UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 217 (LC)
UTLC Case No: RA/25/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

Rating - Costs – appeal against a VTE Decision – Respondent concedes appeal before hearing – Land Chamber's simplified procedure – whether Respondent's late concession amounts to unreasonable behaviour - whether Appellant entitled to wasted costs - Lands Chamber's Practice Directions 2010 – appeal dismissed

BETWEEN:

MRS LYNN BROPHY **Appellant**

- and -

EDWARD SIMMONDS
(VALUATION OFFICER) **Respondent**

Re: Loose Boxes and Premises,
Hallcat Farm,
Lowca,
Whitehaven
Cumbria CA28 6QT

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Before: P D McCrea FRICS

Decision on Written Representations

The following cases are referred to in this Decision:

Ridehalgh v Horsefield [1994] Ch 205
Total Fulfilment Logistics Limited v Paul May (Valuation Officer) [2014] UKUT 0354 (LC)
Andrew McDonough (Valuation Officer) v Mrs Andrea O'Keeffe [2015] UKUT 0074 (LC)

DECISION

Introduction

1. This short decision concerns the entitlement of an applicant to claim costs under rule 10(3) of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 if, shortly before the hearing, the respondent valuation officer concedes an appeal which has been proceeding under the Tribunal's simplified procedure.

Brief history

2. The appeal by Mrs Lynn Brophy was against a decision of the Valuation Tribunal for England ("VTE") dated 27 February 2015 and was in respect of loose boxes at Hallcat Farm, Lowca, Whitehaven, Cumbria. CA28 6QT. The VTE confirmed that the loose boxes should be entered in the list as a separate hereditament with a rateable value of £480 effective from 2 August 2011. The appellant's case was that the loose boxes were not liable to non-domestic rating at all, as they were within the curtilage of her home.

3. In her Notice of Appeal to the Tribunal, the appellant requested that the appeal be dealt with by written representations, although later said that she wished to have an oral hearing.

4. When responding on behalf of the valuation officer, Mr Steve Brothers of the VOA's litigation team requested that the appeal be assigned to the Tribunal's simplified procedure. Both parties submitted statements of case. On 2 October 2015 the Registrar directed that the appeal be determined under the simplified procedure.

5. On 16 November 2015 the Tribunal indicated to the parties that the appeal would be heard on Friday 12 February 2016.

6. On 22 January 2016 the Tribunal received an email from Mr Brothers which said that the valuation officer then dealing with the appeal, Mr Edward Simmonds, had inspected the property for the first time during the previous week, during which he had told Mrs Brophy that he was prepared to agree the appeal and delete the entry in the rating list.

7. Mr Brothers indicated that the valuation officer was therefore prepared for the Tribunal to allow the appeal by consent. Mrs Brophy then indicated that she wished to make an application for costs. Accordingly, a consent order was made by the Tribunal (which was satisfied that the valuation officer's concession was properly made), deleting the assessment from the rating list with effect from 2 August 2011, but noting that the appellant reserved the right to make a

subsequent application for costs within 1 month. Mrs Brophy subsequently made an application for her costs.

The appellant's submission

8. Mrs Brophy said that the appeal had been ongoing for almost five years which was totally unwarranted. She had attended three appeal hearings, one of which was postponed after she had waited for an hour, and at another the valuation officer did not attend. On each occasion she had travelled for two hours and waited at the venue. At the last hearing before the VTE, which she said took almost four hours, her appeal was turned down but owing to an error of law she had now won her appeal to the Tribunal.

9. Mrs Brophy said she had had to study rating law and guidelines, including previous decisions, and in addition had carried out correspondence, copying and printing which had gone on for some years. Mrs Brophy said that the valuation officer should never have brought the case which, from the beginning, was known to be a borderline case, as Mr Simmonds subsequently confirmed during their meeting. Mrs Brophy understood that she was able to claim either £19 per hour, or a third of the total cost had she instructed a solicitor. She claimed a spot figure of £5,000, without providing a breakdown.

The respondent's submission

10. Mr Brothers said that the valuation officer's original view that the loose boxes should be treated as non-domestic property, liable to a rating assessment, was upheld by the VTE. In January 2015[1], prior to the VTE hearing, and then in May and June 2015, the VOA engaged counsel to run a series of test cases before the President of the VTE in order to test its approach to the domestic/non-domestic borderline and in particular whether equestrian facilities should fall to be treated as appurtenances to domestic property. Six individual situations were considered by the President which helped the VOA rationalise its approach.

11. After Mr Simmonds had inspected the appeal property for the first time on 18 January 2016, he discussed the appeal with Mr Brothers, and in the light of the decisions of the President of the VTE, decided that the facts of the case did not present a sound basis upon which to proceed, and accordingly agreed that the entry in the rating list should be deleted.

12. Mr Brothers said that, accordingly, the VO had not unduly prolonged the dispute, nor acted unreasonably, nor were there any exceptional circumstances which should warrant an order for costs against the VO.

[1] The decision in the first case was actually published in January 2014

The Tribunal's power to award costs

13. The Tribunal's jurisdiction to award costs is statutory. It is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides (so far as relevant) as follows:

> 29. **Costs or expenses**
>
> (1) The costs of and incidental to—
>
> (a) [First-tier Tribunal] and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) "wasted costs" means any costs incurred by a party—
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.
>
> (6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

14. By section 29(3) the power conferred by section 29(2) to determine by whom and to what extent costs are to be paid, has effect subject to the Tribunal's procedural rules. Rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (as amended), which came into force on 1 July 2013, makes the following relevant provisions:

> 10. **Orders for costs**
>
> (1) The Tribunal may make an order for costs on an application or on its own initiative.
>
> (2) An order under paragraph (1) -
>
> (a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6)

(b) …

(3) The Tribunal may in any proceedings make an order under for costs:

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting proceedings; or

(c) in the circumstances to which paragraph (14) refers.

(4)-(5) …

(6) The Tribunal may make an order for costs in proceedings –

(a) – (c) …

(d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales.

(7) Subject to paragraph (3), in proceedings to which paragraph (6) applies, the Tribunal may direct that no order for costs may be made against one or both specified parties in respect of costs subsequently incurred.

(8) In proceedings to which paragraph (6) applies, the tribunal must have regard to the size and nature of the matters in dispute.

(9)-(13) …

(14) The Tribunal may order a party to pay to another party costs of an amount equal to the whole or part of any fee paid (which has not been remitted by the Lord Chancellor under the Upper Tribunal (Lands Chamber) Fees Order 2009) in the proceedings by that other party that is not otherwise include in an award of costs.

15. It is also relevant to note that section 23 of the Tribunals, Courts and Enforcement Act 2007 authorises the making of practice directions which regulate the practice and procedure of the Upper Tribunal. The 2010 Practice Directions of the Lands Chamber were made under that power.

16. The Tribunal's Practice Direction indicates that:

"12.8 Simplified and written representations procedure

Where proceedings are determined in accordance with the simplified procedure … costs will only be awarded if there has been an unreasonable failure on the part of the claimant to accept an offer to settle, or if either party has behaved otherwise unreasonably, or the circumstances are in some other respect exceptional."

17. The power conferred by rule 10(6)(d) to award costs in appeals from the VTE is therefore modified by paragraph 12.8 of the Practice Direction. In a simplified procedure case costs will only be awarded in exceptional circumstances. Such circumstances include where a party has behaved unreasonably. The power to award costs where a party has behaved unreasonably is conferred by rule 10(3)(b). A separate power to order a party to pay "wasted costs" is also conferred by rule 10(3)(a); wasted costs in this context has the meaning indicated by section 29(5) of the 2007 Act and encompasses cases where costs have been incurred as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative. Such behavior would also be exceptional and could result in an award of costs even in a case proceeding under the simplified procedure.

Discussion

18. Where an appeal is assigned to the Tribunal's simplified procedure, the parties know that, other than in exceptional circumstances, they will not recover the costs they incur in dealing with the proceedings. Assignment to the simplified procedure only takes place after the parties have expressed their preference and it would be unusual for a case to be dealt with under the simplified procedure if a party objected to that course. In most cases the option for the simplified procedure is the informed choice of both parties, made in the expectation that they will have to bear their own costs even if they are wholly successful.

19. There have been two recent examples of applications for costs in appeals from the VTE which have been dealt with under the Tribunal's simplified procedure.

20. In *Total Fulfilment Logistics Limited v Paul May (Valuation Officer)* [2014] UKUT 0354 (LC), the circumstances were that the appellant withdrew the appeal shortly before the hearing and the valuation officer sought its costs; I said this:

> "(12)… I have considered the alternative open to the appellant. Had [the surveyor acting for the appellant] appeared at the hearing, there is nothing to suggest that costs would have been awarded against the appellant, even had the VO been wholly successful on the substantive issue. The VO would, in all likelihood, not have recouped the costs of the preparation of his expert report. In fact, by withdrawing the case the appellant had saved costs both for themselves and the respondent."

21. No order for costs was made in that case.

22. In a more recent costs decision following the withdrawal of an appeal, *Andrew McDonough (Valuation Officer) v Mrs Andrea O'Keeffe* [2015] UKUT 0074 (LC), the Tribunal (Mr A J Trott FRICS) said this:

> "41. The early settlement of disputes is to be encouraged. It would be unhelpful if a party which had reassessed the strength of its case was to be discouraged from withdrawing an appeal in a simplified procedure case by concern that it would automatically become liable for the costs of the respondent. To withdraw an appeal which is believed to have little prospect of success is a reasonable course of action, not an unreasonable one and it should not automatically be penalised. Some additional factors are likely to be necessary in a simplified procedure case (such as a frivolous or purely tactical appeal) to make it appropriate to order the appellant to pay the respondent's costs."

23. In fact, in the case the Tribunal did award 50% of the respondent's costs against the appellant owing to the appellant's unreasonable submissions about the respondent's conduct, criticism of the presentation of her case and the fact that she appointed an expert valuer.

24. *Total Fulfilment* and *McDonough* were both cases in which the appellant withdrew the appeal shortly before it was due to be heard; this case is different, in that the appeal has been conceded by the respondent valuation officer a few weeks before the hearing and the appellant has secured the outcome she sought all along. However, there is no reason why the proper approach to the issue of costs should not be the same in each situation.

25. In this case, it is for Mrs Brophy to show that the valuation officer has acted unreasonably, or that there are some other exceptional circumstances that should cause me to depart from the general "no-costs" rule under the simplified procedure.

26. In *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal considered what was meant by "unreasonable" behaviour; the context was an application for an order for the payment of wasted costs. Sir Thomas Bingham MR said that:

> " 'Unreasonable' … means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

27. Applying this acid test, I do not consider that the VO's conduct in this case was unreasonable. The merits of whether the appeal property should be entered into the rating list were patently not hopeless, as the VTE had determined that it should be so assessed. Whilst ratepayers should, to an extent, be entitled to expect the Valuation Office Agency to speak with one voice, each valuation officer is required to apply his or her own judgment to the situation presented to them, and in marginal cases differences of opinion are reasonably to be expected.

In this case I accept that very soon after he took conduct of the case and had inspected the appeal property, Mr Simmonds came to a conclusion which was different from that of his predecessor, and therefore agreed that the entry in the rating list should be deleted. By doing so, he has avoided both sides incurring costs in attending the hearing that was scheduled for 12 February 2016.

28. As in *Total Fulfilment Logistics*, it is relevant to consider what might have been the implication for costs if the appeal had proceeded to a hearing and the Tribunal had made a finding in favour of Mrs Brophy. There is nothing to suggest that she would have been awarded her costs in the event that I agreed that the assessment should be deleted from the rating list. As in that case, here further costs were avoided by the Valuation Officer conceding the appeal.

29. In part Mrs Brophy's application for costs has been based on the inconvenience and expense to which she was put in connection with the hearings before the VTE. This Tribunal has no power to award costs in respect of expenses incurred before the VTE. Rule 10(3) and 10(6)(d) confer power to make orders for costs only in the proceedings before this Tribunal itself. In any event, nothing in Mrs Brophy's application suggests that the valuation officer acted unreasonably before the VTE.

30. I am therefore not persuaded that there are any other exceptional circumstances that would cause me to depart from the general rule of no-costs under the simplified procedure. Accordingly, I make no order for costs in this appeal.

31. I re-emphasise the Tribunal's comments in *McDonough v O'Keeffe*. In ordinary circumstances, and in the absence of unreasonable behaviour, appellants should not be discouraged from withdrawing an appeal, or respondents conceding, in a simplified procedure case owing to the threat of a costs order being made against it.

Dated: 9 May 2016

P D McCrea FRICS