UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – COSTS - order striking out Points of Dispute in detailed assessment process – sanction for failure to make an interim payment – jurisdiction – rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

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

BETWEEN:

(1) ASTOR BRISTOL LIMITED
(2) SEAN O'MAHONY
(3) LISA O'MAHONY

Appellants

and

BRISTOL SCHOOL OF PERFORMING ARTS LIMITED **Respondent**

Re: White Hart Hotel,
Brislington Hill,
Bristol,
BS4 5BD

Judge Elizabeth Cooke
Determination on written representations

The appellants were unrepresented.
Mr Simon Atkinson for the respondent

The following cases are referred to in this decision:

Bhandal v Commissioners of Her Majesty's Revenue and Customs SCCO Ref 1904183, 12 June 2020.
Days Healthcare UK Ltd v Pihsiang Machinery Co Ltd [2006] EWHC 1444 (QB)

Introduction

1. This is an appeal about costs, and it raises an issue about jurisdiction. It is an appeal from an order made by the FTT striking out Points of Dispute filed in the process of detailed assessment of the costs of an action, in response to the appellant's failure to comply with an order to make an interim payment.

2. The appeal is a review of the FTT's decision and has been conducted under the Tribunal's written representations procedure. The appellants have not been legally represented and their written submissions have been provided by the second appellant, Mr O'Mahony. Written representations have been made for the respondent by Mr Simon Atkinson of counsel. I am grateful to them both.

3. In the paragraphs that follow I set out the factual and procedural background, and the FTT's decision, and then consider the grounds of appeal.

The factual and procedural background

4. The appeal arises from a reference to the FTT from HM Land Registry of an application to rectify the register of title to the property occupied by the respondent to this appeal, Bristol School of Performing Arts Limited. The respondent was the applicant before the FTT and for the avoidance of confusion I refer to it as "BSPA". The FTT's substantive decision was made on 2 January 2020, in favour of BSPA; both the FTT and the Tribunal have refused permission to appeal that decision. On 30 April 2020 the appellants were ordered to pay BSPA's costs on the indemnity basis, to be subject to detailed assessment if not agreed, and to make an interim payment of £48,184.74 by 22 May 2020. On 5 June 2020 the FTT refused the appellants' application for an extension of time to make the interim payment.

5. The orders of 30 April 2020 and 5 June 2020 have not been appealed.

6. Meanwhile steps were taken towards the detailed assessment of the costs of the reference. On 28 May 2020 BSPA filed its Bill of Costs, claiming £142, 501.59. On 26 June 2020 the appellants filed their Points of Dispute. Had all their points been successful they would have had to pay £72,457.84.

7. On 9 July 2020 BSPA made to the FTT what it described in a covering email as an application "for debarring and/or unless orders" against the appellants in response to their failure to pay the interim payment. The draft order accompanying the application provided for two alternative orders. One was for the appellants "to be debarred from relying upon their Points of Dispute and judgment be entered for [BSPA] in respect of its costs in the sum of £142,501.59". The alternative was an order that unless the appellants made the interim payment, or alternatively a payment of £72,457.84, within 14 days "they be debarred from relying upon their Points of Dispute and judgment be entered for BSPA in respect of its costs in the sum of "142,501.59."

8. It will be seen that the respondent had an order for an interim payment which it could have enforced, but instead it sought to use the threat of a "debarring order" to try to make the appellants pay. I have been helpfully referred to *Days Healthcare UK Ltd v Pihsiang Machinery Co Ltd* [2006] EWHC 1444 (QB) and *Bhandal v Commissioners of Her Majesty's Revenue and Customs* (a decision of Master Nagalingam, SCCO Ref 1904183, dated 12 June 2020). In both those cases one of the parties was in persistent and flagrant default of orders to pay very substantial sums, and an application was made to debar that party from further participation in the process of assessment.

9. In neither of those cases was an order made striking out material already filed in the costs process.

10. Master Nagalingam made explicit the contrast between the two types of order, at paragraph 81:

> "… the Defendants, rather than seeking to strike out the points of dispute or otherwise lock the Claimant out of the detailed assessment process altogether instead sought a measured sanction of debarring the Claimant from taking any further steps – in circumstances where the further steps relate only to the detailed assessment hearing itself. The Claimant has put in points of dispute and the court will therefore take these into account in conducting the assessment."

11. It is worth pausing to consider what type of order BSPA was seeking in the present case. It used the word "debar", but it seems that what it sought was an order striking out the Points of Dispute already filed. That can be inferred from the wording of BSPA's draft order ("to be debarred from relying upon their Points of Dispute") and from the practical result sought namely that the claimed costs be awarded in full. At any rate, and even if I am wrong about that, that is what the FTT did in response to the application, as will be seen.

The FTT's decision

12. The FTT gave the appellants seven days to respond to the application of 9 July 2020. The appellants asked for more time because their costs draftsman was away and because of the general difficulties caused by the pandemic, but they were not granted an extension.

13. On 21 July 2020 the FTT made the order that is now appealed that:

    a. The appellants were debarred from relying on their Points of Dispute

    b. That the appellants were to pay the respondent's costs of the reference in the sum of £142,501.59 less any pre-reference costs (with a revised sum to be provided by 28 July 2020)

    c. That the appellants were to pay the respondent's costs of the application of 9 July on the indemnity basis, to be summarily assessed if not agreed

and the FTT gave directions for the summary assessment of the costs of the application. In her reasons the learned judge said that the appellants had had sufficient time to respond to the application of 9 July, and that they could have no reason for failing to make the interim payment. She said that she bore in mind the serious findings of fact and behaviour made against the appellants in the substantive decision, and also the failure to pay the £72,457.84 admitted to be due.

14. What the FTT did was not to debar the appellants from future participation in the assessment process, but from relying upon the Points of Dispute already filed. In other words, the Points of Dispute were struck out. The judge paid no regard to them – she says nothing in her reasons about their contents – and summarily assessed the costs as payable in full (less pre-reference costs which the FTT does not have jurisdiction to award).

The grounds of appeal

15. The appellants sought permission to appeal on grounds of procedural fairness and lack of jurisdiction to make the order; alternatively, if there was jurisdiction to make the order, the judge had erred in her assessment of the costs following the striking out of the Points of Dispute.

16. The FTT's reasons in its order of 21 July 2020 were given in one page. Its reasons for refusing permission to appeal on 17 August 2020 extend to five pages and set out much more of the judge's thinking, but most of it is devoted to the argument about procedural fairness and the very short period given to the appellants to respond to the application; that ground of appeal is not pursued in the Tribunal because the appellants accept that they have now been able to set out their arguments as to why the Points of Dispute should not have been struck out. The order refusing permission to appeal also stated that the costs due, once pre-reference costs had been deducted, was £125,242.59 including VAT.

17. In the Tribunal the appellants' grounds of appeal are now, first, that the FTT did not have jurisdiction to strike out the Points of Dispute, and second that if it did have jurisdiction then in summarily assessing the costs following the strike-out the FTT took into account an irrelevant consideration and failed to take into account a relevant consideration. If there was no jurisdiction to make the order then the further grounds are irrelevant and so I look first in detail at the jurisdiction point.

Did the FTT have jurisdiction to strike out the Points of Dispute?

18. The appellants argue that even if the FTT had jurisdiction to debar them from future participation in the assessment process, it did not have power to strike out the Points of Dispute because striking out is governed by rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the FTT Rules") and the circumstances in which that rule permits it had not arisen. The respondents say that the order was validly made under rule 8(2). In his written representations Mr Atkinson refers to the order as a debarring order and says that it was validly made under rule 8(2) of the FTT Rules.

19. The judge in the order of 21 July 2020 made no reference to any of the rules. In her refusal or permission to appeal she said that her order was made under the FTT's "wide powers to manage litigation under Rules 6 and 8, in accordance with Rule 3 and the requirement to manage it in accordance with the overriding objective".

20. Rule 3 of the states that "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly", and does not give any specific powers. Rule 6 is as follows:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may …"

21. There follows in rule 6(3) a list of powers, none of which enables the FTT to strike out proceedings or part of them. Indeed, none of them is a sanction; all the powers are directed to the progress of the proceedings or of a hearing and there is no reference to non-compliance or to how the FTT might respond to non-compliance. That comes in Rule 8, which enables the FTT to respond in a number of ways to a failure to comply with a direction. Rule 8(2) says:

> "(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as the Tribunal considers just, which may include—
>
> (a) waiving the requirement;
>
> (b) requiring the failure to be remedied;
>
> (c) exercising its power under rule 9 (striking out a party's case);
>
> (d) exercising its power under paragraph (5); or
>
> (e) barring or restricting a party's participation in the proceedings."

22. Sub-paragraph 5 has no relevance to land registration cases. The relevant subparagraphs here are (c) and (e), which make a distinction between exercising the power to strike out under rule 9, and barring or restricting a party's participation in the proceedings. The power to strike out is given by rule 9 and an order, such as the one appealed, striking out the Points of Dispute must be made in accordance with the requirements of rule 9. By

contrast there is no need to proceed under another rule if what is ordered is that a party be barred for the future from taking part in the proceedings.

23. Accordingly I disagree with the respondent's argument that the order under appeal was made under rule 8(2), because rule 8(2) requires compliance with rule 9 and does not give an additional power to strike out. Mr Atkinson makes that argument while describing the order that the FTT made as an order that precluded the appellants from further participating in the assessment process (paragraphs 19 and 20 of the written submissions). As we have seen, that was not what the FTT did; it prevented the appellants from relying on the Points of Dispute, which is to say it struck them out. Moreover Mr Atkinson also refers to the appellants as having been "debarred from relying upon their Points of Dispute" (his paragraph 17). He is trying to have it both ways, namely that there was a debarring order made with jurisdiction under rule 8(2) but which had the effect of a striking out under rule 9. He cannot have it both ways.

24. I also disagree with the learned judge's analysis, absent from the order appealed but suggested briefly in the refusal of permission to appeal, of her jurisdiction to make the order. Rule 3 sets out the overriding objective, and rule 6 gives the FTT power to regulate its own procedure, but the rules then go on to make specific provisions about a particular order, and those specific provisions govern the FTT's jurisdiction to make that particular order. Neither rule 3, nor rule 6 nor rule 8 gives the FTT power to strike out the whole or part of proceedings otherwise than in accordance with rule 9.

25. Was the order nevertheless made within the FTT's jurisdiction under rule 9? If it can be construed as such there is a further problem that the decision was nevertheless not explained as such, and the appellant was entitled to a proper explanation of the order made. However, as will be seen that does not arise because rule 9 does not provide jurisdiction to make the order as things stood on 21 July 2020.

26. The relevant part of Rule 9 reads as follows:

> "(3) The Tribunal may strike out the whole or a part of the proceedings or case if—
>
> (a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;
>
> (b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;
>
> (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;

(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; or

(e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding."

27. What the appellant says is that in the absence of an "unless" order, as described in rule 9(3)(a), the order was not correctly made under rule 9.

28. I agree. Sub-paragraph (b) is not relevant since there was no suggestion that the FTT was unable to deal fairly and justly with the detailed assessment of costs; sub-paragraph (c) is obviously irrelevant; and sub-paragraph (e) is irrelevant because there is no suggestion that there was no prospect of the Points of Dispute making any difference to the assessment. As to sub-paragraph (d), in order to bring the strike-out within that sub-paragraph in my judgment the FTT would have had to find that the appellant's conduct in the detailed assessment of costs was frivolous, vexatious or an abuse of process, which it did not. It might have regarded the failure to make the interim payment as vexatious, but I do not believe that that would enable it to step sideways, so to speak, and strike out a different part of the proceedings by way of punishment. The point of sub-paragraph (d) is to enable the tribunal to get rid of the frivolous, vexatious or abusive part of the proceedings, not to punish vexatious behaviour by striking out something else.

29. The FTT could have struck out the Points of Dispute in response to the failure to make an interim payment, but only by first making an unless order in compliance with rule 9(3)(a)

30. Accordingly there as no jurisdiction to strike out the Points of Dispute under rule 9 and the appeal therefore succeeds.

31. I have reached that conclusion without the need to make any further reference to *Days Healthcare* or to *Bhandal v HMRC* (see paragraph 8 above). Both those cases concerned orders debarring a party from taking part in the detailed assessment process, made at a date when the Points of Dispute (in each case) had already been served. Neither concerned an application to strike out a case or pleading already made. In *Days Healthcare* the order sought was made, and in *Bhandal v HMRC* an application to vary such an order was refused; but in each case the Points of Dispute already filed remained to be considered by the court. The debarring order prevented further participation, for example appearance at a hearing before the costs judge. The two cases are relied upon by the appellants to argue that because their Points of Dispute had already been filed they should still have been considered in the process of assessment of their costs. The answer to that argument is that had there been jurisdiction to strike out the Points of Dispute, for example because an unless order had not been complied with, then it would have been correct for the FTT to disregard the Points of Dispute. But I have found that there was no jurisdiction and the point does not arise.

The remaining grounds of appeal

32. Since the striking out of the Points of Dispute must be set aside, I do not need to go into any detail on the other grounds of appeal which are about the judge's summary assessment of the costs once she had struck out the Points of Dispute.

Conclusions

33. The FTT's order of 21 July 2020 striking out the appellant's Points of Dispute in the detailed assessment process was made without jurisdiction and is set aside. Everything else that the judge ordered flowed from that order; her assessment of costs was a nullity because the detailed assessment process remained on foot, and the order that the appellants pay the respondent's costs of the application of 9 July 2020 is also set aside.

34. It remains for me either to re-make the decision on that application or to remit it to the FTT. The interim payment has now been made and there is no point in remitting the matter, so I turn to consider remaking the decision.

35. The respondent's application was for either an order striking out the Points of Dispute or an unless order. Had the judge regarded this process as an appropriate way of enforcing the order for the interim payment then the correct order to make would have been an unless order. By now, of course, the respondent has achieved its objective in getting the interim payment made; and that means that there is no purpose in my making the unless order that should have been made in response to the application of 9 July 2020.

36. Accordingly I re-make the decision of the FTT by refusing to make either of the orders sought by the application of 9 July 2020.

37. There is no need therefore for anything to be remitted to the FTT, where the matter remains and the detailed assessment process can now go forward.

Judge Elizabeth Cooke

22 February 2021