Case No: 11578/2008

Neutral Citation Number: [2012] EWHC 2353 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

The Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Monday, 16 July 2012

BEFORE:

HIS HONOUR JUDGE HODGE QC
(Sitting as a Judge of the High Court)

BETWEEN:

ALLAN ATTWOOD

Petitioner

- and -

GEOFFREY MAIDMENT & ORS

Respondents

MR ANDREW CLUTTERBUCK (instructed by **Stockler Brunton**) appeared on behalf of the Petitioner

MR THOMAS GRANT and MR JAMES SHEEHAN (instructed by **Macfarlanes LLP**) appeared on behalf of the Respondents

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Approved Judgment

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1. JUDGE HODGE QC: This is my second extemporary judgment of today relating to the affairs of Annacott Properties Limited, petition number 11578 of 2008. Having, I hope, now dealt with all substantive issues of valuation and quantification on this unfair prejudice petition, I now have to address the issue of costs.

2. The costs up to the judgment on 22 September 2011 have already been addressed, and I am therefore concerned only with the costs incurred since that date. Mr Clutterbuck, for the petitioner, tells me that his costs amount to some £165,000, including VAT, but excluding uplift, since that date.

3. Mr Grant, for the respondents, was unable, even on instructions, to supply any accurate estimate of the respondents' costs.

4. Mr Attwood asked for his costs of the petition since 22 September 2011. He submits that the starting point is that the proceedings since then have been an inquiry to determine the relief to which Mr Attwood is entitled in consequence of the unfair prejudice he had suffered as a result of the conduct of Mr Maidment. The starting point, he says, is that all those costs have been incurred by reason of Mr Maidment's wrongful conduct, in relation to which he, Mr Attwood, has been the successful party. He says that the starting point should be that Mr Attwood should be entitled to those costs.

5. Even if, however, one looks simply to the position since 22 September, and focuses upon the exercise which has been undertaken since then of determining the price that Mr Maidment should be required to pay for Mr Attwood's shares in Annacott, Mr Clutterbuck submits that Mr Attwood has been the successful party, in the event. He submits that Mr Maidment's expert evidence, in the person of Mr Roe, was wholly rejected, and rejected in resounding terms, whilst, in large part, the evidence of Mr Mason, Mr Attwood's expert valuer, was largely accepted. He also submits that Mr Maidment's own evidence on condition was held to be of little value, and that of his sister was largely rejected.

6. Save for the minor issue of the sums outstanding on three properties by way of mortgage as at the valuation date, Mr Clutterbuck submits that Mr Attwood has been almost wholly successful since 22 September last year. Indeed, he goes so far as to say that Mr Attwood's opening case has suffered no more than the inevitable minor attrition to be expected in any valuation dispute. He submits that there is therefore no reason not to make the usual order on an unfair prejudice petition in the circumstances of a petitioner's success, namely that Mr Maidment should pay all of Mr Attwood's costs. He submitted orally that Mr Attwood had conducted the inquiry as to the value to be paid for his shares in a measured, and a realistic, manner, advancing no exaggerated claims, and there is therefore no reason for depriving Mr Attwood of any of his costs. So far as Mr Maidment's success in relation to the outstanding mortgages is concerned, Mr Clutterbuck accepts that Mr Attwood lost on that issue; but he says that it was a small issue, and that the challenge to Mr Maidment's oral evidence on that issue was quite reasonable.

7. On the issue of interest, Mr Clutterbuck submitted, at least initially, that it was effectively a draw; and he made the point that it had not been an expensive area of dispute. In reply, Mr Clutterbuck indicated that he, perhaps, had been unduly

restrained on behalf of his client, Mr Attwood, in saying that it was a draw. When one came to the actual levels of interest effectively awarded by me, he submitted that they varied from 6.5 per cent in 2005, peaking at 7.75 per cent in July 2007, reverting back to 6.5 per cent in October 2008. Because of the increase in the rate of interest from 2 per cent to 3 per cent over base after October 2008, the interest awarded had gone from 7.5 per cent in November 2008 to 3.5 per cent by March 2009, where it has remained ever since. That, Mr Clutterbuck says, should be contrasted with the rate of interest of 2 per cent throughout for which Mr Grant had been contending on behalf of Mr Maidment.

8. Mr Grant submits that the court has a wide discretion as to costs, both as to their incidence and as to their amount. That is said to be true of the quantum aspect of a trial as much as it is in relation to liability. He submits that the Annacott petition has effectively proceeded on a split trial basis. He says there is no rule that a claimant who succeeds on liability should automatically be awarded his costs of determining quantum. He invites the court, in its assessment of the costs leading up to today, to bear in mind the following factors: First, the ultimate figure for the value of the properties, taking into account the presence of assured shorthold tenancies and short lease discounts, is in the order of £7.39 million. That is to be compared, and contrasted, with the values for which each party was contending. As to that, it seems to me that the valuation of Mr Mason, Mr Attwood's expert, by the time the trial began, taking account both of the assured shorthold tenancies and condition, was some £8.25 million. There was a little uncertainty as to the starting point of Mr Roe at the beginning of the trial, taking into account assured shorthold tenancies and condition. It seems to me that it amounted to some £6.007 million at the start of the trial. There was also some movement from Mr Roe during the course of the trial itself. Mr Grant submits that the final valuation figure is, whilst marginally closer to Mr Mason's position, roughly half way between the two. Mr Grant submits that both parties were partially successful on the valuation issue, neither being wholly successful.

9. It seems to me that Mr Attwood's valuation came out at some £860,000 more than the eventual court valuation. That means that the court valuation was some 10 per cent less than the figure for which Mr Mason contended. On the other hand, the court valuation was some £1.38 million more than the figure for which Mr Maidment was contending. In other words, the court valuation was some 23 per cent more than Mr Maidment's suggested figure. On that, it seems to me that Mr Grant understates the degree of success of Mr Attwood on that ultimate issue. Mr Grant submits that it was Mr Maidment who was substantially successful on the question of the assured shorthold tenancy discount. He had argued for a 10 per cent discount, whereas Mr Attwood had contended for a 2.5 per cent discount. I found that 7.5 per cent was the appropriate discount, rejecting Mr Mason's evidence on that issue. Mr Grant submits that that had a significant depreciatory effect on the resulting valuation. That is true; but, of course, that does not alter the fact that the court valuation was rather closer to Mr Attwood's valuation than that of Mr Maidment.

10. Mr Grant also points to the fact that Mr Maidment was successful on the factual question of the outstanding mortgages on the properties. He submits that Mr Attwood's sustained challenge on that point was unwarranted. It had given rise to much correspondence on the issue, as well as the need for written evidence from Mr Maidment in his ninth witness statement. Mr Grant submits that a substantial part of

the cross examination of Mr Maidment at the May hearing was devoted to this issue; and detailed submissions were made on it, both in writing and orally. All of this, Mr Grant says, ought to have been unnecessary.

11. As against that, Mr Clutterbuck makes the point that the whole issue emerged as a live issue of dispute because Mr Maidment had no relevant documents on the issue. I addressed this point at paragraphs 12, 13 and 14 of my May judgment. At paragraph 12, I referred to the fact that Mr Clutterbuck had submitted that the documents had not shown any mortgage borrowings on the three properties at the valuation date. Mr Maidment had effectively been the accounting party; and it had been for him to produce any relevant documents. Indeed, Mr Maidment acknowledged, at the end of that part of his cross-examination relating to the mortgages, that the evidence as to their existence was not 100 per cent complete.

12. My conclusion, at paragraph 14, was that, whilst I had disbelieved Mr Maidment on other issues, I was prepared to accept his evidence on this point, essentially for the two reasons I there gave. On this issue, I accept Mr Clutterbuck's submission that it was reasonable for Mr Attwood to require this issue to be investigated, and ventilated at trial. That was because, first, there was a background of my having found Mr Maidment to be an unreliable and untrustworthy witness; and, secondly, that it had been for Mr Maidment to produce relevant documentation, and he had failed to do so. It does not seem to me that that is a matter of conduct which should result in any significant discount from any costs award, particularly since, although it did take some time at trial, it was, nevertheless, not all that extensively debated an issue, either in evidence or submission.

13. I bear in mind, in that regard, Mr Grant's submission that it was hardly surprising, after the passage of some five and a half years since October 2005, that Mr Maidment had been unable to come up with documents. Nevertheless, I do not accept Mr Grant's submission that this was a point that should never have been contested.

14. Mr Grant also submits that Mr Attwood's case on interest was exaggerated. He makes the valid point that Mr Attwood failed in his attempt to obtain interest on a borrowing, as opposed to an investment, basis; and that he failed in his attempt to obtain quasi-interest at 9 per cent per annum. Nevertheless, for the reasons advanced by Mr Clutterbuck in his submissions, my award of base plus 2 per cent until 31 October 2008 and base plus 3 per cent thereafter has resulted in a substantial award to Mr Attwood.

15. Bearing in mind what is the relative success and failure of the parties on all of those issues, Mr Grant submits that effect should be given to that in the court's decision on costs. He refers me to the guidance of Jackson J, as he then was, in the case of Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2009] 1 Costs LR 55 at paragraph 72. Effectively, Mr Grant submits that although, in principle, an issue-based costs order would be appropriate, Mr Maidment does not seek such an order, given the practical difficulties in assessment to which it might give rise. Instead, following the guidance set out in the Multiplex Constructions case, the factors identified by Mr Grant should, he says, be reflected in a percentage reduction in the amount of the costs which Mr Attwood can recover. He invites the court to bear in mind that were an issue-based costs order to be made, that would not only result in a reduction in the costs payable to Mr Attwood, but in some payment of costs the other way. Taking all the above factors

into consideration (together with any other factors to which it is appropriate for the court to have regard once it had made a final ruling), Mr Maidment should, Mr Grant says, not be required to pay more than 40 per cent of Mr Attwood's costs since the 22 September hearing.

16. Mr Grant also relies upon certain letters that have passed between the parties on a "without prejudice save as to costs" basis. Mr Grant accepts that none of those offers were beaten by Mr Maidment; but he says that Mr Maidment had made sensible offers and has received no sensible response. He submits that there was no exaggeration on the part of Mr Maidment in his attempts to settle the matter. Mr Grant points to the following exchanges: first of all, a letter on 16 September (at page 5) offering, in an attempt to draw the litigation to a speedy and final resolution, a cash payment of £1.15 million within 28 days, together with a payment by Mr Maidment to Mr Attwood of Mr Attwood's reasonable costs of the litigation, to be assessed if not agreed. That offer was made on 16 September. It was responded to by a letter from Stockler Brunton on 19 September (at page 13) indicating a willingness to accept £2.5 million within 28 days, together with costs, on the clear understanding that there was to be no challenge to the uplift of 100 per cent provided by the conditional fee agreement. Mr Grant submits that that was a wholly inappropriate response.

17. Mr Clutterbuck points to the fact that, at the end of the day, with interest, Mr Attwood is to receive £2.13 million. That cannot be said to be so far below Stockler Brunton's counter-offer that it should be treated as evidence of an unreasonable unwillingness on the part of Mr Attwood to engage in negotiations. I bear in mind that the Stockler Brunton response was on Monday 19 September, following an offer the preceding Friday 16 September. That is against a background of a hearing date of 22 September, leaving very little time to engage in any meaningful negotiations at all.

18. The next offer (from Mr Maidment) was one of 14 November (at page 15) in the sum of £900,000. That received no response at all. Given the substantial reduction on the sum previously offered, I find that unsurprising.

19. The final exchange was initiated by a letter of Thursday 26 April (at page 17) offering to settle at £1.15 million plus £300,000 interest. Mr Grant accepts that that is way below the level the court has awarded; indeed, it is approaching £700,000 below the ultimate award, inclusive of interest; but Mr Grant submits that it should have been the subject of a serious counter-offer, or at least an invitation to enter into serious negotiations. Instead, this offer, made on the Thursday before the Bank Holiday Monday, was rejected on Wednesday 2 May (at page 19). That was some two days before the offer would have lapsed, at 4.00pm on Friday 4 May. Again, I have to bear in mind that the offer of 26 April effectively gave only some four clear working days for acceptance, bearing in mind the bank holiday. I also have to bear in mind that there was a hearing listed for Monday 14 May, and that the reason for imposing a deadline on acceptance until 4.00pm on Friday 4 May was that brief fees had to be delivered shortly.

20. It does not seem to me that there would have been any real prospect of a successful negotiation resulting in an agreement at a level that would have been acceptable to both Mr Maidment and Mr Attwood, given the differences that then remained between them. Mr Grant reminded me of the observations of Ward LJ, delivering the judgment

of the Court of Appeal (with the agreement of Rix and Keene LJJ), in the case of Carver v BAA Plc [2008] EWCA Civ 412, reported at [2009] 1 WLR 113. I bear in mind the actual decision in that case, and that it has been effectively reversed by the *Civil Procedure (Amendment No. 2) Rules 2011* with effect from 1 October 2011. That reversal has been achieved by the introduction of sub rule (1A) to CPR 36.14, whereby, for the purposes of CPR 36.14(1):

> "... in relation to any money claim or money element of a claim, 'more advantageous' now means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly."

21. Mr Grant makes the point that he is not relying upon that aspect of the Carver decision; rather he cites it for two passages in the judgment of Ward LJ. The first is the citation from Smith LJ's judgment in Hall & ors v Stone [2007] EWCA Civ 1354, reproduced at paragraph 26, where she observed:

> "In these days where both sides are expected to conduct themselves in a reasonable way and to seek agreement where possible, it may be right to penalise a party to some degree for failing to accept a reasonable offer or for failing to come back with a counter-offer"

22. Mr Grant also relies upon paragraph 35, where Ward LJ observed that the November 2005 offer in that case had been:

> "...relevant and it was a reasonable, not a derisory one. It met with no response. It met with no counter-offer. The claim was pursued and, albeit through no fault of the claimant herself, it became an exaggerated claim and she must, alas, bear ultimate responsibility for the manner in which her claim was conducted on her behalf by the different professionals advising her. Her exaggerated claim was withdrawn late in the day. Still no counter-proposals were forthcoming. The events of 25th May bordered on the farcical with offer and counter-offer, withdrawal of offer and purported acceptance of an offer which was not even on the table. This was a small claim in which the defendants admitted liability within months of the accident. To have incurred about £80,000 in costs to contest a claim under £5,000 fills one with despair. In all those circumstances Judge Knight QC was fully justified in marking his displeasure by making no order for costs."

23. Mr Grant accepts that the facts of Carver are far removed from those of the instant case; but he derives a point of principle from it, which is that the courts expect parties to seek to negotiate their differences, and to engage in serious and sensible negotiation

to avoid any unnecessary or unreasonable expenditure of costs. Here, he submits that the responses to the respondents' various offers were, first, an exaggerated counter-offer, which had to be combined with the acceptance of a 100 per cent uplift under a CFA; secondly, was to ignore an offer; and, thirdly, was peremptorily to reject it.

24. Mr Clutterbuck objects that he has been ambushed by the very late production, only over the short adjournment, of this correspondence, in relation to which he has had no opportunity to take instructions. He submits that the offers relied upon by Mr Grant are well below what the eventual sum which Mr Maidment will have to pay is. He submits that those offers exemplified Mr Maidment's unreal confidence that he was going to survive a trial. He submits that Mr Attwood did not conduct the litigation unreasonably; and the court should conclude that Mr Attwood was not unreasonable to refuse to engage in the settlement proposals, and it should not conclude that his responses were unreasonable or lacking in good sense.

25. I have to approach the issue of costs, and the exercise of the court's discretion in relation to them, by reference to CPR 44.3:

> "(1) The court has discretion as to – (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.
> (2) If the court decides to make an order about costs – (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order ...
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including – (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle ..."

26. In the present case, I am satisfied that it is Mr Attwood who has been the successful party, both on the petition, and on the quantification of the sum of money to be paid for his shares by Mr Maidment. The figure is closer to that for which Mr Attwood was contending than that for which Mr Maidment was arguing. It does not seem to me that Mr Attwood has been guilty of any unreasonable conduct. I have given my reasons for finding that it was not unreasonable for Mr Attwood to have challenged the allegedly outstanding mortgages on the three disputed properties, even though that challenge was ultimately unsuccessful.

27. On the valuation issues, the evidence of Mr Maidment's expert, Mr Roe, was wholly discredited. Mr Mason was not accepted in his evidence on two principal issues: the discount for the assured shortholds (where the court found a figure of 7.5 per cent, rather than Mr Mason's 2.5 per cent), and on the discounts for condition of the properties (which the court addressed at paragraph 54 of its judgment, indicating that Mr Mason had perhaps had taken an unduly strict approach); but, subject to those issues, Mr Mason's evidence was largely accepted. Certainly it seems to me that there should be no substantial discount for the way in which the valuation matters were addressed at trial.

28. So far as interest is concerned, neither party's primary cases were accepted; nor was the unchallenged witness evidence produced to the court accepted by the court in either instance. It does not seem to me, when one bears in mind Mr Clutterbuck's analysis, that Mr Grant has made out his submission that the case on interest was wholly exaggerated.

29. In terms of the time taken up at the May hearing, it does not seem to me that there was any substantial time occupied by those matters on which Mr Attwood was unsuccessful. So far as the admissible offers to settle are concerned, it does not seem to me that they should affect the exercise of the court's discretion as to costs. Offers were put forward; but, as Mr Grant accepts, none of them is directly relevant to the final outcome. They are relied upon solely by Mr Grant in support of his submission that Mr Attwood failed unreasonably to engage in discussions as to settlement; but when one analyses the time at which the various approaches were made, and the levels at which they were made, it does not seem to me that that supports Mr Grant's submission.

30. It does seem to me that there should be some slight discount to reflect the fact that Mr Attwood has not been wholly successful in his case. There has been a reduction in the valuation of the properties from that for which Mr Mason had been contending on Mr Attwood's behalf, and that should be reflected in a slight discount on the costs order. I have to assume, in the absence of any evidence from Mr Maidment's side to the contrary, that both sides have been running up costs at a more or less equal level. Bearing that in mind, in the absence of any evidence from Mr Maidment to the contrary, it does seem to me there should be a slight discount (but no more than a slight one); and that the appropriate order, in the exercise of the court's discretion, and weighing in the balance all the factors I have sought to identify, is that Mr Attwood should receive 90 per cent of his costs since 22 September 2011.

[After Mr Grant's application for permission to appeal]

31. It is not suggested that my decision was unjust because of a serious procedural or other irregularity in the proceedings in the lower court; nor is it suggested that, unless my decision were wrong, there is some other reason (still less some compelling reason) why an appeal should be heard. The sole basis upon which this application for permission to appeal is made is that there is a real prospect of success in establishing that my decision was wrong. In my judgment, there is no real prospect of success on appeal in contending my decision was wrong.

32. For the reasons that I have given in my judgment of 22 May, and my extemporary judgment delivered earlier today, in my judgment there is no real prospect of success on any of the six points that Mr Grant has raised as justifying the grant of permission to appeal. I therefore refuse permission to appeal. This is now a final decision, in a matter which I am sitting as a judge of the High Court, and therefore the appeal route is to the Court of Appeal. Mr Maidment can invite the Court of Appeal to give permission to appeal.