UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LAND REGISTRATION – PRACTICE AND PROCEDURE – rectification of the register – mistake on the register – incorrect plan registered with lease – failure to comply with directions

BETWEEN:

MRS SANDRA MICHELLE KENNY-FROW
Appellant

-and-

MR ANTHONY RYAN
Respondent

Re: 121 Healy Place,
Stoke,
Plymouth,
PL2 1BD

Upper Tribunal Judge Elizabeth Cooke
25 November 2021
Royal Courts of Justice

The appellant was unrepresented.
Mr Charles Knapper of Fursdon Knapper, solicitors, for the respondent.

Introduction

1. This is an appeal by Mrs Kenny-Frow from the decision of the First-tier Tribunal ("the FTT") to strike out the applicant's case in a reference from HM Land Registry of her applications for rectification of the register and in her application to the FTT for the rectification of a document under section 108 of the Land Registration Act 2002. The FTT's order was made on 17 March 2021, under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 on the basis both that she had persistently failed to comply with the FTT's directions and that she had no reasonable prospect of success. The FTT subsequently made a costs order against her.

2. Mrs Kenny-Frow's case is that the registered title plan to the lease held by Mr Ryan, the respondent, of the first-floor flat in her property is incorrect and includes land that is not part of the demise. The FTT struck out her reference and her application on the basis that the two plans – the original in the lease and the one on the register – are the same. The parties agree that they are not. I gave permission to appeal on the basis that it was not possible to understand from the FTT's written reasons for its order why the reference and the application had been struck out, and because the discrepancy in the plans calls for explanation.

3. I heard the appeal at the Royal Courts of Justice on 25 November 2021. The appellant, Mrs Kenny-Frow, presented her own case, and Mr Ryan, the respondent, was represented by Mr Charles Knapper of Fursdon Knapper Solicitors.

The factual background

4. The facts set out below are undisputed, except where I say otherwise; it will be seen that a great deal of the crucial background is agreed. I cannot, of course, make any findings of fact in this appeal.

5. Mrs Kenny-Frow is the registered proprietor of 180 Albert Road, Devonport, Plymouth. It is a two-storey building, and until 2013 she held a lease of the ground floor. On 10 May 2013 she surrendered her lease and purchased the freehold from the Co-operative Group Limited; she received a reverse premium of £10,000 (she says she was given the freehold, but in legal terms she is a purchaser). The transfer stated that she bought the property subject to the leasehold interest of Mr Anthony Ryan, the respondent, in the first-floor flat. The address of the flat is 121 Healy Place, Devonport, Plymouth; it is on the first floor of the building although its entrance is on Healy Place rather than Albert Road.

6. Mr Ryan's lease was granted on 29 May 2001 for a term of 999 years. The lease described the demised premises as the property shown for the purpose of identification edged red on the plan, "including the ceilings and floors of the said flat and … the interior surfaces of the external walls therefore Excepting from the demise the main structural parts of the Property including the roof foundations external walls and external parts thereof." The plan showed that the lease did not include any outside space (apart from access up an outside staircase). Specifically the red edging did not include a small patio and outside store on the roof (i.e. on the roof of the ground floor, at floor level to the first-floor flat).

7. Mr Ryan's solicitor, Mr Michael Plant, applied for registration of the lease; HM Land Registry refused to accept the plan. The matter remained unresolved when Mrs Kenny-Frow acquired the freehold in 2013. At that date and for a couple of years beforehand Mr Plant, who had retired, was trying to sort out the registration problem for Mr Ryan. (Mr Knapper's firm had taken over from Mr Plant when he retired but I do not know at what date).

8. It appears from the conveyancing file of Mrs Kenny-Frow's solicitor, Mr Simon Exley of Amicus Law, who was acting for her in 2013 that it became obvious around March 2013 – a couple of months before the purchase was completed – that all was not well between the Co-operative Group Limited and Mr Ryan. Mr Plant got in touch with Mr Exley to explain that there was a dispute about roof repairs, and that the lease had never been registered because of a problem with the plan. (Exactly what Mr Plant said to Mr Exley about the plan is in dispute and I come back to that later). Mr Exley, Mrs Kenny-Frow's solicitor, presented her with a choice: complete now and sort out the problems with the leaseholder yourself, or ask the Co-op to sort out the lease plan and complete after that. Mrs Kenny-Frow was anxious to complete and so she went ahead.

9. Mr Plant supplied Mr Exley with a plan ("the revised plan") that he wanted Mrs Kenny-Frow to sign. She met Mr Plant at the property and signed the revised plan, which is now reflected in the registered title plan for the lease and shows the patio and outdoor store as part of the demised premises.

10. Mrs Kenny-Frow's case is that she signed the revised plan because she understood that the problem with the original plan was just that it did not meet HM Land Registry's requirements and needed to be of better quality; she did not realise that it depicted the patio and stores as part of the demised premises.

11. Mr Ryan's case is that she was advised by her solicitor Mr Exley and was well aware that the revised plan was different, and intended to add those extra areas to his lease.

12. Mr Knapper at the appeal hearing acknowledged that on his own client's version of the facts the lease has not been varied because the mere signing of a different plan cannot have that effect; a deed of variation would have been required and none was executed.

13. But it is not in dispute that Mrs Kenny-Frow signed the revised plan, and that it was different from the 2001 plan in that the original plan did not include those two outside areas and the later one does.

14. Mrs Kenny-Frow has complained that the revised plan was incorrectly dated 2011. Mr Knapper has explained that the 2011 date was the date it was drawn by an architect; it does not purport to be the date of the signature. Mrs Kenny-Frow's signature on the plan is undated.

15. Mr Plant then applied for registration of the leasehold title in July 2013; according to Mr Knapper, who relayed to me at the appeal hearing what Mr Plant told him, Mr Plant submitted the lease with the original plan crossed out and accompanied by the revised plan, signed by Mrs Kenny-Frow. Mr Knapper told me (and again, this is what he says Mr

Plant told him) that Mr Plant also submitted another copy of the plan signed by Mr Ryan which was lost by HM Land Registry. Mr Knapper does not have the original lease, which he said HM Land Registry returned to Wolferstones, solicitors, who were acting for Mr Ryan in a different matter. The lease was registered, and the red edging on the registered title plan shows that the demise includes the patio and outside store.

16. I pause to interject that there is therefore, on the facts that are not in dispute, an obvious mistake on the register; the lease was executed as a deed in 2001 with a plan, which clearly showed the extent of the demise (even if it was not a plan that met HM Land Registry's standards), and the lease (as Mr Knapper acknowledges) has never been varied.

17. I do not know when Mrs Kenny-Frow realised that the revised plan did not match the lease plan, but certainly relations between her, Mr Ryan and Mr Knapper have been acrimonious for most of the time since 2013, about a number of matters including Mr Ryan's occupation of the roof space.

18. In September 2019 Mrs Kenny-Frow applied to HM Land Registry for the alteration of the register on the grounds that the registered title plan is wrong and should be the original 2001 plan which showed that the patio and outside store were not part of the demise. Mr Ryan objected, and HM Land Registry referred the matter to the FTT pursuant to section 73 of the Land Registration Act 2002.

19. On receipt of the reference, the FTT directed her to make an application for rectification of a document pursuant to section 108 of the Land Registration Act 2002. I do not understand why that direction was made. Mrs Kenny-Frow wants to alter the register; she is not seeking to rectify the lease. Her case is that the demise in the lease is different from that shown in the plan submitted with the eventual application for registration and wants the register altered to show the correct area of the demise; there is – although she does not put it this way – a mistake on the register. Mr Knapper told me that he did not understand why that direction was made either; he agrees that Mrs Kenny-Frow is not seeking to rectify the lease; but he did not point that out to the FTT.

20. Nevertheless Mrs Kenny-Frow made the section 108 application as directed, and Mr Knapper filed a response on Mr Ryan's behalf. The FTT made a series of directions about disclosure and the filing of evidence with which Mrs Kenny-Frow either did not comply or did not comply in a way that was satisfactory to the FTT or to Mr Knapper. On 8 February 2021 the FTT made an order for Mrs Kenny-Frow to show why her case should not be struck out both for failure to comply with the FTT's orders and because she had no realistic prospect of success. On 17 March 2021 the FTT issued a decision striking out her case, in both the reference from HM Land Registry and the section 108 rectification application, for both those reasons. I will come to the detail of the decision later.

21. There are two issues in the appeal. First, did the FTT make an error of law in striking out the reference and the application on the basis that Mrs Kenny-Frow had no reaslitic prospect of success? Second, did the FTT fall into error in its discretionary decision to strike out the reference and the application for failure to comply with directions? The latter was a discretionary decision made as a matter of case management, and so the Tribunal

will not interfere unless the FTT's decision fell outside the range of possible decisions within the exercise of its discretion.

22. Mr Knapper argued that Mrs Kenny-Frow's procedural shortcomings were so great that the FTT was right to strike out her case even if she had a cast-iron case with no prospect of failure. That is not what the FTT said; the judge in her reasons explains why the case is struck out because it has no realistic prospect of success and then goes on to deal with the procedural matters as an additional reason. So I examine the substantive decision first, and then revert to the other grounds for the strike-out, and to Mr Knapper's argument about the inadequacy of Mrs Kenny-Frow's litigation behaviour.

Did Mrs Kenny-Frow have a realistic prospect of success?

23. In order to understand what information and evidence was available to the FTT when it made the appealed decision, I need to say more about Mrs Kenny-Frow's case in the FTT, about Mr Ryan's case in the FTT, and then about the reasoning in the FTT's decision of 17 March 2021. In an endeavour to ensure that the respondent's case is properly set out I also consider the explanation of events that Mr Knapper gave at the hearing of the appeal.

Mrs Kenny-Frow's case in the FTT

24. Mrs Kenny-Frow's case was first stated in her application to HM Land Registry for alteration of the register. I have not seen a copy of the application, but HM Land Registry in its notice to Mr Ryan, which is in the bundle, copied Mrs Kenny-Frow's letter of explanation. It is long and not entirely relevant but it sets out her account of what happened in 2013 and says that when she was asked by her solicitor to sign the revised plan as a favour to Mr Ryan and Mr Plant, and was assured that there were no changes to the plan, and that the only difference was that it was now compliant with HM Land Registry's requirements: "no changes and land registry compliant, everything same as 2001 terms and conditions." She also said that Mr Plant, when he met her at the premises to get the plan signed, "assured me the architect plan was the same as the 2001 drawn plan, no changes". Obviously, Mrs Kenny-Frow herself did not notice that the plan was different. Nor did the judge in the FTT.

25. When the matter was referred to the FTT it was accompanied by HM Land Registry's case summary, which explains that the 2001 lease identified the demised premises as the ground floor flat only, and said that Mrs Kenny-Frow claimed that she was misled into accepting the later plan.

26. As noted above, on receipt of the reference the FTT required Mrs Kenny-Frow to make an application for rectification of a document pursuant to section 108 of the Land Registration Act 2002 on the basis that she wanted to rectify the lease. I do not understand why that direction was made and Mr Knapper agrees that it was inappropriate. Mrs Kenny-Frow, of course, did not have the legal knowledge to explain that the direction was incorrect and had to accept the way that the FTT characterised her case. She made the application, and again set out her account of what had happened, which was consistent with what she had written to HM Land Registry.

27. There are no other pleadings in the FTT. At some stage Mrs Kenny-Frow appears to have filed three witness statements, one from her husband, one unnamed, and one from a customer at her gym, which have no bearing on the legal significance of the events of 2013. Mrs Kenny-Frow herself did not make a witness statement, but her section 108 application is signed with a Statement of Truth, and dated 21 August 2020.

28. It is apparent from the orders made by the FTT that disclosure was a problem; Mrs Kenny-Frow was ordered to disclose the conveyancing file from her purchase of the freehold in 2013, and Mr Knapper told me that eventually he obtained it and provided copies for the Tribunal and for Mrs Kenny-Frow. She did provide a copy of the findings both of Amicus Law, Mr Exley's firm, and of the Legal Ombudsman, on the complaint she made in 2018 about Mr Exley, who she said should have advised her that the plans were different.

29. Amicus Law found that the firm was not asked to advise her on whether the revised plan correctly recorded the extent of the demise and did not do so. Amicus Law's letter of 26 July 2018 said "[Mr Exley] simply stated that he needed confirmation that the plan was in an acceptable format for the Land Registry, not that it was actually correct and a true reflection of who owned what. I do not consider that Mr Exley had any way of knowing whether or not the plan was correct."

30. The Legal Ombudsman reached the same conclusion and said, in a decision of 8 February 2018, "I have seen nothing in the evidence provided by either the firm or Ms Kenny-Frow confirming that the firm gave Ms Kenny-Frow any advice regarding the revised plan."

31. Mrs Kenny-Frow also sent a great many emails to the FTT. In the judge's words, she bombarded the FTT with emails. Much of what she said in those emails was irrelevant, at least to a lawyer looking at the substance of her application, although all of it was important to her. In its order of 22 October 2020 the FTT said:

> "The Tribunal is at liberty to refuse to read, acknowledge or answer any emails or correspondence which are not copied to the other party, and (with particular reference to the nature and frequency of emails being received by the Applicant) make no clear contribution to the litigation, persist in making arguments or providing statement about the dispute which are lengthy, discursive and hard to follow, and make no application or answer any question put by the Tribunal."

32. In its notice of 8 February 2021 the FTT said that in view of the warnings she had been given "not all [the Applicant's] emails have been read."

33. Even assuming the FTT had read none of Mrs Kenny-Frow's emails, her case in the FTT was clear from her application to HM Land Registry, from HM Land Registry's case summary, and from her section 108 application: the lease plan did not include the outside areas, the revised plan did, she had signed the revised plan in the belief that it was the same as the lease plan, but it was not the same and therefore the registered title plan should be altered to reflect the correct demise. The response to her complaint about her solicitor confirmed that she had not been advised that the plans were different.

34. Mrs Kenny-Frow did not say to the FTT as a lawyer might have done, that the lease was never varied and therefore the demise is defined by the words of the lease (which appear to exclude any outside area) and the 2001 plan. But that much is obvious not only from what she did say but also from the way Mr Ryan put his case.

Mr Ryan's case in the FTT and his evidence

35. The only pleading by Mr Ryan in the FTT is his response on form T411 to the application for section 108 rectification, which was signed by Mr Knapper in October 2020. In it he refutes the suggestion that the revised plan was altered after it was signed (I have not seen a suggestion to that effect by Mrs Kenny-Frow). It said that she "consented to the amended plan of her own free will and having the benefit of advice from her solicitor who was instructed at the time." It quoted a letter from Mr Exley to Mrs Kenny-Frow of 8 May 2013. I will not set it out in full but it included the following:

> "I have spoken to Mr Plant who is helping Anthony … Mr Plant is a former solicitor and … acted for Anthony when he acquired the lease. The lease was never then registered by the solicitor acting for Anthony and by the time the application was made new rules came in which mean the plan was of poor quality and was no longer acceptable to the Land Registry. …
>
> I have been assured that the plan the [sic] Mr Plant has prepared by a local architect is Land Registry compliant (though I still need to check it fully). The plan was sent to the Co-op for approval some time ago again it appears all that is required for them to do and this sounds familiar is sign it. If I can confirm to you that I think the plan will be acceptable to the Land registry, it will most likely be that the best way to resolve the issue is to confirm that when the freehold of the property is transferred to you, you will sign it to confirm it's correct, you will probably need to complete a deed of variation replacing one plan with the other this is straightforward."

36. There is, obviously, no suggestion in that letter that the revised plan was anything other than a Land Registry compliant version of the original and no mention of an extension to the demise.

37. The respondent went on to say that he relied upon Mr Exley's email to Mrs Kenny-Frow of 8 May 2005 "which contained the original plan, the revised plan and a plan showing the direction from which each of 8 photographs were taken so as to fully identify the changes to the plan." The reference to 2005 must be wrong. If it is intended to refer to the email quoted above, then that email did not attach any photographs and made no reference to the plans being different. It may be that the emails referred to are those sent by Mr Plant to the Co-op and to Mr Exley on 8 May 2013, which did attach photographs showing the area depicted by the revised plan but, again, says only that the plan had been changed so as to be Land Registry compliant and made no reference to an extension to the demise.

38. The respondent goes on to deny that Mrs Kenny-Frow was misled and says that

> "the amended plan was submitted to the solicitor for the Applicant, was described as a sort of deed of variation so as to amend the premises and the Applicant approved the amended plan by signing it so that it could be lodged with the Land Registry."

39. So the respondent's case was the two plans were different and that Mrs Kenny-Frow's signature of the plan was "a sort of deed of variation" which amended the demised premises.

40. Mr Ryan did not make a witness statement in the FTT. Mr Plant did. His statement, dated 23 October 2020, explained that following the grant of the lease "problems arose with the lease plan which was deemed by the Land Registry to be unsuitable"; that he then had a new plan drawn up after walking round the flat and the outside area with Mr Ryan, who "clarified that the rear store was included in the demise and had been used solely by him as part of the Flat from the grant of the lease in 2001." He got approval for the plan from HM Land Registry. He sent it to the Co-op along with photographs of the flat and the outside area to show what was included. The statement sets out his correspondence with Mr Exley and indicates that he also sent the photographs to Mr Exley. Mr Exley expressed in an email of 9 May 2013 some doubt about whether the plan would be acceptable to HM Land Registry because it did not show any of the features of the locality. But he accepted confirmation from Mr Plant that "my successor firm have liaised with HMLR who have confirmed the plan is satisfactory", saying "If Fursdon Knapper have already had confirmation from the Land Registry that they will accept the plan, then I'm happy with that."

41. Mr Plant goes on to describe his meeting with Mrs Kenny-Frow at the property on 8 June 2013. He says that they walked over the full extent of the land and she confirmed she was happy to sign the plan and did so. He did not mislead her.

42. There is no suggestion whatsoever in Mr Plant's witness statement that the revised plan did not match the 2001 plan in terms of the extent of the demise, nor that the revised plan was intended to be a deed of variation let alone that it actually functioned as such.

The FTT's decision of 17 March 2021

43. The material before the FTT included Mrs Kenny-Frow's case, summarised above at paragraph 33, which was that the two plans were different and should not have been, Mr Ryan's case summarised at paragraph 39, which was that the two plans were different and intended by both parties to be so, Mr Plant's witness statement which makes no reference to any difference between the plans, the conveyancing file, and the findings on Mrs Kenny-Frow's complaints about Mr Exley.

44. The FTT's reasons for its decision of 17 March 2021 were the same as those given in its notice of 8 February 2021, which required Mrs Kenny-Frow to make submissions in response to the FTT's intention to strike out her case because of procedural failures and because she had no realistic prospect of success. The state of Mrs Kenny-Frow's case was dealt with in paragraphs 3 to 5 and 8 to 16 of the decision of 17 March 2021. It was said that she was applying to rectify the lease and had therefore been directed to make a section

108 application, and that the application to alter the register could do no better than the rectification application. At paragraph 4:

> "The s108 application is dated 21st August 2020. The Applicant contends she is entitled to rectify the plan attached to a lease because she was misled into signing a revised plan and as a result (it appears) the Respondent has title to a first floor patio which is not part of his demise. The Applicant has no reasonable prospect of establishing this to be the case."

45. The judge makes no reference to what Mrs Kenny-Frow said in her application for alteration of the register or in her section 108 application, nor to the respondent's response to that application. She says that she has been assisted by Mrs Kenny-Frow's solicitor's conveyancing file, by Mr Plant's witness statement, and by the complaints file from Amicus Law. She goes on to summarise Mr Plant's witness statement, and it is clear that she has also read the conveyancing file. She concludes at paragraph 14:

> "Mr Plant describes in paragraph 18 of his witness statement how he met the Applicant on site on 8th June 2013, how she signed the plan. Given that she had already agreed to sign the revised plan prior to completion (it had been sent to her by Mr Exley who had commented on it), it is hard to see how the allegation that she was misled is sustainable. There were no changes to the extent of the demise, just a decent HMLR approved plan. The evidence is that what was demised to the Respondent in 2001 is what is demised to the Respondent now. The lease was not varied and the plan was agreed by the Co-op and Mr Plant to be correct. Mr Exley was assured it was compliant."

46. At paragraph 16 the judge said:

> "[Mrs Kenny-Frow] has never identified with any particularity why [the revised plan] is different or inaccurate or how it would be rectified. For these reasons I would strike out her applications pursuant to Tribunal Rule 9(3)(e)."

47. It will be apparent that the judge had misunderstood, indeed was wholly unaware of, both Mrs Kenny-Frow's case and Mr Ryan's. She had failed to spot that the two plans are different, and that the parties agree they are different. She accepted without question Mr Plant's evidence which does not mention the difference and gives the impression that all that happened was that a Land Registry compliant plan was substituted for a poor quality one, without a change in the demise.

48. Manifestly the judge's conclusion that the application had no realistic prospect of success was based on a fundamentally mistaken view of the facts and of each party's case, and cannot stand.

Mr Knapper's further explanation at the hearing of the appeal.

49. Mr Knapper explained to me at the hearing of the appeal that shortly after the grant of the lease in 2001 Mr Ryan realised that the plan was wrong. He wanted it to include the patio

and the outdoor store. So he tried to get the plan altered. Mr Plant had a new plan drawn up, as Mr Ryan wanted it, in 2011, and the Co-op agreed in principle, orally to Mr Plant, that the new plan would be substituted. Mr Knapper accepted that that agreement had no legal effect. Obviously, said Mr Knapper, if the Co-op and Mr Ryan had executed a deed of variation before the transfer of the freehold to Mrs Kenny-Frow then that would have been the end of the matter. But they did not, and instead Mrs Kenny-Frow agreed before completion to sign the plan after completion, and she did.

50. I asked Mr Knapper why Mr Plant's witness statement did not set out the explanation that Mr Knapper now gives, and he could not answer.

51. Mr Knapper argued that Mrs Kenny-Frow was told that the two plans were different and agreed to sign the revised plan on the basis that it gave Mr Ryan extra land. But he was unable to point me to anything, either in Mr Plant's correspondence with the Co-op or with Mr Exley, or in Mr Exley's correspondence with Mrs Kenny-Frow, that said the revised plan was different from the original.

52. Mr Knapper acknowledged that, even on his client's case that Mrs Kenny-Frow signed the revised plan after advice and in full knowledge of the difference, the demise remained unchanged. He relied upon that fact that he and Mr Plant and Mr Exley thought at the time that it did.

53. The conveyancing file includes a letter from Mr Plant to Mr Exley on 8 May 2013 in which he quoted a letter from Fursdon Knapper to HM Land Registry referring to HM Land Registry's previous rejections of the plan. It enclosed a copy of the new plan and of the old lease with the plan on the back, and sought confirmation that all that was needed was a copy of the revised plan with the freeholder's signature. The letter went on to say that that confirmation was given. The quoted letter from Fursdon Knapper did not say to HM Land Registry – just as Mr Plant did not say in his correspondence with Mr Exley or in his witness statement to HM Land Registry – that the two plans were different. The correspondence is appropriate for a case where all that is happening – as the judge in the FTT thought – was that a decent plan was being substituted for a poor quality one. I take it that in confirming that a simple signature on the revised plan would be sufficient, HM Land Registry failed to notice – as Mrs Kenny-Frow says she did, and as the judge in the FTT did – that the two plans showed different areas. I find it very difficult to believe that all three solicitors involved at the time were aware of the difference in the plans and collectively took leave of their legal learning and assumed that a simple signature on a different plan would vary the lease. It appears that Mr Exley did not, since Amicus Law and the Ombudsman found that he did not know the plans were different. What Mr Knapper or Mr Plant knew is, as things stand, unknown because evidence has not been heard and tested.

54. Be that as it may, nothing in this new account of a negotiation with the Co-op for an extended demise to Mr Ryan casts any doubt on Mrs Kenny-Frow's case that there is a mistake on the register or justifies the FTT's decision to strike out her case for alteration of the register on the basis that it had no reasonable prospect of success.

55. There remains a mystery as to the basis on which Mr Ryan can resist an application to alter the register. He has probably had the use of the outside areas since 2001, because Mrs Kenny-Frow's lease did not extend to them and the freeholder would not have interfered. But on the case Mr Knapper now puts forward for him, he knew that they were not demised to him. Mr Knapper expressed the view that having agreed, with the benefit of legal advice, to alter the plan, Mrs Kenny-Frow should not now be going back on that. I do not know what legal principle he was thereby expressing. Whether she did or did not have that legal advice is not known because evidence has not been tested, but the FTT's assessment of Mrs Kenny-Frow's conveyancing file matches mine: she was not advised by Mr Exley that the plans were different. She did sign the revised plan; but the FTT correctly stated, and Mr Knapper agrees, that the mere signature of a plan does not vary the lease. And there is no suggestion of a written contract to do so, and any other agreement is ineffective on the basis of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. There is no suggestion of an estoppel, nor can there be in the absence of detrimental reliance. There is a faint suggestion in Mr Ryan's response to the rectification application of adverse possession, which has not been pursued. Mr Knapper suggested that the lease was improperly executed in 2001 because the plan was not adequate, but that was not Mr Plant's view as seen in his correspondence and his witness statement, and if true it would mean that his client has no lease at all. I find it difficult to see why Mrs Kenny-Frow does not have an irresistible case for alteration of the register, on the basis of the respondent's own case (whether that is what he said in his response to the rectification application or what his only witness says). And whilst some years have passed since the lease was registered, neither the Land Registration Act 2002 not the Limitation Act1980 imposes a limitation period on an application for alteration of the register, and Mrs Kenny-Frow is not applying for equitable relief, so it is difficult to see how the delay could stand against her.

56. That is a mystery that I cannot solve but on which no doubt Mr Ryan will take advice.

The strike-out for procedural failings

57. The FTT also struck out Mrs Kenny-Frow's case on the basis of rules 9(3)(b) and (d):

> "(b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;
> …
> (d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal"

58. At paragraphs 7 and 17 the FTT said:

> "7. The Applicant, to put it bluntly, is incapable of complying with any orders to disclose documents in a convenient format, and her usual response to any direction is to send many emails and attach documents by using photographs of every page. She has not responded to the Respondent's solicitors' practical offers of assistance. She has received numerous warnings about bombarding the Tribunal and the Respondent with numerous emails and carried on regardless.

> 17. In addition [to having no prospect of success], … she has breached Rule 9(3)(b) by failing to comply with directions in such a way that the proceedings cannot be dealt with "fairly and justly". She is on a mission to reverse a perceived wrong and that has made any attempt to litigate as requested impossible. That provides another ground for striking out, as does the related ground in Rules 9(3)(d), that the manner in which she is conducting proceedings is "frivolous, vexatious or otherwise an abuse of the process of the Tribunal." There is sufficient correspondence from the Respondent's solicitors … to express justified exasperation about the Applicant's litigation conduct. As I have indicated, while she might now have provided all the disclosure she was ordered to provide (it remains unclear to me) she has not filed any evidence to support her case, and on my analysis of what there is, the only appropriate order is to strike the applications out for the reasons I have given."

59. As I noted above, it is not the case that Mrs Kenny-Frow filed no evidence. She submitted evidence in the form of her application for section 108 rectification verified by a statement of truth. She was entitled to rest her case on that, and it is a strong case when looked at in the light of a lawyer's understanding that her signature on the revised plan did not vary the lease.

60. Turning to the other matters, Mr Knapper explained to me that he had offered to scan documents for Mrs Kenny-Frow, which she rejected, and that he had sent her a form to use when making a list of disclosed documents, which she had not used. He took me through the FTT's orders of 2 October 2020, 22 October 2020, 29 October 2020 and 14 December 2020 and explained that Mrs Kenny-Frow had almost completely failed to comply with orders for disclosure, had not filed any evidence, and had made no representations in response to the notice of 8 February 2020. The second volume of the appeal bundle was Mr Knapper's copies of Mrs Kenny-Frow's correspondence, extending to 740 pages including copies of documents.

61. Mr Knapper argues that the strike-out was justified on the basis of rules 9(3)(b) and (d) even if Mrs Kenny-Frow had a cast-iron case, because her litigation conduct was so far out of order.

62. I have no doubt that Mrs Kenny-Frow bombarded the FTT with emails, as she done this Tribunal. I make no finding as to the extent to which she complied with directions for disclosure because it would be disproportionate to go over the correspondence item by item. I will assume in the respondent's favour – but I make no finding – that her compliance was poor and that what there was was chaotic. Mrs Kenny-Frow told me that she did respond to the notice of 8 February 2021 and I would be surprised if she did not do so, but again I make no finding.

63. I take the view that Mrs Kenny-Frow's litigation behaviour is explained by a number of factors. She has not had legal advice, or at least no effective advice, since Mr Exley acted for her, and so she does not understand what is relevant. She has had to conduct litigation in the FTT during the pandemic when she was required to communicate electronically and does not have a way to scan documents (I think, but I may be wrong, that she operates from her phone). Her streams of email correspondence are an expression of frustration and of perfectly understandable panic when her application for alteration of the register was

referred to the FTT which instantly misunderstood and misdirected her case, and then addressed to her a series of orders written in an unmistakably angry tone stating that the Tribunal and the Respondent were not required to read her correspondence insofar as it "makes no clear contribution to the litigation, which are lengthy, discursive, and hard to follow". Small wonder that she tried again and again to explain.

64. What then should be the outcome of the appeal from the striking out of Mrs Kenny-Frow's case on the basis of rules 9(3)(b) and (d)? I take the view that the FTT in making that decision exceeded the ambit of its discretion because it failed to have regard to three relevant factors.

65. First, Mrs Kenny-Frow's litigation behaviour was understandable in a situation where the FTT was failing completely to hear her. Second, paragraph 17 of the FTT's decision makes it clear that the decision to strike out her case on the procedural grounds rested very much on what it saw as the weakness of her case; the FTT failed to have regard to the fact that Mrs Kenny-Frow had a strong case for alteration of the register. Third, the FTT failed to take into account the fact that the position of the respondent's representatives has been, to put it neutrally, questionable.

66. It is important that I say more about that third point, not least because it is likely to become relevant in the context of costs later. I take the view that the following are all matters of concern:

    a. Mr Knapper signed his client's response to the section 108 application which asserted that the plan took effect as a "sort of deed of variation". He knows that that is not the case. He has to do the best he can for his client, but I question whether his signing a statement that he knows to be wrong in law is compatible with his duty to the tribunal.

    b. Mr Knapper's account of the history of the matter, given at the hearing of the appeal, on the basis of what he says Mr Plant told him, does not match Mr Plant's own account in his witness statement. Either what Mr Knapper says about an agreement with the Co-op to vary the lease is not true, or Mr Plant concealed that fact, both when he corresponded with Mr Exley and in his witness statement to the FTT by taking care not to mention that the revised plan showed an expanded area for the demised premises.

    c. It appears that Mr Knapper's firm corresponded in 2013 with HM Land Registry, on the basis that the revised plan was just a decent version of the original (see paragraph 53 above). Either Mr Knapper knew at the time that that was not the case, or – if it was at a later date that Mr Plant told him about the Co-op's agreement to vary the lease by enlarging the demised premises – he failed to put matters right later.

    d. Turning to the notice of 8 February 2020, I asked Mr Knapper why he did not question the judge's misunderstanding of both parties' cases when he received the notice (which set out all the reasons subsequently given in the decision of 17 March 2021). He said he "misread" the judge's statement that " There were no

changes to the extent of the demise, just a decent HMLR approved plan". He then said that he had relied on the understanding of all the solicitors involved at the time that the signed plan would vary the lease. I fail to understand that as a reason for not correcting the judge's misunderstanding of his client's position.

67. I take the view that the FTT's decision to strike out Mrs Kenny-Frow's case pursuant to rules 9(3)(b) and (d) was based on a misunderstanding of both parties' cases, and on a failure to take account of relevant considerations , and I set it aside.

Conclusion and disposal

68. The FTT's order of 17 March 2020 struck out Mrs Kenny-Frow's two sets of proceedings, and directed the Chief Land Registrar to cancel her application on Form AP1. That order is set aside, subject to what I say below about the application for rectification.

69. So too, therefore, is the FTT's order of 16 April 2021, whereby Mrs Kenny-Frow was ordered to pay the respondent's costs of the reference and of the rectification application in the sum of £13,000. I indicated at the close of the hearing of the appeal that that would be my decision, whereupon Mr Knapper made an application for his client's wasted costs in the FTT. I declined to hear that application on the basis that costs in the FTT will be for the FTT to determine in due course. I have no doubt that the FTT will bear in mind at that stage the extent to which Mrs Kenny-Frow's conduct of the litigation was influenced by the respondent's resistance to her application on what appears – on the material before me - to be a wholly unmeritorious basis.

70. I have today made the following orders:

    a. I set aside the FTT's order of 17 March 20201 insofar as it relates to the reference from HM Land Registry, REF/2020/221.

    b. I set aside the costs order of 16 April 2021.

    c. I direct the Chief Land Registrar to reinstate the application in Form AP1.

    d. Accordingly the reference is reinstated in the FTT and stands as if just received by the FTT. I direct that it shall be case-managed by a different judge in the FTT if Mrs Kenny-Frow decides to proceed with the application.

    e. I direct that if Mrs Kenny-Frow does wish to pursue the application she shall write to the FTT requesting directions within 56 days of the date of this decision. That timescale allows her time to get legal representation; on the basis of what the respondent says she has a strong case, but she needs support to present it clearly. It also allows the respondent and his representative time to consider their position, particularly in light what I have said at paragraph 55 above.

71. The direction to make an application under section 108 of the Land Registration Act 2002 should never have been, and therefore those proceedings remain struck out but the parties

and the FTT are to note that any suggestion made for the purposes of costs that she was unsuccessful in that application should be rejected. Costs will of course have to be dealt with at the conclusion of the FTT proceedings, although I express the hope that the parties will be able now to consider whether this dispute can be brought to an end without pursuing that litigation.

Upper Tribunal Judge Elizabeth Cooke

29 November 2021