Case No: UT/2015/0022

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

On Appeal from the Property Chamber First Tier Tribunal Land Registry Division.
Order of Judge Hargreaves 15th August 2014

The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 10 November 2015

Before :

His Honour Judge Behrens
(sitting as a Judge of the Upper Tribunal)

- -

Between :

JACI AGARWARLA	**Appellant**
(aka MATOS)	
- and -	
HOWARD CHAPMAN	**Respondent**

- -
- -

Cheryl Jones (instructed directly) for the **Appellant**
Sunil Agarawarla appeared as Agent for the **Respondent**

Hearing date: 9 November 2015

- -

Approved Judgment

Judge Behrens :

Background

1. This is a costs appeal. It arises in the context of a long running dispute mostly being fought in the Cambridge County Court between Jaci Agarwarla and her brother-in law, Sunil Agarawarla. In the course of that dispute Judge Moloney QC has made a number of costs orders against either side.

2. Amongst the orders made by Judge Moloney QC was a charging order in respect of 2 properties nominally owned by Howard Chapman – 2 and 16 Bernhart Close, Edgware HA8 0SH (Title Nos AGL 77910 and 73627). Although the properties were in the name of Howard Chapman, it was Judge Moloney QC's view that he held them on trust for Sunil Agarawarla.

3. Judge Moloney QC's order was made prior to the final hearing in the dispute and was made to support an order for security for costs. In December 2012 Judge Moloney QC handed down a judgment in favour of Sunil Agarawarla and directed that the charges be removed. Jaci Agarwarla complied with this order. However Jaci Agarwarla sought permission to appeal. Permission to appeal was granted in March 2013. On 3rd August 2013 Goldring LJ made an order restoring the charges pending the appeal.

4. On 9th August 2013 Jaci Agarwarla applied to enter restrictions on the register in respect of the properties. The application was opposed and the matter referred to the Property Chamber of the First Tier Tribunal ("FTT") in November 2013.

5. On 17th December 2013 the Court of Appeal dismissed Jaci Agarwarla's appeal with costs. The order for costs was stayed pending the determination of an account between Jaci Agarwarla and Sunil Agarawarla.

The hearing before Judge Hargreaves

6. On 15th August 2013 the reference came before Judge Hargreaves. Both parties were represented by Counsel acting on a Direct Access basis. Howard Chapman was represented by Mr Robson of Arden Chambers who had represented Sunil Agarawarla in much of the litigation including the hearings before Judge Moloney QC and the Court of Appeal. Jaci Agarwarla was represented by Mr Dematchki of 3 PB Barristers. Mr Dematchki was from the same Chambers as Miss Jones who represented Jaci Agarwarla before me. Miss Jones has acted for Jaci Agarwarla on a number of occasions in the past but was not available on 15th August 2013. Howard Chapman did not attend the hearing. Sunil Agarawarla did attend the hearing and appeared to be giving instructions to Mr Robson.

7. Judge Hargreaves made 3 orders and gave reasons for doing so:

1. She directed the Chief Land Registrar to cancel the applications for the restrictions. Whilst she accepted that the applications were justified when the reference was made she held that there was no justification for them after the decision of the Court of Appeal on 17th December 2013.
2. She ordered Jaci Agarwarla to pay Howard Chapman's costs summarily assessed in the sum of £5,349. She held that Mr Robson's fees were incurred after Jaci Agarwarla's right to the restrictions came to an end and well after she should have agreed to the cancellation of her applications.
3. She refused an application by Sunil Agarawarla for litigant in person costs as he was not a party.

Permission to Appeal

8. Jaci Agarwarla sought permission to appeal on 5 grounds. Ground 1 related to the signature on the statement of costs. Ground 2 took a number of detailed points on the Statement of Costs. Ground 3 made the point that Judge Hargreaves failed to require Mr Robson to produce any evidence of his retainer. Ground 4 alleged that Judge Hargreaves should not have proceeded with the summary assessment given the serious errors. Ground 5 submitted that there should have been a detailed assessment.

9. On 12th September 2014 Judge Hargreaves refused permission to appeal. That refusal was confirmed on paper by Judge Raeside QC on 14th October 2014. However following an oral hearing on 5th February 2015 Judge Pelling QC granted permission to appeal on Grounds 3, 4 and 5 only but gave permission to Jaci Agarwarla to add an additional ground that Judge Hargreaves had failed to have had regard to the indemnity principle by failing to consider whether Howard Chapman had incurred any liability for any of the claimed costs. He directed Jaci Agarwarla to file a witness statement.

10. Both Sunil Agarawarla and Howard Chapman filed evidence in answer to Jaci Agarwarla's witness statement. It is not necessary to refer to them in detail. In paragraph 15 of his witness statement Howard Chapman refers to retainer letters he has received from Mr Robson but describes them as privileged.

11. On 10 September 2015 Judge Keyser QC gave standard directions in relation to disclosure of additional documents, bundles and skeleton arguments. Jaci Agarwarla complied with that order. Howard Chapman did not.

The hearing

12. Miss Jones appeared at the hearing on behalf of Jaci Agarwarla. She had a bundle prepared by Jaci Agarwarla and had prepared a skeleton argument based on the documents in her possession.

13. After about 10 minutes Sunil Agarawarla appeared and sought to represent his nephew. He also produced a bundle of documents. Miss Jones objected to my reading the documents and permitting Sunil Agarawarla to represent Howard Chapman. However for reasons I gave at the time I allowed the late admission of the documents and permitted Sunil Agarawarla to represent his nephew. In summary:

1. This was an appeal over a very narrow point. The sole issue was whether there was a retainer between Howard Chapman and Mr Robson.
2. The appeal is governed by The Tribunal Procedure (Upper Tribunal) Rules 2008 ("The 2008 Rules"). The overriding objective (Rule 2) requires me to deal with cases fairly and justly. That includes dealing with the matter in proportion to the importance of the matter and the resources of the parties. It requires me to avoid unnecessary formality and to seek flexibility in the proceedings.
3. The appeal is concerned with a relatively small sum of money less than £6,000.
4. It is not a case where the Respondent has ignored all the rules. He filed evidence in accordance with the letter from the Tribunal. Whilst it is true he has failed to comply with Judge Keyser's order it is plain from rule 7 that failure to comply with the rules is not necessarily fatal and that the Upper Tribunal has discretion as to the action it may take.
5. I was shown a witness statement dated 4th August 2014 from Howard Chapman in which he authorised Sunil Agarawarla to deal with the matters on his behalf. I do not see why I

should not act on that statement and allow Sunil Agarawarla to represent his nephew's interest.

14. The documents introduced by Sunil Agarawarla included the documents referred to in paragraph 15 of Howard Chapman's witness statement in respect of which privilege had been claimed. Miss Jones objected to my looking at the documents on the grounds that privilege was not waived.

15. Whilst I see the force of Miss Jones's objection I do not accept it. First it seems to me that the authority granted to Sunil Agarawarla was wide enough to include authority to waive privilege in relation to this matter. This is a case where Miss Jones complains she has not seen the retainer letters. She should not now be able to object when Sunil Agarawarla, as agent for Howard Chapman voluntarily discloses them.

16. There are 3 relevant documents:

1. Mr Robson's draft fee note. This is addressed to Sunil Agarawarla and describes Sunil Agarawarla as the Direct Access client. The costs for the hearing are included in this fee note. Thus the draft fee note supports Jaci Agarwarla's appeal as it appears that Sunil Agarawarla was Mr Robson's client.
2. A letter apparently dated 12th May 2014 from Mr Robson to Howard Chapman setting out the terms of the retainer. The letter follows the model letter provided by the Bar Standards Board and, if genuine, provides strong evidence that there was a retainer between Sunil Agarawarla and Mr Robson. However, Miss Jones saw the letter for the first time on 9th November 2015 and has concerns about it. The copy exhibited is not signed; she also has concerns that the fonts in different parts of the letter appear different. Furthermore there is no evidence that these terms were accepted
3. A letter apparently dated 16th July 2014 from Mr Robson to Howard Chapman setting out the terms on which he was willing to appear on 15th August 2014. He concludes stating his fee for the hearing will be £1,500 plus VAT. Miss Jones has similar concerns about this document.

Discussion and Conclusions

17. This is a very narrow appeal. There is, as other judges have pointed out, no basis for challenging the reasonableness of Mr Robson's fees. Furthermore Judge Hargreaves' reasons for ordering costs against Jaci Agarwarla are plainly unappealable. Jaci Agarwarla should plainly have abandoned her application for the restrictions after the Court of Appeal dismissed her appeal.

18. However I do think that in the very unusual circumstances of this case that there were grounds for thinking that Mr Robson's client was Sunil Agarawarla and not Howard Chapman. In those circumstances I do think that Judge Hargreaves ought to have explained the basis of her reasoning. If she had inadequate material she could have adjourned the assessment of the costs in order to obtain the relevant retainer letters.

19. It would be unfair on Jaci Agarwarla for me to decide the matter on the basis of documents disclosed on the morning of the hearing especially in the light of the comments made by Miss Jones after what can only be described as a very brief perusal.

20. In those circumstances it seems to me that the reference should be returned to Judge Hargreaves for her to reconsider the sum payable under paragraph 2 of the order of 15th August 2014 in the light of this judgment, the documents disclosed in this appeal including

those disclosed by Sunil Agarawarla on 9th November 2014 and any further material disclosed by the parties in the light of the directions set out below.

21. As privilege has now been waived in relation to the retainer between Howard Chapman and Mr Robson there is no reason why he should not be invited to file a witness statement setting out the terms of the retainer and exhibiting copies of all contractual documents between himself and Howard Chapman including any replies by Howard Chapman to any offers made by himself. He should also be invited to comment on the fact that fee note sent to Sunil Agarawarla appears to include the work included in the costs order.

22. The conduct of the appeal has plainly been disrupted by the late decision of Sunil Agarawarla to waive privilege on behalf of Howard Chapman in relation to the documents and by the failure of Howard Chapman/Sunil Agarawarla to comply with the order of Judge Keyser QC. I agree with Miss Jones that if there had been early disclosure of the documents the course of the appeal might have been very different.

23. In those circumstances I think that Howard Chapman should pay the costs of to-day in any event. I summarily assess those costs in the sum of £3,366 (being 50% of Miss Jones' total fees plus Vat plus the costs of preparing the bundle).

24. If it turns out that there was a valid retainer I see no reason why Howard Chapman should pay any further costs. Accordingly the balance of Jaci Agarwarla's costs together with any costs incurred by Howard Chapman (other than costs of the hearing on 9th November 2015) will be in the discretion of Judge Hargreaves.

The Order

25. I will accordingly make an order in the following terms:

1. The appeal will be allowed in part. The summary assessment of costs in paragraph 2 of the order of 15th August 2014 will be set aside and the matter will be returned to Judge Hargreaves to reconsider the summary assessment in the light of this judgment, the documents disclosed in this appeal including those disclosed by Sunil Agarawarla on 9th November 2014 and any further material disclosed by the parties.
2. Howard Chapman's Counsel, Mr John Robson is invited to file a witness statement on or before 11th December 2015 setting out the terms of the retainer and exhibiting copies of all contractual documents between himself and Howard Chapman including any replies by Howard Chapman to any offers made by himself. Mr Robson is invited to comment on the fact that the draft fee note sent to Sunil Agarawarla appears to include the work included in the costs order.
3. The parties are at liberty to file further evidence solely in relation to the terms of the retainer on or before 23 December 2015.
4. Any further directions as to the conduct of the hearing before Judge Hargreaves are in the discretion of Judge Hargreaves.
5. Howard Chapman is to pay Jaci Agarwarla the costs of 9th November 2015 summarily assessed in the sum of £3,366. Enforcement of this order is stayed pending the further hearing before Judge Hargreaves. Save that Howard Chapman will not be able to recover any costs incurred in relation to the hearing on 9th November 2015, the remaining costs of the appeal and the costs of any further hearing are in the discretion of Judge Hargreaves.

ADR

26. Rule 3 of the 2008 rules provides:

> **Alternative dispute resolution and arbitration**
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> 3.—(1) The Upper Tribunal should seek, where appropriate—
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> (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and
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> (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.
>
> (2) Part 1 of the Arbitration Act 1996(b) does not apply to proceedings before the Upper Tribunal.

27. This appeal now involves satellite litigation in respect of a small amount of money. The costs that Howard Chapman has been ordered to pay are not very different from the costs in Judge Hargreaves's order.

28. I urge the parties to attempt to compromise the further hearing before Judge Hargreaves before further substantial costs are incurred out of all proportion to the amount in dispute.

His Honour Judge Behrens

Decision released 13 November 2015