



[2016] UKUT 473 (TCC)

Appeal number: UT/2016/0043

UPPER TRIBUNAL

(TAX AND CHANCERY CHAMBER)

CHARLOTTE ISOBEL HUGHES

Appellant

- and -

MARK DANIEL MOONEY

Respondent

TRIBUNAL:

JUDGE ELIZABETH COOKE

DECISION

1. This is an appeal from a costs order made against the Appellant in the Land Registration Division of the First-tier Tribunal ("the LRD"), on 8 March 2016. The costs arose as a result of the reference to the LRD, by HM Land Registry, of the Appellant's application for the entry of a restriction on the register of title to 82, Leman Street, Derby ("the property"). The Respondent is the sole registered proprietor of the property, and the Appellant wanted a restriction entered to protect the beneficial interest she says she has in the property by virtue of a Declaration of Trust dated 8 December 2009. The Respondent objected to the entry of the restriction and the application was referred to the LRD, pursuant to section 73 of the Land Registration act 2002, on 14 April 2015.

2. Following that reference the parties exchanged Statements of Case in accordance with the LRD's directions, and then in June 2016 those pleadings were considered by a judge. Essentially the Applicant relied upon the Declaration of Trust, dated 8 December 2009, signed by both parties and witnessed, to the effect that she was to have a 50% beneficial interest in the property, subject to a mortgage dated 30 June 2006 in favour of the Nationwide Building Society. She says that the Declaration of Trust was executed in response to her family's provision of £5,000 towards renovations in the property. The Respondent's case was that he signed that Declaration of Trust in ignorance of its effect, without legal advice and without sight of its contents. However, in his Statement of Case he accepted that the Appellant did have a beneficial interest in the property, arising from the payment of £5,000 by virtue of a constructive trust. The distinction is important because it means that on the Respondent's case the extent of the Appellant's interest in the property has not been determined.
3. Seeing that admission from the Respondent, in his Statement of Case, the judge of the LRD asked the parties if they were content for the LRD to direct the registrar to enter a restriction, but also to record that the basis and extent of the beneficial interest in the property was not agreed. The parties agreed to that suggestion, and accordingly the LRD made that direction, by the consent of the parties, on 21 October 2015. The Respondent then sought an order for his costs in the LRD proceedings on the basis that the Appellant had not succeeded in her specific application, but that it had been common ground from the outset that she had a beneficial interest in the property.
4. The First-tier Tribunal made a costs order on 8 March 2016 in the Respondent's favour, on the basis that he had made settlement offers before the reference to the Tribunal which the Applicant should have accepted. Those costs were summarily assessed in the sum of £1382.40, including VAT.
5. Judge Cousins in the Upper Tribunal gave permission to appeal that order, on 4 May 2016, on two bases. First, he took the view that the costs claimed related to a period before the reference to the Tribunal. That is not one of the applicant's grounds of appeal, and it is clear on looking at the Schedule that that is not the case. The costs claimed date from the reference to the Tribunal in April 2015.
6. Judge Cousins also gave permission on the ground that the LRD's costs decision may have been premature, in light of the fact that the extent of the Appellant's beneficial interest had not been determined, and may have been taken without regard to the Appellant's submission that it was *not* common ground, before the reference to the LRD, that she had a beneficial interest in the property. I take that as a grant of permission to appeal the costs order on the basis that it may have been made in error as to fact or law, and accordingly I consider, below, the legal basis for making a costs order in the LRD and the basis on which it was made in this case.
7. The parties have agreed that I should determine this appeal on the basis of their written submissions, in order to save further costs.
8. I pause to note that the Appellant has put forward a great deal of material in her Notice of Appeal and in her written submissions about the merits of her claim, including two witness statements about the Declaration of Trust. I make it clear that this appeal is not a determination of the merits of the Applicant's claim to a 50% beneficial interest in the

property arising from the Declaration of Trust. The appeal is against the costs order. The Respondent has asked that the two new witness statements be removed from the Applicant's bundle and ignored by the Upper Tribunal. I pay no further regard to them because they are not relevant to the question I have to answer, which is whether the costs order was properly made.

The legal basis of an order for costs

9. In the Land Registration Division of the First-tier Tribunal costs normally follow the event – in other words, the unsuccessful party normally has to pay the successful party's costs: see Rule 13 of the Tribunals Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and paragraph 9 of the Practice Directions for the Land Registration Division of the Tribunal. Paragraph 9 makes it clear that the LRD has a discretion as to costs (paragraph 9.1 (a)) and that it will take into account the conduct of the parties, whether a party has succeeded or been partially successful in the LRD proceedings, and any admissible offer of settlement that is drawn to its attention (paragraph 9.1 (c)).
10. Accordingly, and in accordance with the usual principles, where a party has been successful but proceedings were unnecessary, that will count against that party in the costs decision. And where an offer of settlement has been made, either in open correspondence or without prejudice save as to costs, and the successful party has not done so well as he or she would have done had that offer been accepted, then costs will not follow the event and the successful party will be penalised in costs for that failure to settle.

The basis of the order for costs against the Appellant

11. The Applicant's appeal of the costs order is on the basis that she was successful and should not have to pay. She points out that the Respondent did not agree that she had a beneficial interest in the property until he did so in his Statement of Case.
12. What the Applicant sought in her application to Land Registry was the entry of a restriction to protect a beneficial interest in the property arising from the Declaration of Trust. What she got was a restriction to protect her beneficial interest in the property, but no decision – and a record on the register that there was a dispute – as to the basis of that interest. As a starting point, therefore, she was partially successful. It could also be said that the Respondent was partially successful, or at least not unsuccessful, in that he has not conceded the validity of the Declaration of Trust and there has been no finding against him. In effect by his concession that a restriction could be entered he ensured that no adverse finding would be made on that point by the Tribunal. There was therefore a very strong case for the Tribunal making no order for costs.
13. In making the order of 8 March 2016 the judge of the LRD was certainly aware of the Appellant's contention that it was not common ground that she had a beneficial interest in the property – this is made clear in paragraph 4 of the decision. He did not make an express finding as to which party was correct on that point. In fact the Respondent had written to the registrar in November 2014 stating that he did not accept that the Appellant had a beneficial interest in the property, and that is why the reference to the Tribunal was made. The first formal concession as to the Appellant's interest was in the Respondent's Statement of case. It may be that the LRD judge gave insufficient consideration to that fact.

14. However, the real basis of the costs decision appears to have been that in rejecting offers of settlement the Appellant had made herself liable to pay the Respondent's costs. The judge made particular reference to an offer made in January 2015, before the reference to the Tribunal. The Respondent offered to sell the property and give her half the proceeds after payment both of the Nationwide mortgage and of the sum due under a Charging Order made against him in the Derby County Court on 15 February 2011. That offer would have given the Applicant half the sale proceeds less half the debt due under the Charging Order, half of that debt being in the region of £2,400. The judge found that the offer was "credible, reasonable and the refusal to accept by the applicant put her at risk as to costs".
15. The Appellant rejected that offer because, she said, it did not reflect what she and the Respondent had agreed. She did not accept that her interest was subject to the Charging Order, which post-dated the Declaration of Trust.
16. The LRD made no finding about the validity or otherwise of the Declaration of Trust – and it is difficult to see how it could have done so in the light of the parties' agreement as to the entry of the restriction. The LRD was not therefore able to make a judgment about whether the offer of settlement made in January was one that the Applicant should have accepted. It could not assess the merits of the offer without having made a decision on the underlying merits of the claim to a beneficial interest.
17. Accordingly it appears to me that the applicant could not be said to have rejected an offer that she ought to have accepted, and that the LRD was in error in finding that she had done so and in holding that against her in making the costs decision of 8 March 2016.
18. Accordingly this appeal is allowed. The Upper Tribunal is able to make an order that the LRD could have made on reviewing its decision. In the light of the matters set out above it appears to me clear that both parties were partially successful and that there should be no order for costs. Accordingly its order is that the costs order of 8 March 2016 is revoked and that there is no order for costs in the reference to the LRD.
19. The Appellant would appear to be entitled to her costs of this appeal, although they will be limited because she is a litigant in person. If either party wishes to apply for the costs of this appeal they should do so within 14 days of the date of this order, following which I will give directions.

JUDGE ELIZABETH COOKE

Release date 26 October 2016