UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – Costs – application to modify - objector relying solely on privity of contract – original covenantor transferring burdened land to spouse to avoid objection – objection withdrawn – whether objector to pay costs of application – rules 10(3) and 10(6)(c), Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 — Lands Chamber Practice Directions para 12.5(2) – application for costs refused

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BETWEEN:

(1) PETER JAMES MUNDAY
(2) LINDA ANN MUNDAY

Applicants

and

THE CROWN ESTATE COMMISSIONERS

Objector

Re: Pinewood Lodge,
Warren Lane,
Oxshott,
Surrey KT22 OST

Martin Rodger QC, Deputy Chamber President

Determination on written representations

The following cases are referred to in this decision:

Willow Court Management Company (1985) Limited v *Alexander* [2016] UKUT 0290 (LC)

McPherson v BNP Paribas [2004] EWCA Civ 569

Cancino v Secretary of State for Home Department [2015] UKFTT 00059 (IAC)

Re: Hutchinson's application [2009] UKUT 182 (LC)

Ridehalgh v Horsefield [1994] Ch 205

Introduction

1. By rule 10(6) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("the 2010 Rules") the Tribunal may make an order for costs in proceedings under section 84 of the Law of Property Act 1925 for the discharge or modification of restrictive covenants affecting land.

2. Paragraph 12.5 of the Tribunal's Practice Directions identifies the principles which will be applied by the Tribunal when it exercises its discretion in relation to the costs of applications under section 84. By paragraph 12.5(2) of the Practice Direction provision is made for cases where an objector's standing to object has to be determined, as follows:

> "Where an applicant successfully challenges an objector's entitlement to object to an application, the objector is normally ordered to pay the applicant's costs incurred in dealing with that challenge, but only those costs. Where an applicant unsuccessfully challenges an objector's entitlement to object to an application, the applicant is normally ordered to pay the objector's costs incurred in dealing with that challenge."

3. This case concerns an objection which was challenged by the applicants and then withdrawn before it was necessary for the Tribunal to make a determination of the objectors' entitlement to object. The applicants now seek an order for their costs and the application raises the question of what the proper approach to costs should be in those circumstances.

The facts in outline

4. By a conveyance made on 31 March 1983 land forming part of The Crown Estate's Oxshott Estate in Surrey ("the Estate") was conveyed by the Crown Estate Commissioners to Mr David Jones and the second applicant (who at that time was Mrs Linda Jones). The land is now known as Pinewood Lodge, Warren Lane, Oxshott. The conveyance was subject to restrictive covenants which bound the purchasers not to erect any further building on the land without the consent of the Commissioners and prohibited its use otherwise than for a single private dwelling house. Pinewood Lodge is now owned by the first applicant alone, but until recently was owned by him jointly by his wife, the second applicant, who as Mrs Jones, had been party to the 1983 conveyance as one of the joint purchasers.

5. In 2014 the applicants obtained planning permission for the construction of an additional dwelling on the property. Their solicitors contacted solicitors acting for the Commissioners in February 2015 enquiring whether they would be prepared to modify the covenants to enable the planning permission to be implemented and indicating a willingness to meet the Commissioner's costs of a necessary deed of modification and to negotiate a payment of compensation for any diminution in value of land on the Estate belonging to the Commissioners, provided that land was first identified to the applicants. In response the Commissioners' solicitors suggested that negotiations be conducted through chartered surveyors but, apparently as a matter of policy, they declined to disclose whether they owned any part of the Estate capable of benefiting from the covenants.

6. On 19 June 2015 the applicants applied to the Tribunal under section 84(1) of the 1925 Act for the modification of the covenants under grounds (aa) and (c). On 4 November the Commissioners

filed a notice of objection in which they asserted that the proposed use of the land was not reasonable and that the covenants secured a practical benefit to the Commissioners by preventing harm to the character of the Estate. The notice of objection specified that the Commissioners' legal entitlement to the benefit of the restrictive covenants derived from their status as original covenantees; the Commissioners did not assert either additionally or in the alternative that the covenants were created to benefit land which they own.

7. The applicants did not admit the Commissioners' entitlement to the benefit of the covenants and on 15 December 2015 they applied to the Tribunal for the notice of objection to be struck out.

8. On 17 December 2015 the applicants executed a transfer of Pinewood Lodge to the first applicant alone subject to a declaration that he was to hold the property on trust for himself and the second applicant as joint tenants in equity.

9. On 4 January 2016 the applicants' solicitors informed the Commissioners' solicitors that the transfer had now been registered and proposed that as the second applicant no longer held the legal estate she should be no longer be an applicant in the proceedings. By letter dated 15 January 2016 the Commissioners' solicitors invited the applicants to serve formal notice of the second applicant's withdrawal and indicated that, in the event that such a notice was given, they would consent to it on condition that the Commissioners be indemnified in respect of all of their wasted costs incurred in dealing with her application. No such notice of withdrawal was ever given but shortly after that exchange of correspondence, on 25 January 2016, the Commissioners' solicitors themselves gave notice of the withdrawal of their clients' objection to the modification application. Had that notice of withdrawal not been given the Tribunal had already directed that a hearing should take place on 8 February to determine whether the Commissioners were entitled to be admitted as objectors.

10. The applicants responded to the notice of withdrawal indicating that they were agreeable to it on terms that the Commissioners pay the applicants costs.

11. The Tribunal then directed that both parties file and serve any application for costs which they wished to make and on 10 February 2016 the applicants made a formal application under rule 10(3) of the 2010 Rules for an order that the Commissioners pay the applicant's costs of the proceedings on the grounds that they or their solicitors had acted unreasonably in objecting to or conducting the proceedings.

12. To complete the procedural background to this application it is necessary only to record that, no other objection having been received and the Tribunal being satisfied that it was appropriate to do so, it made an order on 16 March 2016 modifying the covenants to the extent necessary to enable the applicants to implement their planning permission.

The application for costs

13. I will consider first whether in the circumstances described it is appropriate for the Tribunal to make an order against the Commissioners on the grounds that the applicants have been put to some expense in considering and responding to an objection which was subsequently not pursued. I will then consider whether there has been anything in the conduct of the application justifying the making of an order under for costs against the Commissioners or their solicitors under either rule 10(3)(a) (wasted costs) or rule 10(3)(b) (where a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings).

14. The Tribunal's power to make orders in respect of costs derived from section 29, Tribunals, Courts and Enforcement Act 2007. The costs of and incidental to all proceedings in the Upper Tribunal are in the discretion of the Tribunal (section 29(1)). The Tribunal has "full power to determine by whom and to what extent the costs are to be paid" (section 29(2)). The power is, however, subject to tribunal procedure rules (s.29(3)). The relevant procedure rules are the 2010 rules.

15. The effect of rule 10 of the 2010 Rules is to limit the circumstances in which an order for costs may be made to those referred to in paragraphs (3)-(6) of the rule. Rule 10(3) deals with wasted costs and costs where a party and its representatives has acted unreasonably. Rule 10(6)(c) confers a general power to make orders for costs in proceedings under section 84 of the 1925 Act. There is therefore no doubt that the tribunal has "full power" to make an order for costs in a case of this type. That power is to be exercised in accordance with the Tribunal's Practice Directions made under the authority conferred by the 2007 Act.

The application considered under rule 10(6)(c)

16. The question which now arises for consideration is whether an objector who withdraws the objection before the Tribunal adjudicates on it ought to be treated in the same way as an objector whose entitlement to object to the application has been successfully challenged; in the latter case, as paragraph 12.5(2) of the Practice Direction makes clear, the successful applicant is normally entitled to an order that the objector pay the applicant's costs incurred in dealing with the challenge.

17. The Tribunal's normal approach to applications of all types is to encourage parties to make sensible concessions and, where appropriate, to abandon less important points of contention or even their entire case if they conclude that it is unlikely to succeed. In the context of appeals from the First-tier Tribunal (Property Chamber) the Tribunal has recently restated its view that such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs (see *Willow Court Management Company (1985) Limited* v *Alexander* [2016] UKUT 0290 (LC) at [35]).

18. A similar approach is taken in the Employment Tribunal (*McPherson v BNP Paribas* [2004] EWCA Civ 569) as well as in the Immigration and Asylum Chamber of the First-tier Tribunal (see *Cancino v Secretary of State for Home Department* [2015] UKFTT 00059 (IAC), a decision of McCloskey J, Chamber President of the UT(IAC) and Judge Clements, Chamber President of the F-tT IAC)).

19. I do not consider that the Tribunal's usual practice concerning the withdrawal of appeals from the Property Chamber (where the normal rule is that no costs are awarded) can necessarily be translated without modification to the Tribunal's jurisdiction under section 84, for which a specific power to order the payment of costs is provided by rule 10(6). The practice has evolved in jurisdictions where, generally, costs shifting does not apply and where the successful party has no expectation, in normal circumstances, of recovering costs from the unsuccessful party. In cases where the issue is one of standing to file an objection to an application under section 84 the Tribunal's Practice Directions create a different expectation, at least so far as an unsuccessful application to be admitted as an objector is concerned. Nevertheless, despite the difference in context, the encouragement of sensible concessions remains a relevant consideration, although not an overriding one.

20. As paragraph 25(2) of the Practice Directions makes clear, even where an applicant has successfully challenged an objector's entitlement to object the Tribunal retains a discretion on the issue of costs although the discretion is normally exercised in favour of making the objector pay the applicant's costs. In a case where the objection has been withdrawn, rather than being dismissed on grounds of standing, the express provision of the Practice Direction is not engaged and the exercise of the Tribunal's discretion must be considered in the round. The more readily the withdrawal of the objection can be interpreted as an acceptance that the objector does not have the benefit of the covenant (and so ought never to have objected) the more inclined the Tribunal may be to equate the withdrawal with an adverse determination, especially where the withdrawal occurs close to the date of a hearing or after significant expense has been incurred in meeting the objection.

21. The most significant feature of this case is that the objection to the modification of the covenants was made by the original covenantee in response to an application by one of the original covenantors. In principle the original covenantee is entitled to enforce its contractual rights against the original covenantor although the only remedy available where the original covenantee no longer retains land intended to benefit from the covenant may be an award of nominal damages.

22. Reference has been made to *Re: Hutchinson's application* [2009] UKUT 182 (LC) the Tribunal (George Bartlett QC, President) refused to admit an original covenantee as an objector where he no longer retained land capable of being benefited by the covenant. But in that case the land burdened by the covenant was not in the hands of the original covenantor, but had been sold by him 10 years previously. It cannot be assumed that an original covenantee is not entitled to be admitted as an objector to an application made by the original covenantor.

23. Whether an original covenantee is entitled to be admitted as an objector to an application made by an original covenantor where (as is suggested in this case) the covenantee no longer owns land with the benefit of the covenant, was to have been the subject of the hearing on 8 February 2016. That issue would have been determined if the Commissioners had not decided to withdraw their objection once they became aware that the second applicant no longer owned a legal interest in the property.

24. Where the applicants have themselves taken steps to remove the grounds on which the objectors claimed to be entitled to the right to be heard it does not seem to me to be necessary to

reach a decision on the issue of standing solely for the purpose of determining the applicants' claim against the same objectors for an order for costs. Fairness and justice do not seem to me to require that, having avoided the issue, the applicants should be treated as if the issue had been determined in their favour. I am satisfied that in this case it is not appropriate to make an order for costs against the Commissioners purely on the basis that they withdrew their objection. There is no presumption that an order for costs will follow the withdrawal by a party of its case, although under rule 20(2) of the 2010 Rules notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal and consent may be given on terms as to costs.

The application considered under rule 10(3)

25. I turn next to consider separately whether there are grounds in this case for an order under rule 10(3)(a) or (b).

26. Sub-paragraph (a) concerns "wasted costs" i.e. costs incurred by a party "as a result of any improper, unreasonable or negligent act or omission" on the part of a legal or other representative (s.29(5), Tribunals, and Enforcement Act 2007). This jurisdiction mirrors that of the civil courts under s.51(7) of the Senior Courts Act 1981 and is exercised in the light of the guidance given by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205.

27. Sub-paragraph (b) of Rule 10(3) concerns unreasonable behaviour by a party or its representative in bringing, defending or conducting the proceedings. In determining an application under this provision it is first necessary to consider whether the necessary standard of conduct has been demonstrated before going on to consider whether an order for costs ought to be made and, if so, what form that order ought to take see (*Willow Court v Alexander* at [27] – [30]).

28. The first matter relied on in support of the application is the Commissioners' discontinuance of their objection "without a change of circumstances" having previously required the applicants to incur the costs of dealing with the objection. There seems to me to be no substance in the complaint that this was improper or unreasonable since it overlooks the significant change of circumstances that arose when the applicants transferred the title to Pinewood Lodge from their joint names (one of them being an original covenantor) into the sole name of the first applicant (who was not).

29. The second matter relied on is the fact that the objection was made in circumstances where the Commissioners knew or ought to have known that the objection had no prospect of success. I do not regard the mere making of the objection as sufficient in this case to amount to unreasonable conduct or as crossing the threshold of wasted costs. It cannot be suggested that an objection by an original convenantee to an application by an original covenantor is frivolous. A covenantee does not obviously act in an unreasonable manner by seeking to maintain the status quo for which the party had originally contracted. Moreover, where a party who has the benefit of a covenant and therefore an entitlement to object does object, the Tribunal will not ordinarily order that that party pay the applicant's costs simply because the objection has failed. The Commissioners' objection may have had little prospect of success if, as is suggested to be the case, they have not retained any land with the benefit of the covenant, but had they been admitted as an objector they would at least have been in a position to invite the Tribunal to refuse to exercise its discretion in favour of modification of the covenants.

30. The final ground relied on as amounting to unreasonable conduct in defending the application is the supposed refusal of the applicants' offer to pay compensation, if any was justified, and to pay the costs of a deed of modification. The offer was made by the applicants before the application commenced, and application was made notwithstanding that the Commissioners had indicated that in principle they were prepared to discuss terms for an agreed modification. Once again this does not seem to me to be conduct falling within rule 10(3)(b) which is concerned only with actions "in bringing, defending or conducting the proceedings", which do not include conduct before the proceedings were commenced. Nor, even if it is assumed that it was the result of advice, does it seem to me that a refusal of an unquantified offer of compensation, conditional on an entitlement to compensation first being established, amounts to behaviour on the part of the Commissioners' solicitors capable of attracting the wasted costs jurisdiction.

Disposal

31. It follows that I am satisfied that there are no grounds on which an order for costs under rule 10(3) may be made in this case. The application is therefore dismissed.

Martin Rodger QC
Deputy President

22 November 2016