UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 252 (LC)
UTLC Case Numbers: LP/21/2020
LC-2020-000192

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – COSTS – unsuccessful objector ordered to pay the applicant's costs because of the objector's unreasonable behaviour in pursuing a manifestly hopeless legal argument.

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

BETWEEN:

FATHER'S FIELD DEVELOPMENTS LIMITED — **Applicant**

and

NAMULAS PENSION TRUSTEES LIMITED — **Objector**

Re: Part of Earls Colne Golf Course,
Station Road,
Earls Colne,
Colchester.

Judge Elizabeth Cooke and Peter McCrea FRICS FCIArb

Determination under written representations

Mr Philip Sissons for the applicant, instructed by Ellisons Solicitors
Mr Andrew Francis and Ms Lina Mattsson for the objector, instructed by DMH Stallard LLP

© CROWN COPYRIGHT 2021

The following cases are referred to in this decision:

Fathers Field Developments Limited v Namulas Pension Trustees Limited [2021] UKUT 169 (LC)

Re Norfolk and Norwich University Hospital NHS Trust's Application (LP/41/2001)

Re Tate's Application [2013] UKUT 289

Winter v Traditional & Contemporary Contracts Limited [2007] EWCA 1008

One Step (Support) Ltd v Morris-Garner [2019] AC 649

Introduction

1. In *Father's Field Developments Limited v Namulas Pension Trustees Limited* [2021] UKUT 169 (LC), dated 12 July 2021, the Tribunal granted the application by Father's Field Developments Ltd under s84 of the Law of Property Act 1925 ("the 1925 Act") for the discharge of restrictive covenants on part of Earls Colne Golf Course, Colchester.

2. Following receipt of that decision, both the applicant and the objector claim their costs. For the applicant, Mr Sissons applies for an order that the objector, Namulas Pension Trustees Limited, pays the applicant's costs of the application, to be subject to detailed assessment on the standard basis if not agreed. For the objector, Mr Francis submits that the applicant should pay all, or a fair proportion – say 70% – of the objector's costs of the application, and alternatively, that there should be no order for costs.

3. We order that the objector pay the applicant's costs, to be assessed on the standard basis if not agreed, and now outline the reasons for that order.

The Tribunal's discretionary powers to award costs

4. There is no real disagreement between the parties about the law and about the Tribunal's practice with regard to costs. By section 29(1) of the Tribunals, Courts and Enforcement Act 2007, the costs of and incidental to all proceedings in the Tribunal shall be in the discretion of the Tribunal, which shall have full power, subject to its Procedure Rules, to determine by whom and to what extent the costs are to be paid.

5. Rule 2(1) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 as amended, ("the Rules") states that the "overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly". Rule 2(3) requires the Tribunal to "give effect to the overriding objective when it … (a) exercises any power under these Rules …".

6. The Tribunal may make an order for costs on an application or on its own initiative (Rule 10(1)) including in applications under section 84 of the 1925 Act (Rule 10 (6)(c)). The Tribunal must have regard to the size and nature of the matters in dispute (Rule 10(8)) and may order that an amount be paid on account before costs are assessed (Rule 10(13)).

7. The provisions in the Rules relating to costs in applications under the 1925 Act are amplified in the Upper Tribunal (Lands Chamber) Practice Directions dated 19 October 2020:

> "15.7 The Tribunal has power to award costs on an application to discharge or modify a restrictive covenant affecting land, but the following principles will be applied to the exercise of that power.
>
> …
>
> 15.10 Unsuccessful objectors will not normally be ordered to pay any of the applicant's costs, unless they have acted unreasonably. Because the applicant is seeking to remove or diminish the property rights of the objector the Tribunal will not usually regard making an objection and pursuing it to a hearing as unreasonable.

> 15.11 Successful objectors will usually be awarded their costs unless they have acted unreasonably.
>
> …
>
> 24.10 The Tribunal's power to award costs is discretionary, and it will usually be exercised in accordance with the principles applied in the High Court. The general rule is that the successful party ought to receive their costs from the unsuccessful party. (A different general rule applies to applications to discharge or modify a restrictive covenant – see paragraph 15.10 above). The Tribunal will have regard to all the circumstances of the case, including the conduct of the parties; whether a party has succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct which may be taken into account will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which they have conducted their case; whether or not they have exaggerated their claim; and whether they have unreasonably refused to engage in ADR or comply with a relevant pre-reference protocol."

Submissions on principle and policy

8. Mr Francis makes a number of general submissions on the 'policy factor' recognised by paragraph 15.10 of the Practice Directions. He observes that because the applicant is seeing to remove or diminish the objector's property rights by a statutory process, the minimum expectancy of the objector is that even of the applicant wins, absent other factors, the objector will have to only have to bear his or her own costs. The objector is entitled to object to the application; objection itself should not be treated as unreasonable so as to dictate a different costs outcome.

9. What, Mr Francis says, paragraph 15.10 does not deal with is the question of whether as the price of 'victory', the applicant should pay all or any of the objector's costs. He submits that the policy is equally relevant where the applicant is successful; the objector can say that the effect of the applicant's success, which relieves him of his obligations under a covenant, and removes or diminishes the objector's rights, should carry with it the obligation on the applicant to 'indemnify' the objector for his costs (in effect and to the extent that the standard basis of assessment allows) as part of the costs of that outcome. Mr Francis refers to the decision of the Lands Tribunal (George Bartlett QC, President) in *Re Norfolk and Norwich University Hospital NHS Trust's Application* (LP/41/2001) dated 21st October 2002, where the President said (at 21)

> 'In exercising its power to award costs the Tribunal will always bear in mind the nature of the proceedings, which must ordinarily put an objector in a more favourable position in relation to costs than the unsuccessful party in ordinary civil litigation.'

10. Mr Francis submits that there is nothing in the Rules or the Practice Directions to say that an order for costs in the objector's favour is wrong or outside the Tribunal's powers or discretion. We agree.

11. Mr Sissons submits that the applicant has succeeded in obtaining the discharge of the restrictions without the payment of any compensation; and that the objector acted unreasonably in maintaining its objection and should therefore pay the applicant's costs as paragraph 15.10 envisages. Mr Francis makes the uncontroversial point that the burden of proof is firmly on the applicant to establish that the objector did act unreasonably, and highlights the last element of PD 15.10: "the Tribunal will not usually regard making an objection and pursuing it to a hearing as unreasonable". It is not unreasonable, he says, for the objector to rely on its legal rights. Again, we agree.

12. Relying on *Willow Court Management Co (1985) Ltd. v Alexander* [2016] UKUT 290 (LC) at 22-26, Mr Francis submits that the Tribunal should be careful and not 'be over zealous in detecting unreasonable conduct after the event'. In considering whether there is a reasonable explanation behind the conduct complained of, Mr Francis submits that in the context of the application, we must be satisfied that a realistic standard of behaviour has not been met. We bear that closely in mind.

13. Faced with cross-applications for costs we address first Mr Sissons' application because our response to it makes it unnecessary for us to give any detailed consideration to those of Mr Francis.

The applicant's application for costs

14. Mr Sissons relies on four factors which he says, either individually or collectively, justify an award of costs against the objector.

The objector's conduct of the litigation

15. Mr Sissons submits that the objector acted unreasonably in the way in which it pursued its objection. First, it advanced a case that the applicant was in 'flagrant breach' of the covenant, only abandoning that position at the last possible moment during closing submissions, and it made substantial pre-hearing requests for further disclosure in an attempt to bolster that allegation. Secondly, despite the way in which the objector's case was put, in cross examination Mr Adams Cairns conceded Mr Entwistle's consistent position that the imposition of the covenant made no difference to the amount paid for the golf course in 2001. Had this concession been made earlier, much of the valuation evidence would have been unnecessary or at the very least less extensive. Thirdly, the objector rejected the applicant's suggestion that the basis of compensation ought to be decided as a preliminary issue with a view to avoiding the costs of valuation evidence. Finally, the objector failed to comply with the Tribunal's deadline for the exchange of experts reports, making the applicants incur some further costs.

16. Mr Francis argues that none of this conduct was unreasonable. We agree and would regard it all as part of the vicissitudes of litigation. The application for a preliminary issue as to the

basis of compensation to be determined was refused by the Tribunal; whether the Tribunal would have acceded to the request had it been made by consent is not known.

The nature of the objection

17. Mr Sissons submits that objection was motivated by purely financial considerations, rather than by any desire to protect amenity or control development. The application took on all the characteristics of commercial litigation, and was only ever about money, and so the rationale for the principle outlined in paragraph 15.10 of the Tribunal's Practice Directions (that the applicant is seeking to remove or diminish the objector's property rights) does not apply, or at least applies with considerably less force. Since the objector failed in seeking to obtain compensation, costs should follow the event.

18. In response, Mr Francis says it is difficult to see any difference between how an objector seeking to protect a property right, in its desire to obtain compensation in consideration of a discharge or modification of a covenant which is still 'live' between the original parties, is any less a "property" right than one where an objector owns benefitted land and seeks compensation. Most if not all contested applications under section 84 take on the characteristics of commercial litigation, without objector's actions being elevated to unreasonable conduct. There is no reason, he submits, for the usual policy factor and paragraph 15.10 from applying. Merely objecting to the application is not enough to establish unreasonableness. The subject covenant was qualified, and at no time did the applicant ever apply formally for consent; the objector was entitled to insist on its contractual rights, and at no time during the hearing did the applicant contend that it was unreasonable for the objector to impose a financial condition for its approval.

19. This point by itself does not persuade us. Many objectors to applications under section 84 are motivated by a desire for compensation for the diminution of their property right and for the loss of amenity to their property, and many cases feel very much like commercial litigation. That does not make the objector's conduct unreasonable.

Attempting to establish compensation based on negotiated damages

20. The objector's contention that compensation should be based on the negotiated damages approach was, Mr Sissons, submits, always doomed to fail. He refers to the decisions of the Tribunal (N J Rose FRICS) in *Re Tate's Application* [2013] UKUT 0289, and of the Court of Appeal in *Winter v Traditional & Contemporary Contracts Limited* [2007] EWCA 1008 confirmed by the Supreme Court in *One Step (Support) Ltd v Morris-Garner* [2019] AC 649. It was surprising, he says, that the objector put the question of compensation as the proper basis of assessment of compensation at all, especially given the Tribunal's indication at the start of the hearing that we were bound by authority to hold that a pecuniary interest was not a practical benefit for the purposes of ground (aa), and that compensation under section 84(1)(i) cannot be assessed by reference to negotiated damages.

21. By maintaining its hopeless position, that it was entitled to damages equating to more than 1/3 of the sum the applicants paid for the whole golf course, the objector frustrated or made much less likely the prospects of early settlement, obliged the applicants to adduce detailed and

expensive expert evidence, and increased the length of the hearing (which might otherwise have been dealt with in a single day), and thus the costs of counsel, experts and solicitors. Taken together, the objector's conduct was sufficiently unreasonable to justify a costs order in favour of the applicants.

22. Mr Francis says that the qualified nature of the covenant and the obligation on the applicant to seek consent from the objector was a perfectly reasonable basis from which to oppose the application and distinguish the authorities cited. He goes so far as to say (his paragraph 4(b)) that "it was clear prior to and at the hearing that the qualified nature of the Covenant was material to whether case law bound the Tribunal to a specific course of action in respect of compensation".

23. It was certainly clear at the hearing that Mr Francis regarded the qualified nature of the covenant as material to that issue. Nevertheless, the argument was hopeless and it is very difficult to see how there could have been any prospect of persuading the Tribunal otherwise. As we said in our substantive decision:

> "Mr Francis argued that the present application can be distinguished from those authorities on the basis that this is a qualified covenant; the contract explicitly contemplates that the covenantee would have the opportunity to give consent to a breach of covenant, and that therefore the objector has the benefit of control of development and of occupation of the land. However, that "control" is still a purely financial interest; the objector has no interest at all in the style or structure of development, nor any wish for example to approve plans. Accordingly we fail to see that that is any different from the situations in the authorities (and indeed *SJC Construction* was about a qualified covenant). Even where there is an absolute covenant with no mention of consent it is open to the covenantee to exercise the same control by demanding a price for release, and is in a stronger position than would be conferred by a qualified covenant since there is no question of an implied obligation not to withhold consent unreasonably. The consequence of Mr Francis' argument, as Mr Sissons pointed out, would be that an absolute covenant would give the covenantee less protection than a qualified one, since the latter would be protected from section 84 while the former is not."

24. It is of course counsel's responsibility to put his client's case as strongly as it can be put, whilst advising his client of the strengths and weaknesses of its case. The objector took a considerable risk in pursuing an argument that flew in the face of authority, and that had it succeeded would have generated the irrational result that a qualified covenant provided better protection than an absolute one. That was not a realistic standard of behaviour. The risk has not paid off and we regard the pursuit of a hopeless argument as unreasonable behaviour on the objector's part and sufficient in itself, absent any other factor, to justify an award of costs in the applicant's favour.

Failing to accept a reasonable offer of settlement

25. Mr Sissons' fourth factor in favour of an order for costs in his client's favour is the objector's rejection of an offer of settlement. He tells us that on 14 May 2001 the applicant made an offer

to pay £5,000 in compensation in return for the discharge of the covenant on the application land, on the basis that each side would pay its own costs. The objector rejected that offer, instead seeking payment of £11,500 on the basis that the applicant must pay all of the objector's costs, later reduced to £11,500 with the applicant paying 80% of the objector's costs.

26. He submits that, having 'beaten' its offer, and the objector's best offer, the applicant should be awarded its costs of being forced to a contested trial.

27. In the absence of the preceding factor we would have regarded this one as significant in relation to the costs arising after the applicant's offer was rejected. However, our conclusion that the objector's unreasonable behaviour is sufficient in itself to justify an award of costs in the applicant's favour means that we need give no further consideration to this final factor.

The objector's application for costs

28. In the light of what we have said above about the objector's unreasonable behaviour we need say no more about Mr Francis' application that the applicant pay the objector's costs or a proportion of them. There is no general principle that the applicant should pay those costs as the price of its success, although such an order will in some circumstances be appropriate. But in the present case, where litigation was inflated out of all proportion by the pursuit of a hopeless argument, it would be unjust to make such an order and the application is refused.

Interim payment

29. Mr Sissons applies that the objector should pay the applicant's costs amounting to £123,187.51, to be assessed if not agreed, of which £86,000 or 70% should be paid on account within 14 days of the Tribunal's order.

30. Mr Francis accepts that the Tribunal is able to order an interim payment and suggests that 50% would be more appropriate; we accept that 70% is in line with the Tribunal's usual practice and we order a payment of £86,000 within 28 days of the date of this decision.

Judge Elizabeth Cooke　　　　P D McCrea FRICS FCIArb

11 October 2021