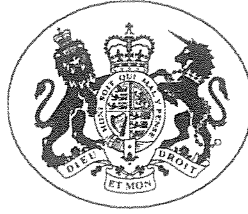


[2018] UKFTT 0174 (PC)

REF/2017/0044

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Sheikh Mohammed Al Amoudi

APPLICANT

and

Glenside Holdings Limited

RESPONDENT

Property Address: Land and buildings on the south side of Devenish Road, Sunninghill
Title Number: BK297971

ORDER

UPON hearing Mr Michael Walsh of Counsel for the Applicant and Mr Imran Benson of Counsel for the Respondent

AND UPON the Tribunal having determined that the Applicant is not liable to pay the costs incurred by the Respondent prior to the reference to the Tribunal by the Chief Land Registrar on 10 January 2017 (the Reference Date")

IT IS ORDERED that:

1. The Applicant shall pay the Respondent's costs of these proceedings incurred after the Reference Date on the standard basis, which have been agreed in the sum of £15,000 (inclusive of VAT).

2. The Respondent shall pay the Applicant's costs of the Respondent's Application for costs, which have been agreed (subject to any appeal) in the sum of £15,000 (inclusive of VAT).

3. The sums payable pursuant to paragraphs 1 and 2 above shall be set-off against each other such that no net payment shall be made.

REASONS

Introduction

1. The Respondent in these proceedings, Glenside Holdings Ltd, is the registered proprietor of land in Sunninghill ("the property"), registered at HM Land Registry under title number BK297971. By an application dated 23 November 2015 the applicant, Sheikh Mohammed Al Amoudi, applied for the entry of a restriction on the register of title to the property. On his form RX1 he said that he was the beneficial owner of the property "by virtue of an implied, resulting or constructive trust and/or by virtue of proprietary estoppel." The Respondent objected to the application. The matter could not be resolved by negotiation. It was therefore referred to the Land Registration Division of the Property Chamber of the First-tier Tribunal ("the LRD") pursuant to s 73 of the Land Registration Act 2002 ("the LRA 2002").

2. Sheikh Mohammed's representative was informed by the LRD on 26 January 2017 of the requirement to serve a Statement of Case within 28 days. He did not do so. An extension of time was given on 1 March 2017. An "unless" order was made on 20 March 2017. On 21 April 2017 the proceedings were struck out and the registrar was directed to cancel Sheikh Mohammed's application.

3. The Respondent has applied for its costs. It is the Respondent in the proceedings and the Applicant for costs, and so to avoid confusion I shall continue to refer to the parties by name. The claim for costs amounted to over £132,000 (including VAT), most of which was incurred prior to the reference of the matter to the Tribunal on 10 January 2017.

4. On 26 July 2017 I directed an oral hearing of the claim for costs and invited the parties to make submissions as to why pre-reference costs should be awarded, in the light of the LRD's practice of awarding only costs incurred after the date of the reference.

5. The hearing took place on 30 January 2018; Mr Imran Benson appeared for Glenside Holdings Ltd and Mr Michael Walsh for Sheikh Mohammed, both of counsel. I am grateful to both for their helpful and interesting arguments.

6. After hearing argument in the morning I gave a decision, with brief reasons, that the LRD did not have jurisdiction to award pre-reference costs. As to the post-reference costs, I refused the application made by Glenside Holdings Ltd for an award of costs on the indemnity basis. I promised full written reasons for both decisions, which I set out below; time for any application for permission to appeal runs from the date of this written decision. Following that decision on 30 January the parties were able to agree their respective liabilities for the post-reference costs of the tribunal proceedings and so no assessment of costs was required.

The LRD's jurisdiction and the question of pre-reference costs

The law and current practice

7. Section 29(1) of the Tribunals, Courts and Enforcement Act 2007 reads as follows:

> The costs of and incidental to-
>
> 1. all proceedings in the First-tier Tribunal, and
> 2. all proceedings in the Upper Tribunal
>
> shall be in the discretion of the Tribunal in which the proceedings take place.

8. The wording echoes that of section 51(1) of the Senior Courts Act 1981:

> Subject to the provisions of this or any other enactment or to rules of court, the costs of and incidental to all proceedings in-
>
> 1. the civil division of the Court of Appeal;
> 2. the High Court; and
> 3. any county court
>
> shall be in the discretion of the court.

9. The LRD is unusual in the First-tier Tribunal in that costs normally follow the event; rule 13 of the Tribunals Procedure (First-tier Tribunal) (Property Chamber) provides that whereas orders for costs may be made in the other divisions of the Property Chamber only in respect of wasted costs or if a person has acted unreasonably in bringing, defending or conducting proceedings, there is no such restriction in the LRD.

10. So the LRD is a full costs jurisdiction, and its statutory power to award costs looks very similar to that of the courts. It is well-established that costs awarded by a court will often include pre-action costs, for example of taking legal advice or obtaining expert evidence before proceedings are issued, and explicit provision is made for this in Civil Procedure Rules 44.2(6)(d):

> The orders which the court may make under this rule include an order that a party must pay-
>
> …
>
> 4. costs incurred before proceedings have begun.

11. The application before me is for Sheikh Mohammed to pay the costs of Glenside Holdings Ltd incurred before the reference of this matter to the LRD. In order to explain my decision I have first to set out three background matters.

12. The first is that while courts will award costs that have been incurred before the issue of proceedings, there is no direct parallel to the issue of proceedings in matters referred to the LRD by HM Land Registry. Such proceedings are not issued on the initiative of one of the parties, but referred by the registrar when he is obliged by the LRA 2002 to do so.

13. The second is that the registrar has his own costs jurisdiction. Section 76 of the LRA 2002 provides:

> (1) The registrar may make orders about costs in relation to proceedings before him.
>
> (2) The power under subsection (1) is subject to rules which may, in particular, make provision about—
>
> (a) who may be required to pay costs,
>
> (b) whose costs a person may be required to pay,
>
> (c) the kind of costs which a person may be required to pay, and
>
> (d) the assessment of costs.

(3) Without prejudice to the generality of subsection (2), rules under that subsection may include provision about—

(a) costs of the registrar, and

(b) liability for costs thrown away as the result of neglect or delay by a legal representative of a party to proceedings.

(4) An order under subsection (1) shall be enforceable as an order of the court.

(5) A person aggrieved by an order under subsection (1) may appeal to the county court, which may make any order which appears appropriate.

14. Rule 202 of the Land Registration Rules 2003 provides:

(1) A person who has incurred costs in relation to proceedings before the registrar may request the registrar to make an order requiring a party to those proceedings to pay the whole or part of those costs.

(2) The registrar may only order a party to proceedings before him to pay costs where those costs have been occasioned by the unreasonable conduct of that party in relation to the proceedings.

(3) Subject to paragraph (5), a request for the payment of costs must be made by delivering to the registrar a written statement in paper form by 12 noon on the twentieth business day after the completion of the proceedings to which the request relates.

15. Accordingly the registrar can award costs only where they have been occasioned by one party's unreasonable behaviour. This is unsurprising. An application to the registrar is essentially a non-contentious act. It is not litigation. It is important for property owners, and for those with an interest in land belonging to someone else, to be able to make applications to and correspond with the registrar and with anyone who has objected to their application without fear of an adverse costs order unless they are behaving unreasonably.

16. The third background point is that it is the practice of the LRD not to award costs that have been incurred before the date of the reference. There is no provision in the statute to that effect, but the LRD judges have taken the view that costs incurred before that date fall

within the jurisdiction of the registrar and will not be awarded by the LRD. Indeed, Judges Simon Brilliant and Michael Michell in their book *A Practical Guide to Land Registration Proceedings* [2nd edn, 2015] at paragraph 3.19, discussing the registrar's costs jurisdiction, have this to say:

> The Registrar has no jurisdiction to make any order in respect of costs incurred after a dispute has been referred to the Tribunal. Equally, the Tribunal has no jurisdiction to make an order in respect of costs incurred before a dispute has been referred to it."

17. No authority is cited for that proposition and there has been no authoritative decision on the point.

18. The application before me is a challenge to that practice. Mr Walsh, for Sheikh Mohammed, argues that in the interests of judicial comity I should adhere to the LRD's practice and that, even if I am minded to depart from it, I should leave the point to be decided by the Upper Tribunal. Mr Benson points out that the decisions of the LRD are not authoritative and that I should depart from practice if it is incorrect, and I agree. The decisions of the LRD judges do not create precedent and I would have no hesitation in departing from their settled practice if I took the view that it was incorrect.

The arguments for Glenside Holdings Ltd

19. Mr Benson argues that costs incurred prior to the reference can be recovered in the LRD, just as can pre-action costs in court proceedings, and just as can for example the costs incurred in connection with an inquest in personal injury proceedings. *Roach and another v Home Office* [2009] EWHC 312 (QB) was a case where the victim of personal injury died, and a later civil claim in damages against the Home Office was successful. Costs of attendance at the inquest were sought, and were awarded. At paragraph 23 Davis J said:

> There is no doubt at all that costs incurred prior to proceedings are capable in principle of being recoverable as costs in the proceedings. The principle has been widely stated as follows:
>
> > "there is power in the master to allow costs incurred before action brought, and if the costs are in respect of materials ultimately proving of use and service in the action, the master has discretion to allow these costs."

(*Pêcheries Ostendaises (SA) v Merchants' Marine Insurance Co* [1928] 1 KB 750, 757, Lord Hanworth MR.)

20. In paragraphs 32 – 48 Davis J also discussed and agreed with the decision of Clarke J in *In re Gibson's Settlement Trusts* [1981] Ch 179 where in similar circumstances some of the costs of attendance at an inquest were recovered in the civil proceedings insofar as they were relevant and incidental to those proceedings.

21. I asked Mr Benson how one could distinguish costs that related to proceedings before the registrar from costs of and incidental to the LRD proceedings, where they were incurred before the date of the reference.

22. His response was that this can be discerned by consideration of the purpose of each item of costs. He observes that the registrar's role is high-level; he has only to consider whether there is a valid application and, if there is, whether there is an objection that is not groundless. In that event he must refer the matter to the LRD if it cannot be resolved by negotiation. He is not concerned with the merits of the case, nor therefore with issues relating to the history of the property and the legal issues involved in the claim and the objection and so on. But all those issues are relevant to the LRD proceedings. The LRD's task, by contrast with the registrar's high-level duties, is fine-grained and concerned with every detail of the application and the objection. The LRD's task is different from the registrar's and the registrar's costs jurisdiction is something of a red herring; it does not affect the LRD's power to award costs of and incidental to the LRD proceedings.

23. Glenside Holdings Ltd has not sought to recover its costs relating to the proceedings before the registrar. It made this concession some time ago, and it stands by it. Those costs amount to £23,059.56, and it can be seen from the schedule of costs that the work done related to:

1. Reviewing the Sheikh's application notice
2. Reviewing initial documents received by the solicitors from Glenside Holdings Ltd
3. Preparing the objection to the Applicant's application
4. Reviewing and commenting on Land Registry's case summary.

24. The rest of the costs incurred by Glenside Holdings Ltd before the date of the reference is, Mr Benson argues, of a different nature and is incidental to the LRD proceedings. It includes reviewing documents, correspondence and planning applications relating to the property over many years, taking leading counsel's advice about the merits of the Sheikh's application, the likely outcome of LRD proceedings and evidential issues, preparing an application for security for costs in the LRD, preparing a Statement of Case for the LRD, contacting witnesses and preparing statements.

25. All these items, says Mr Benson, relate to the Tribunal proceedings and have nothing to do with the proceedings before the registrar. Accordingly they fall within the scope of the LRD's jurisdiction to award costs. He adds that the property is worth some £30 million and that, in view of the timescale allowed for the service of Statements of Case in the LRD, it would have been negligent for Macfarlanes LLP not to proceed with work on the Tribunal proceedings before the reference was made so as to be able to participate properly in those proceedings.

26. Mr Benson stresses that there is nothing the Land Registration Rules 2003 nor in the LRA 2002 to restrict the LRD's costs jurisdiction to costs incurred post-reference. He observes that the consequences of the LRD not awarding pre-reference costs is that it would be possible to make a meritless or dishonest application, causing the objector to incur heavy costs, wait until the matter is referred to the LRD and then withdraw without fear of an adverse costs order. Alternatively, if the answer to that example is for the Respondent to seek costs from the registrar, there will be two sets of costs proceedings which is a duplication of effort.

27. I comment further upon that example below.

The arguments for Sheikh Mohammed

28. Mr Walsh's answer to Mr Benson's arguments is that the LRD simply has no jurisdiction to award costs before the date of the reference because they fall within the jurisdiction of the registrar. He argues that the statutory framework reveals that Parliament intended that there be a separate costs jurisdiction for proceedings before the registrar and before the LRD and that pre-reference costs all fall within the former and not the latter..

29. Those two separate jurisdictions have a different basis for their costs orders. Proceedings before the registrar, says Mr Walsh, are largely uncontentious. Costs are

awarded only where the paying party has behaved unreasonably. And there is in general no need to incur substantial costs at this stage; the objector has only to decide whether or not to object to the application, which does not warrant the expenditure of a 6 figure sum in legal advice.

30. Mr Walsh's argument is that only once the matter has been referred to the LRD does a full costs jurisdiction take effect, and that the referral is not a golden goose or a magic gateway which enables either party to claim pre-reference costs on a different basis from that which Parliament prescribed for proceedings before the registrar.

31. Mr Walsh draws the analogy of appeal proceedings, in which the costs at first instance are not recoverable. He also compares the situation where a landlord seeks to recover service charges in the county court and proceedings are then diverted to the First-tier Tribunal for a decision on the reasonableness of those charges, before returning to the county court for a final determination. In such a case, the costs incurred in the First-tier Tribunal cannot be recovered in the county court.

32. Turning to Mr Benson's example at my paragraph 26 above, Mr Walsh observes that in such a case costs can be sought from the registrar against the party who acted unreasonably in the pre-reference period. The referral to the tribunal does not prevent that recovery.

Discussion

33. Parliament has created two costs jurisdictions, one for the registrar and one for the LRD. They are incompatible, because while the registrar can award costs only if they are occasioned by a person's unreasonable conduct the LRD awards costs of and incidental to the proceedings on the usual civil basis that the loser pays the winner's costs. Therefore the same item of expenditure cannot fall within both regimes as that would generate a contradiction.

34. How then can one discern under which jurisdiction a particular item of costs falls? Mr Walsh says the distinction is made by the time at which the costs were incurred, whereas Mr Benson urges me to examine the nature and purpose of each item of costs in order to ascertain whether it relates to the registrar's activities or to the LRD's proceedings, the latter being detailed and concerned with the merits of the matter.

35. The exercise that Mr Benson would ask the LRD to carry out would be extremely difficult because of the need to examine, and to hear argument about, the nature and purpose of each individual item of costs. It would be rendered more difficult because much of the material involved, particularly legal advice, would be privileged.

36. I have therefore considered whether the correct response might be to say that the LRD has a discretion to award costs, which is not restricted by the statute in terms of the time at which those costs were incurred, but that as a matter of practicality the LRD will normally exercise its discretion by excluding pre-reference costs. If that were the case then there might well be cases where an LRD judge took a different view and awarded pre-reference costs, or where the parties might agree that the LRD judge should do so.

37. But that cannot be right, because the exercise of distinguishing the costs relating to proceedings before the registrar and the costs of and incidental to the LRD proceedings are not merely difficult to distinguish; it is logically impossible to make that distinction.

38. That is because the proceedings before the registrar continue up to the date on which the reference is made and therefore all costs incurred up to that date can be costs relating to those proceedings. Those proceedings do not simply consist of the application, the objection, and the making of the reference. There is often on-going correspondence with the registrar about the application or the objection. Moreover, the matter is not referred to the LRD on the date that an objection is received and determined by the registrar not to be groundless. The statute requires referral only if the matter cannot be resolved by negotiation, and therefore the proceedings before the registrar include time for discussion and negotiation between the parties. There is often correspondence between the parties and, naturally, where parties are represented legal advice is taken and witnesses may be contacted. I understand from Mr Benson's skeleton argument that there was indeed an attempt at negotiation in this case, and it is unrealistic to say that the legal advice taken by Glenside was unrelated to the proceedings before the registrar or can in any sense be distinguished from those proceedings.

39. It is therefore impossible to say - whatever view the parties put forward with hindsight - whether costs were incurred by Glenside Holdings Ltd in this case, for example, with a view to preparing for the LRD proceedings. All the work could have been done with a view to persuading the Sheikh to withdraw his application or with a view to considering whether or not the objection should be withdrawn.

40. I note the analogy with proceedings conducted in both the county court and the First-tier Tribunal. In such cases, there are two distinct costs regimes – that of the court and that of the tribunal – with different bases of assessment. The costs attributable to the distinct regimes can be distinguished by their subject matter. But here we have two costs regimes for activities that relate to exactly the same subject-matter, namely the application to the Land Registry and the objection thereto. They cannot be distinguished by subject matter. It is unrealistic to suppose that they can be distinguished by the level of detail with which they are concerned, or by the fact that the registrar's activities are "high-level" while the LDd's concerns are more "granular" as Mr Benson put it.

41. Quite simply, costs incurred during the proceedings before the registrar are within his costs jurisdiction and while those proceedings are current no other costs jurisdiction is relevant. The LRD has its own costs jurisdiction and it begins at the moment when the matter is referred to it.

42. Accordingly despite the use of identical words in the respective statutes, the LRD's position as to pre-reference costs is quite different from the position in the civil courts in relation to pre-action costs. It is different because the statutory framework is different; the pre-reference costs fall within a different costs jurisdiction. That is not the case with pre-action costs, nor is it the case with the costs of attendance at an inquest (because the coroner has no costs jurisdiction).

43. The statutory framework dictates the conclusion that Parliament intended two separate costs regimes, separated by the date of referral. The virtue of this is obvious. It encourages negotiation, during a period when neither party is at risk as to costs provided each behaves reasonably. It protects parties who do not wish to litigate or cannot afford to litigate from the costs risk associated with litigation. Indeed, many applicants to HM Land Registry withdraw as soon as the matter is referred to the LRD for precisely that reason.

44. It also ensures that there cannot be duplicated claims for the same item of costs, which would happen if the costs jurisdictions overlapped in time. Returning to Mr Benson's example at my paragraph 26, as things stand the vexatious applicant cannot escape liability for costs for the pre-reference period, because an application can be made to the registrar for those costs. There would have to be a separate application for post-reference costs, of course. The alternative is the spectre of applications both to the LRD and to the registrar in respect of the same items of expenditure. In such a case the paying party

would be arguing that each item was incurred in relation to the proceedings before the registrar (before whom he would then argue that he had not behaved unreasonably, a defence not available in the LRD); alternatively, the payee might pursue costs before the registrar and, if the registrar decided that his opponent had not behaved unreasonably, the applicant could change horses and seek those same costs in the LRD on the basis that they were incidental to the LRD proceedings, in which there would be no need to prove unreasonableness.

45. That would be a waste of time and costs for the registrar, the parties and the LRD and cannot have been Parliament's intention.

46. Accordingly I conclude that the two jurisdictions do not overlap in time, and that the LRD does not have jurisdiction to award pre-reference costs.

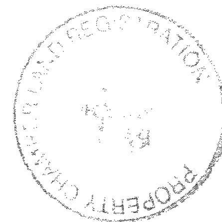
Indemnity or standard basis

47. I can deal very briefly with the remaining matter, which is the basis of assessment. Glenside Holdings Ltd has applied for its costs on the indemnity basis. It does so on the grounds that Sheikh Mohammed's application was without foundation or prospect of success and was brought, in effect, to oppress the Respondent. The Sheikh is one of the richest men in the world, I am told, whereas the Respondent has limited resources.

48. I remind myself that the application relates only to the post-reference costs. No finding of fact has been made by the LRD. Applicants to HM Land Registry often withdraw once the matter reaches the LRD, for a variety of reasons. There is no basis in these circumstances for an award of indemnity costs and they are to be paid on the standard basis.

Dated this 9 February 2018

Elizabeth Cooke



BY ORDER OF THE TRIBUNAL