

UPPER TRIBUNAL (LANDS CHAMBER)



**UT Neutral citation number: [2019] UKUT 214 (LC)
UTLC Case Number: LREG/24/2019**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – COSTS – WITHOUT PREJUDICE OFFERS

**IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER
TRIBUNAL PROPERTY CHAMBER (LAND REGISTRATION)**

BETWEEN:

MS PENNY JANE GILCHRIST

Appellant

and

C & C EQUINE SERVICES LIMITED

Respondent

**Old Helyers Farm,
Kirdford Road
Wisborough Green,
Billinghamurst,
RH14 ODD**

Before: Judge Elizabeth Cooke

Determination on written representations

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Introduction

1. This is an appeal from a costs decision made in the Land Registration Division of the First-tier Tribunal (“the FTT”), and dated 19 December 2018. The appeal is allowed, and I have re-made the FTT’s decision, as well as ordering the appellant to make a payment on account to the respondent.

The factual and procedural background

2. The appellant, Ms Gilchrist, was the respondent in proceedings in the FTT. She had objected to the application made to HM Land Registry by C & C Equine Services Ltd (“C & C”) to be registered as proprietor to two parcels of land, referred to in the proceedings as the yellow land and the pink land; the dispute was referred to the FTT under section 73 of the Land Registration Act 2002. The FTT made its decision on 5 February 2018; C & C was successful as regards the yellow land, but Ms Gilchrist’s objection prevailed in the case of the pink land.
3. Ms Gilchrist sought permission to appeal the FTT’s decision about the yellow land; the FTT refused permission, as did this Tribunal.
4. The FTT then made an order dated 19 December 2019 that Ms Gilchrist should pay half of C & C’s costs incurred in the FTT up to 11 December 2017 and the whole of those costs from 12 December 2017 onwards. The reason for the different order from 12 December onwards was that Ms Gilchrist had refused an offer of settlement dated 21 November 2017 that the FTT found was made “Without prejudice save as to costs”, and would have done better had she accepted it than she did eventually by virtue of the FTT’s substantive decision.
5. Ms Gilchrist sought permission to appeal that decision, which the FTT refused, and renewed her application to this Tribunal. In a decision dated 20 May 2019 I refused permission on most of the grounds advanced by Ms Gilchrist, but gave permission on one ground, namely the fact that it appeared arguable that the offer dated 21 November 2017 was simply a without prejudice offer, and was not made without prejudice save as to costs.
6. In granting permission I considered the written submissions made on behalf of C & C by Mr Thorowgood of counsel which I had invited on this point only under rule 21(8) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. Having considered those submissions I took the view that neither party was likely to have anything to add to what they had already said on this point. I invited them – if they could not resolve matters by agreement – to make written submissions by 5 p.m. on 28 June 2019 if they objected to my deciding the appeal on paper on the basis of their submissions already made. I also said, in response to an application by C & C for a payment on account, that I proposed to order Ms Gilchrist to pay £16,421.59 on account of costs (being 70% of half of C & C’s

claimed costs), in any event, unless she made written submissions objecting to that order by 5 p.m. on 28 June 2019.

7. No further submissions have been made on behalf of C & C. Ms Gilchrist has sent detailed written submissions, on which I will comment below. I turn now to the substance of the appeal, and then to the payment on account.

The determination of the appeal

8. The solicitors for C & C disclosed, in support of its application for costs, a letter they had sent to Ms Gilchrist dated 21 November 2017 headed “without prejudice”. The letter contained an offer of settlement, which Ms Gilchrist did not accept. Had she done so, she would have done substantially better than she did after the substantive hearing. The offer was not stated to be “Without Prejudice save as to costs”, and it did not include any equivalent expression (such as “we reserve the right to draw this letter to the judge’s attention on the question of costs”) or indeed any hint that refusal might have costs consequences. It is difficult to see, therefore, why it was disclosed or why it could be regarded as admissible. The judge stated in his costs decision that ‘in context the offer was made on the footing that it was “without prejudice save as to costs”’, but did not explain what it was about the context that led him to that conclusion.
9. Mr Thorowgood in his written representations of 27 March 2019 argued that the offer of 21 November 2017 should be construed as “without prejudice save as to costs” because it referred explicitly to the costs savings that would result from avoiding a site visit and trial, and because it said that if it were accepted the parties would bear their own costs. He says that the obvious implication of these references was that the reverse would be the case if the offer were not accepted and that the Respondent would rely upon the terms of the offer should it be successful.
10. That is not an obvious implication. The letter goes no further, and has no other implications, than does any without prejudice offer. There is nothing to indicate that the letter was without prejudice save as to costs.
11. Mr Thorowgood also argued that an issues-based costs order should be made by this Tribunal if permission was granted to Ms Gilchrist; I have addressed that argument in my decision of 20 May 2019 and explained why I refused to grant permission to C & C to cross-appeal on that basis.
12. Nothing further has been said on behalf of C & C and I remain of the view that I expressed in my decision of 20 May 2019 namely that Ms Gilchrist has a strong case on appeal on this point. The offer should not have been disclosed, nor should it have been regarded by the FTT as having been made without prejudice save as to costs.
13. As I noted above Ms Gilchrist has made written submissions in response to my grant of permission. Insofar as they relate to this appeal, her submissions are that she could not have known that she would have done better to accept the offer of 21 November 2017 and

was right to refuse it. But that is not relevant to the appeal. I am deciding this point in her favour – costs will no longer be determined on the basis of the fact that she refused the offer of 21 November 2017, and there is no need for her to argue that she was right to refuse it.

14. The rest of Ms Gilchrist's submissions are about the FTT's substantive decision and about my refusal of permission to appeal that decision. Those matters are now closed and I make no comment about them.
15. Nevertheless Ms Gilchrist's appeal of the costs decision succeeds on this point; she should not have been ordered to pay all of C & C's costs for the period after she refused the offer. For the avoidance of further delay I re-make the FTT's order. The judge in the FTT made a carefully reasoned decision about costs, concluding that C & C was by far the successful party in the light of the relative importance of the two parcels of land, but acknowledging that Ms Gilchrist had incurred some expense in defeating its case as regards the pink land. He ordered Ms Gilchrist to pay half of C & C's costs of the proceedings in the FTT save for the period after she had rejected the offer made on 21 November 2017, for which period she was to pay the costs in full. That final proviso is the only ingredient that has changed. The judge had indicated in his substantive decision, before the without prejudice offer was disclosed, that he was minded to order Ms Gilchrist to pay half of C & C's costs, and I take the same view. Accordingly Ms Gilchrist is ordered to pay half of C & C's costs of the proceedings in the FTT, to be assessed on the standard basis in default of agreement.
16. On 21 March 2019 the registrar of the Upper Tribunal made an order staying the assessment of costs in the First-tier Tribunal; that stay will expire 7 days after the date of this decision. No doubt the parties will bring this to the attention of the costs judge in the FTT.

The payment on account

17. In my decision of 20 May 2019 I said that I was minded to order Ms Gilchrist to make a payment on account of costs, amounting to 70% of half of the costs claimed by C & C. Ms Gilchrist objects to that order, but has not explained why she should not be ordered to make a payment on account; her objections relate to the merits of the case and to liability to pay anything at all.
18. C & C has had, all along since the FTT's costs order, an undoubted entitlement to half its costs, and it is not right that it should be kept out of all of that entitlement for a protracted period. Ms Gilchrist is ordered to pay the sum of £16,421.59 within 28 days of the date of this decision.

9 July 2019

Elizabeth Cooke
Judge of the Upper Tribunal