordered the trustees to pay Mr Patrick’s costs relating to the southern boundary. He recognised therefore that it was arguable that his approach to costs had been incorrect and granted permission to appeal.

Discussion and conclusion

13. Costs are in the discretion of the judge who made the substantive decision. The Tribunal will not interfere with a costs decision unless it can be shown that the decision was irrational or

involved an error of law or otherwise fell outside the range of reasonable decisions open to the judge. The mere fact that the appeal judge might disagree with the trial judge's costs order is not a reason why the appeal should succeed.

14. The Parish Council of course prays in aid the Tribunal's decision on the appeal costs, which differs from the order made by the judge.
15. That decision had something of a chequered history. The Tribunal first made a decision on the costs of the appeal in July 2020, but because of an administrative oversight the decision was not sent to the parties for some time. In the July order the Tribunal reached the same conclusion as the FTT had reached; because Mr Patrick had been successful as regards the southern boundary he was entitled to those costs, whereas the appeal had been withdrawn as regards the eastern boundary so that the respondents were entitled to their costs relating to that boundary. As a result the Tribunal set off the two liabilities and made no order for costs. Permission to appeal that decision was sought by the Parish Council. On reading the grounds of appeal the Tribunal took the view that it had misunderstood the terms of the application for costs; it had initially read it as a joint application by the Parish Council and the trustees for their costs relating to both boundaries, but on reflection understood that there were in fact two separate applications and that the Parish Council was concerned only with the costs of the eastern boundary. It reviewed its initial decision and determined that Mr Patrick was to pay the costs of the Parish Council and of the trustees as regards the eastern boundary, and that the trustees were to pay his costs incurred in connection with the southern boundary.
16. When the FTT made its costs order it had the dubious benefit of the Tribunal's first costs decision only, because the reviewed costs decision had not yet been made.
17. Does that mean that the appeal from the FTT's costs decision should be allowed? The Tribunal has gone through a similar reasoning process and has concluded that the set-off solution is incorrect and has made a more complex order. Its conclusion is not the same as that reached by the FTT. That does not necessarily mean that it disagrees with the costs decision made by the FTT as regards the FTT proceedings. It certainly does not mean that the FTT's decision was irrational or fell outside the range of reasonable decisions that it might have made in the exercise of its discretion.
18. Reverting to the FTT's decision, I take the view that an ambiguity ran through the proceedings – both at first instance and on appeal – in the sense that it was not entirely clear who was making which objection. I deliberately left this unstated in paragraphs 3 and 4 above. Certainly both objectors were interested in the eastern boundary and there is no doubt that both objected to the boundary that Mr Patrick sought, although the Parish Council had a far keener interest in that boundary as it claimed to own the “blue strip” that was in due course excluded from the title. The trustees, as I understand it, claimed to own that strip only if the Parish Council did not. But the southern boundary was less obvious. The objection to HM Land Registry as regards the southern boundary was made by the trustees, but the Parish Council expressed “support”. On that basis, together with the joint representation of the respondents, it was certainly not irrational for the FTT to conclude that the Parish Council, as well as the trustees, had “picked a fight”, as the judge in the FTT put it, with Mr Patrick about the ownership of the ditch along the southern boundary. The Tribunal, considering the costs of the appeal, reached a different conclusion, but that does not mean that the conclusion reached by the FTT, considering the costs at first instance, was irrational.
19. In my judgment the costs decision made by the FTT was within the range of reasonable discretionary decisions open to it, and the appeal therefore fails.

Judge Elizabeth Cooke
14 September 2021