[2015] UKUT 0690 (TCC)

Case No: UT/2015/0055

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(In the Matter of the Land on the West Side of 2 Bridle Path, Horndean, Waterlooville, Hampshire – HM Land Registry Title No. SH32540)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/12/2015

Before :

HIS HONOUR JUDGE DIGHT

- -

Between :

(1) JOHN LINDSAY **(2) DENISE ANN LINDSAY**	**Appellants**
- and -	
MARILYN GLORIA YOUNG	**Respondent**

- -
- -

The Appellants appeared in person
Mr Christopher Semken (of **Verisona Law**) appeared for the **Respondents**
Hearing dates: 14/12/15

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Decision Approved by the court for handing down

His Honour Judge Dight:

1. This is an appeal from the decision of First Tier Tribunal Judge ("the Judge"), Mr Owen Rhys, dated 22nd December 2013 by which he ordered that the appellants pay the respondent's costs to be subject to a detailed assessment on the standard basis if not agreed of the reference of a dispute from HM Land Registry to the First Tier Tribunal. The appeal is brought with permission granted by His Honour Judge Simon Barker QC contained in a decision dated 9th March 2015, in paragraph 2 of which he provided that:

> "The application for permission to appeal against the order that the appellants pay the respondent's costs, including an interim payment on account of such costs in the sum of £10,000, is allowed"

2. He gave the following reasons for that decision:

> "The judge's reasons for his costs order, including the payment on account, include that evidence as to the valuation of the land in question is irrelevant to costs; this is arguably an error of principle (see the Practice Directions Property Chamber, First Tier Tribunal Land Registration of 30 July 2013)."

3. At the hearing of the appeal the appellants represented themselves and provided me with two volumes of documents a skeleton argument and a speaking note from which Mrs Lindsay made her submissions during the course of the morning. The respondent was represented by Mr Christopher Sempken of counsel who provided me with a skeleton argument and a bundle of authorities.

Factual background

4. The dispute concerns a plot described as land on the west side of 2 Bridle Path Cottages, Horndean, Waterlooville, Hampshire. The issue before the Judge was whether the appellants could show title to the plot by adverse possession. The respondent to the appeal is the daughter and personal representative of the paper owner of the land whose title dates back to 15th October 1945. The appellants are the registered proprietors of the land under Title No. SH32540 being registered with possessory title to that plot. The plot at one stage formed a larger parcel of land which was divided on 11th October 1996. On 30th April 2003 the appellants became the registered proprietors of 2 Bridle Path Cottages, an adjacent plot, under Title No. SH514117. In his substantive decision, which I will return to in due course, the Judge found that it was only from 2007 that the appellants could show sufficient evidence of adverse possession of the disputed plot, because prior to that the evidence showed that their user of the land been subject to express permission granted by the paper owner. The Judge also found that on 20th July 2010, and on other occasions, the appellants had acknowledged the title of the paper owner of the land. The paper owner died on 11th April 2011 and his daughter, the respondent, obtained a grant of probate to his estate on 24th October 2011. She discovered that on 24th December 2010 the appellants had been registered as owners of the disputed land with possessory title and applied to HM Land Registry to close the title. Because that application was objected to the matter was referred to the The First Tier Tribunal, which the Office of

Adjudicator to the Land Registry had by then become, which resulted in the hearing, in the nature of a trial, which took place before the Judge leading to his substantive decision dated 13th November 2013. In that decision the learned Judge found that, as I have already mentioned, the appellants could not establish adverse possession to the property for a sufficient period of time, that there was insufficient evidence of intention to possess the land in any event, and that they had acknowledged the paper owners title to the land, all of which resulted in the conclusion that the possessory title should be closed. It is to be noted that the value of the land was not a matter for determination by the Judge, although he was referred to a valuation report in the course of the hearing. He plainly reached no conclusions in respect of it. In paragraph 16 of his decision he said:

> "For these reasons, therefore, the deceased's title had not been barred by 24th December 2010, and the applicant is therefore entitled to close the possessory title. I shall therefore direct the Chief Land Registrar to give effect to the applicant's application dated 31st May 2012. I see no reason why the respondents should not pay the applicant's costs on the standard basis, but I shall allow the respondents to make written submissions on costs, to be received no later than Friday 22nd November 2013."

5. In response to that direction the appellants wrote to the Tribunal by a letter dated 8th December 2013, praying in aid the overriding objective and in the seventh and eighth paragraphs they set out their submissions on costs which were effectively:

   i) That the respondent's costs bill was disproportionate to the value of the land in dispute;

   ii) That the appellants' financial position ought to be taken into account;

   iii) That the respondent had failed properly to negotiate for sale of the property and had acted unreasonably in the course of the litigation.

6. In their response dated 17th December 2013 on behalf of the respondent, the appellants' solicitors said:

> "This paragraph is based on a misunderstanding of the overriding objective, which relates to the resolution of issues between the parties by judicial process, not the disposal (by sale or otherwise) of the disputed land. It was open to the respondents at any time to discontinue their opposition to the applicant's application and to pay her costs in such sum as might be assessed by the tribunal."

Having referred to various letters passing between the parties they then said:

> "The respondents were not forced to defend the application, nor did the applicant behave unreasonably."

7. By his decision dated 2nd December 2013 the Judge ordered the appellants to pay the respondent's costs subject to detailed assessment on the standard basis, directed that they pay £10,000 on account of such costs, and gave the following reasons:

> "I am not persuaded that I should make any other order than that the applicant should receive her costs. I have seen the various offers and counter offers passing between the parties. I am not in any position to know whether the valuation placed on the land by the applicant and her advisors was correct. That issue is irrelevant to the costs order. The fact is that she has been successful in the application to close the possessory title, referred to the tribunal to resolve, and on the face of it should obtain her costs. It would have been open to the respondents to protect themselves, by agreeing to the applicant's application on the basis that they paid her costs from the date of the reference, namely February 2013. Regrettably from their point of view they did not do so…"

On 15th February 2014 the appellants lodged an application for permission to appeal, the Judge having refused permission on 24th January 2014, which was refused on paper by Judge Cousins on 11th June 2014 and was renewed orally before His Honour Judge Simon Barker QC leading to his order of 11th March 2015. At that stage the appellants had been seeking permission to challenge not only the costs but also the substantive decision made by the Judge. By his decision of 11th March 2015, granting permission to appeal the costs order, Judge Barker refused permission to appeal the substantive decision on the basis that it had no real prospect of success, leaving the appeal on the issue of costs to be determined by the Upper Tribunal.

The issue on the Appeal

8. The appellants assert:

   i) that the Judge was wrong not to take into account the low level of the value of the property in reaching his decision as to costs;

   ii) the Judge failed to take into account what the appellants considered to be the unreasonable conduct of the respondent;

   iii) the sum of £10,000, ordered by the Judge to be paid on account, was excessive; and

   iv) in any event there is a £500 limit on the costs which could be awarded prior to July 2013.

9. The respondent submits:

   i) that the Judge did not err in principle in refusing to take into account the value of the land in dispute;

ii) the Judge came to a decision within the breadth of discretion afforded to him by the Rules, having taken account of the submissions made by the parties in respect of conduct;

iii) that the sum of £10,000 was a sum which was well within the ambit of the Judge's discretion to order; and

iv) that the appellants are wrong in their submission that there was ever a limit of £500 on the amount of the costs which could be awarded.

The law

10. The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 make provision for costs in Rule 13, headed "Orders for Costs, Reimbursement of Fees and Interests on Costs", in so far as material as follows:

> "(1) The Tribunal may make an order in respect of costs only"
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in-
>
> (i) an agricultural land and drainage case,
>
> (ii) a residential property case, or
>
> (iii) a leasehold case, or
>
> (iv) in a land registration case.
>
> …
>
> (7) The amount of costs to be paid under an order under this Rule may be determined by:
>
> …
>
> (c) Detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal… and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis
>
> …
>
> (9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed"

11. The costs rules before the First Tier Tribunal are not more detailed than those which I have quoted above but they are supplemented by a practice direction dated 30th July 2013, issued by the then Senior President of Tribunals, and known as "Practice Directions Property Chamber, First Tier Tribunal Land Registration". The costs

provisions are contained in PD9 headed "Orders for Costs under Rule 13". That paragraph provides, in so far as material, as follows:

> "9.1 The Tribunal's discretion as to costs
>
> (a) The Tribunal has discretion as to
>
> (i) where the costs are payable by one party to another;
>
> (ii) the amount of those costs; and
>
> (iii) when they are to be paid.
>
> (b) If the Tribunal decides to make an order about costs-
>
> (i) ordinarily the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (ii) the Tribunal may make a different order.
>
> (c) in deciding what order (if any) to make about costs the Tribunal will have regard to all the circumstances, including-
>
> (i) the conduct of all the parties;
>
> (ii) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (iii) any admissible offer to settle made by a party which is drawn to the Tribunal's attention.
>
> (d) The conduct of the parties includes-
>
> (i) conduct before as well as during the proceedings;
>
> (ii) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (iii) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

> (iv) whether a party who has succeeded in the case, in whole or in part, exaggerated its case.
>
> …"

12. The rules relating to the basis of assessment are set out in paragraph 9.2 of the Practice Direction and those relating to the amount of costs in paragraph 9.3 in particular under the heading "Factors to be taken into account in deciding the amount of costs". That rule provides that:

> "(a) Where the Tribunal assesses costs on the standard basis it will have regard to all the circumstances in deciding where the costs were-
>
> (i) proportionately and reasonably incurred; or
>
> (ii) proportionate and reasonable in amount.
>
> …
>
> (d) the Tribunal will also have regard to the-
>
> (i) conduct of all the parties, including in particular
>
> (aa) conduct before, as well as during the proceedings;
>
> (bb) the efforts made if any before and during the proceedings in order to try to resolve the dispute;
>
> (ii) amount or value of any money or property involved;
>
> (iii) importance of the matters to all the parties;
>
> (iv) particular complexity of the matter or the difficulty or novelty of the questions raised…"

13. Paragraph 9.4 of the Practice Direction provides as follows:

> "The provisions of the Civil Procedure Rules relating to the detailed assessment of costs are modified to the extent set out in this Practice Direction or as the Tribunal shall from time to time direct."

14. It is to be noted that the Rules and Practice Direction are modelled on and in a very large part reflect and use similar wording to the relevant costs provisions contained in the Civil Procedure Rules in CPR Part 44, except in relation to the provision concerning payments on account. Thus, for example, in common with the CPR, the

Tribunal Rules and Practice Direction require the Tribunal, in dealing with questions of costs, to apply the following principles:

(1) The Tribunal has a discretion as to cost;

(2) The starting point is that the unsuccessful party will pay the successful party's costs;

(3) The Tribunal however has a discretion to make a different order;

(4) In considering what order to make the Tribunal is to have regard to all the circumstances of the case, including the conduct of the parties, the degree of success and offers to settle;

(5) An order may be made for the costs to be assessed on the standard basis or indemnity basis; and

(6) On assessment on the standard basis account is to be taken of whether the costs were proportionately and reasonably incurred and were proportionate and reasonable in amount having regard to, inter alia, the conduct of the parties and the amount of the property in issue.

In my judgment the rules and practice directions relating to costs are to be construed consistently with the equivalent provisions in the Civil Procedure Rules such that the reported decisions and commentary relating to the latter may be read across in giving effect to the former.

15. The first question that arises, on the appeal, is whether the judge was wrong in principle in reaching the conclusion that the valuation of the plot of land was "irrelevant to costs" (see the reasons for the grant of permission to appeal). However, it is to be noted that the Judge had said that the valuation was "irrelevant to the costs order"; he did not say that it was irrelevant to the costs as a whole or as to the assessment of those costs. The only provision in the Tribunal Rules and related Practice Direction which expressly requires the value of the property involved to be taken into account in relation to costs is to be found in PD9.3(d)(ii), which directs the Tribunal to have regard to the amount or value of any property or money involved in assessing costs. There is no corresponding provision in paragraph 9.1 relating to the Tribunal's discretion as to what costs order to make, or in 9.2 relating to Tribunal's discretion as to the basis on which such costs are to be assessed. In my judgment therefore there was nothing in the Rules or Practice Direction that required the judge to take account of the value of the property in deciding who as between the appellant and respondent should bear the costs of the proceedings or, having reached a conclusion as to that, the basis upon which such costs should be assessed. Further, it is to be borne in mind that the value of the plot was not a material consideration for the judge in reaching his substantive decision. He did not hear evidence about the

value, although he saw certain documents relating to it. He was not required to reach a decision as to the value of the property. In the exercise of his discretion he was entitled to come to the conclusion, in so far as it might be said otherwise to be relevant, that the value had no part to play in assessment of the conduct or the reasonableness of the parties in the litigation itself.

16. The fact that the learned judge need not take account of the value of the property in resolving the question as to what costs order to make does not mean that it is not relevant when it comes to the assessment of those costs on the standard basis in accordance with his order. The assessment was not a matter for him to deal with, given that he ordered that there be detailed assessment of the costs. It will fall to be determined in due course by the appropriate costs officer having regard to, among other things, paragraph 9.3(d)(ii) of the Practice Direction. Had the Judge decided to assess the costs summarily himself then he would have been obliged to take account of the value when considering questions of proportionality, but, as he was entitled to do, he directed detailed assessment thereby leaving the interrelationship between value and proportionality to be considered on another day in another forum.

17. I will turn briefly to the other submissions. The reasons given by the learned judge for his costs decision were brief but accorded, in my view, with the guidance given by the Court of Appeal in ***English v Emery Reimbold & Strick Limited*** [2002] EWCA Civ 605 in which Lord Phillips of Worth Matravers MR, giving the judgment of the court,said as follows between paragraphs 27 and 31 under the heading "Costs":

> "27 At the end of a trial the Judge will normally do no more than direct who is to pay the costs and upon what basis. We have found that the Strasbourg jurisprudence requires the reason for an award of costs to be apparent, either from reasons or by inference from the circumstances in which costs are awarded. Before either the Human Rights Act or the new Civil Procedure Rules came into effect, Swinton Thomas LJ, in a judgment with which Sir Richard Scott V-C, who was the other member of the Court, agreed, said this in *The Mayor and Burgess of the London Borough of Brent v Aniedobe* (unreported) 23 November 1999, Court of Appeal (Civil Division) Transcript No. 2000 of 1999, in relation to an appeal against an order for costs:
>
> > "…this Court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the County Court by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's orders are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event) it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course."

> 28 It is, in general, in the interests of justice that a Judge should be free to dispose of applications as to costs in a speedy and uncomplicated way and even under CPR this will be possible in many cases.
>
> 29 However, the Civil Procedure Rules sometimes require a more complex approach to costs and judgments dealing with costs will more often need to identify the provisions of the rules that have been in play and why these have led to the order made. It is regrettable that this imposes a considerable burden on Judges, but we fear that it is inescapable."

18. The judge's reasons in this case were short, he made it plain that he had considered the factors raised by the appellants in their letter of 8th December 2013 and the responses to that in the respondent's letter of the 13th December 2013. One can infer that he directed himself according to the rules and the practice direction that I mentioned above and in my judgment came to a conclusion which was well within the breadth of discretion of afforded to him by those rules and practice direction.

19. I turn therefore to the question of the payment on account. The discretion under Rule 13(9) to order a payment on account is a broad one and uses a phrase similar to that formerly to be found in the CPR:

> The Tribunal may order an amount to be paid on account before the costs or expenses are assessed".

The provision relating to interim payment under the CPR has been recast so that it now provides, at CPR44.2(8) that:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

20. The notes to that provision in the White Book at page 1433 say, in respect of the earlier rule, as follows:

> "In a number of cases it was emphasised that the court had a wide discretion, both as to whether it should or should not make an order and as to the amount. …
>
> In exercising the discretion under the old rule it has been stated that the court should take into account all the particular circumstances, and that relevant factors to be considered include the need to act justly in accordance with the overriding objective, the relative financial positions of the parties, and the desire of one party to appeal (*Mars UK Limited v Teknowledge Limited*)."

21. In my judgment I am entitled, for the reasons which I give above, to take account of the commentary in relation to the old CPR rule when considering the true meaning and effect of Rule 13(9). I accept Mr Semken's submission that this rule gives the

Tribunal a broad discretion which entitles it to take into account the financial resources of the paying party, but that a lack of resources on the part of the paying party does not of itself mean that the Tribunal should not make an order for a payment on account. Far from it. If the Tribunal sets a reasonable sum by way of payment on account which the paying party then fails to pay then the receiving party would be entitled to form the view (correctly) that there may be little or no commercial point in the receiving party proceeding to a detailed assessment of the full costs with all the time costs and expense that such an assessment usually engenders. Thus, in my judgment, and for those reasons it would be a proper exercise of a judge's discretion to order a payment on account even where the financial circumstances of the paying party are limited. So far as the amount to be paid is concerned it seems to me that this must be a reasonable sum which should be determined in accordance with the jurisprudence on the equivalent provision under the CPR which require the Court to reach a view as to the approximate sum that the receiving party is likely to be awarded via the assessment process. Such a sum is always worked out on a rough and ready basis and is best estimated by the judge who has tried the proceedings who will have a better view than the judge on appeal to know whether the sum sought is reasonable and proportionate bearing in mind the issues at trial, the way in which they have been pursued and the conduct of the parties.

22. In this case the sum awarded by the Judge was approximately one-third of the total sum claimed in respect of costs by the receiving party. It is in the context of this type of litigation a relatively modest sum, albeit I appreciate its size and significance when the paying party is a private person of modest means, but it cannot be said that it was outside the range of figures which it was open to the Judge to reach.

23. For the above reasons, I have come to the conclusion that the appeal should be dismissed.

Decision issued 5 January 2016