

Adverse costs order in the Lands Tribunal

Introduction

In *Jones -v- Stuart and Nestor -v-Stuart*, the Lands Tribunal handed down its first reported decision on costs since its Practice Directions of May 2006 came into force.

J and N applied for orders for costs against S in relation to proceedings that each had brought, pursuant to section 84 of the Law of Property Act 1925, for a modification of restrictive covenants burdening their respective residential properties on the Bulstrode Estate, Gerrards Cross.

J and N had been successful in obtaining the modifications sought and it was their case that the conduct of S both before and after the issue of proceedings had caused considerable delay and expenditure, and had been so unreasonable that, in all the circumstances, S ought to bear the costs of the both proceedings.

Jurisdiction and discretion

Under section 3(5) of the Lands Tribunal Act 1949, the Lands Tribunal may order that: “the costs of any proceedings before it incurred by any party shall be paid by any other party”.

The discretion of the Lands Tribunal to award costs is confirmed in rule 52 of the Lands Tribunal Rules 1996. This discretion should usually be exercised in accordance with the principles of the High Court and the County Court in relation to costs. However, this is qualified in relation to proceedings under section 84 of the Law of Property Act 1925 in which it is necessary to consider the nature of the proceedings when considering the appropriate award as to costs.

Although in section 84 proceedings it is usual that an unsuccessful objector will not be ordered to pay the costs of a successful applicant, this will not always be the case. In particular, this will not be the case where the objector has acted unreasonably or where there has been an offer to settle made to an unsuccessful objector that has not been accepted: *Re Nichols* [1997 1 EGLR 144 and *Re Norfolk and Norwich University Hospital NHS Trust* LP/41/2001 unreported. That position is confirmed in the Lands Tribunal Practice Directions dated May 2006, paragraph 22.4.

J's application

Background

J purchased The Lantern House, Camp Road, with the intention of knocking it down and replacing it with a new building. Lantern House was subject to restrictive covenants dating back to 1948. The relevant terms of the restrictive covenants imposed a 50 feet building line from the road and a restriction on building more or less than two storeys.

S was a local solicitor practising in Gerrards Cross. She was also the owner of a residential property in Camp Road known as Saxons Green. and the owner of one of the (private) estate roads “Main Drive”. It was accepted for the purpose of the section 84 proceedings that S was able to enforce the restrictive covenants on the basis of her ownership of Saxons Green and Main Drive.

In August 2004, J obtained planning permission for his proposed redevelopment of The Lantern House. S did not make any representations to the local authority opposing the grant of permission.

J issued his section 84 proceedings in the Lands Tribunal in August 2005 and in response S lodged a formal objection in November 2005; she later withdrew her objection in February 2006. Despite being pressed, S never identified any loss of amenity whatsoever in relation to S's proposed development.

Application for costs

J cited four main reasons why S should pay the costs of the section 84 proceedings. First, the proceedings were successful and conducted entirely appropriately and conscientiously by J. The proceedings had only been issued as a last resort. J had attempted to resolve the dispute with S (the only objector) several times (see below) and the modifications to the restrictive covenant sought were of negligible impact on anyone in the surrounding area. In particular the modification sought involved merely (i) building 10 feet (3 meters) closer to the road and (ii) converting the loft space into bedrooms so as to add another storey to the building.

Second, S did not accept an offer made before the proceedings of £10,000. S recovered nothing ultimately, and on any basis was the unsuccessful party to the proceedings which would not have been necessary had J's very reasonable settlement offer been accepted. Third, S's conduct in relation to the proceedings had been unreasonable throughout. The inter partes correspondence disclosed that S had attempted to exploit the situation that presented itself. Specifically, S had an agenda, not to use the benefit of the restrictive covenants to ensure that environment of the Bulstrode Estate was maintained, but instead to use her position of being able to enforce the restrictions to ransom as much money as possible out of those in the area (not only J) wanting to carry out developments. S attempted to achieve this by putting pressure not just on J but on his former solicitors (ABC) in order to obtain a settlement whereby ABC would buy out a potential claim of negligence against them in relation to their handling of the purchase of The Lantern House by paying money to S in exchange for a deed of release.

Further, S had requested J's purchase files on the supposition that he had not been properly advised. There was no evidence at that stage that improper advice had in fact been given by ABC. Furthermore, even if there had been evidence of negligence, it had nothing to do with S. In any event, J's files were privileged and wholly irrelevant to the issues in the section 84 proceedings. S knew this. She had a collateral purpose in making the request.

S knew J had solicitors instructed. It was a breach of the Solicitors Rules (rule 19.02) for S to communicate with J directly in these circumstances. S's motive in doing so was to extract privileged communications from J to use in her attempt to obtain a collateral benefit from ABC: namely shares that another client of ABC held in Camp Road Estates Limited. (ABC owned Camp Road)

S made numerous unsubstantiated allegations of conflicts of interest, accusations of professional negligence and threats of reporting ABC to the Law Society. S made these accusations even though any claim for professional negligence that did exist had nothing to do with her. When J instructed IBB solicitors in place of ABC, S started to make

inappropriate accusations and threats against IBB too. S's accusations and threats caused distress, and, most importantly, increased J's legal costs.

Again, S increased costs by regularly raising issues that were irrelevant to the issues in dispute; for example, in correspondence S sought to establish that she had the benefit of the restrictive covenants even though J conceded this for the purposes of the section 84 proceedings. S constantly criticised the manner in which the proceedings was being conducted, officiously interfering in the way IBB were conducting the matter. S failed to identify any alleged failings that had caused her any prejudice. The only sensible conclusion to draw was that S had deliberately attempted to increase costs for J. (It was apparent from the inter partes correspondence that S was well aware that, in ordinary circumstances, she would never have to bear these costs herself).

Fourth, it was quite unreasonable in all the circumstances for S to pursue an objection. S could not provide any evidence of loss, injury or other damage as a result of the modifications sought by J. This is despite the fact she had on several occasions been asked by IBB in correspondence to provide such information. Her objections were consequently and clearly without merit. This was particularly the case since her (principal) right to object stemmed from her ownership of Main Drive. It was not possible to determine how S's interest in Main Drive was in anyway affected by J's proposed redevelopment.

In her formal objection lodged at the Tribunal, S claimed £50,000 in compensation from J. To claim this figure was bound to prevent or impede sensible negotiation of a settlement, as it was totally out of proportion to the extremely nominal loss of amenity (if any) that S would have been able to show.

The only argument put forward by S to support her objection was that the modifications sought by J might result in a "cascade" of such developments which would adversely affect the high-class residential nature and ethos of the neighbourhood. This argument was wholly misconceived as it not take account of the fact that: (i) the modifications sought were slight and of very limited impact; (ii) the Tribunal would always look at each case on its own merits; (iii) planning permission had been granted and S had not made representations to the local authority; and (iv) S had already approved the façade to the developments: indeed, in a letter of 31 March 2004, she stated that "From the plans which you showed me I thought that your new house would be very much in keeping with the appearance of the present houses in Camp Road".

N's application

N's application raised similar considerations. For example, S's unreasonable conduct, especially in relation to her inappropriate focus on the potential negligence claims against N's previous solicitors (XYZ).

Background

N was the freehold owner of Merrifield, Top Park which he bought with the intention of redeveloping the house. N obtained planning permission to construct a replacement family home at Merrifield. S did not object to the grant of planning permission.

The restrictive covenants burdening Merrifield were imposed by a conveyance dated 1937. The relevant terms of these restrictive covenants imposed a 60 feet building line from the

front boundary fence which may be reduced in relation to specific buildings where in the opinion of the estate surveyors a 60 feet building line impractical, provided that the building line shall in no case be less than 30 feet from the front boundary fence. It appeared that estate surveyors no longer existed.

S had the benefit of these restrictive covenants by virtue of her ownership of Saxons Green and Main Drive. Saxons Green was about 665 meters away from Merrifield as the crow flies and there are 26 residential developments between the properties. Neither property could be seen from the other.

Unaware of the restrictive covenants burdening Merrifield, N engaged builders to start work in early January 2005. By the end of May 2005 the building works had progressed to the stage where the brickwork was complete and the roof trusses were in position. The footprint of the development works was at its closest point 30 feet from the boundary. The previous building that had been taken down was at its closest point 51½ feet from the boundary. In June 2005, S sent N a letter marked “SERVICE OF NOTICE OF BREACH OF RESTRICTIVE COVENANT OCCURRING AT MERRIFIELD TOP PARK GERRARDS CROSS”. The breach of covenant alleged was that the replacement building was being constructed less than 60 feet from the front boundary.

Section 84 proceedings were issued by N on 23 August 2005. S gave notice of her objection to the modification sought on 17 November 2005 but withdrew her application on 21 February 2006.

Application for costs

There were three main reasons advanced by N as to why S should pay the costs of the section 84 proceedings.

First, the proceedings were successful and conducted entirely appropriately and conscientiously by N. The application was an entirely reasonable one to have made as: (i) N had no knowledge of the restrictive covenants before S’s notice of breach; (ii) the proceedings were issued almost immediately on discovering that the restrictive covenants existed; (iii) the building work was of negligible impact on anyone in the surrounding area and involved merely that the replacement building encroach over the 60 feet building line; and (iv) the new building was at all points at least 30 feet from the front boundary fence so that under the terms of the restrictive covenant the estate surveyor, if one still existed, could consent to the building work being carried out.

Second, the conduct of S was unreasonable throughout — both before and after the proceedings were issued. The inter partes correspondence disclosed unreasonable interference by S similar to that in the proceedings taken by J. In particular: S made numerous inappropriate references to the potential negligence of XYZ which acted for N on his purchase of Merrifield. These issues of negligence were wholly irrelevant to S and to the issue of the restrictive covenants. It was further evidence of S of involving potentially negligent solicitors to maximise the amount of money she received for the release of the restrictive covenants.

Again, S failed to answer any questions relating to the substance of her objections even though she was regularly prompted by IBB to do so. She was unable to identify any loss of

amenity. Instead S pursued threats such as to institute High Court injunction proceedings to have N pull down his replacement house.

Third, it was unreasonable for S to object to the section 84 proceedings. N's developments had no tangible impact on S. The minor incursion into the 60 feet building line required by the development could not affect S; indeed, S was not at any stage able to demonstrate what practical loss of amenity she incurred as a result of the development. This is particularly the case because the previous building at Merrifield that N had taken down already encroached over the 60 feet building line; and Saxons Green was 665 meters away from Merrifield as the crow flies. It was consequently difficult to comprehend how S could claim to have been affected in any substantive way by the developments as a result of her ownership of either Saxons Green or Main Drive.

In common with the proceedings issued by J, S in her notice of objection claimed £50,000 in compensation and advanced the thin end of the wedge argument.

At the end of a lengthy 34 page judgment in which he went through the inter partes correspondence in detail, Mr Rose FRICS, ordered S to pay the costs of both section 84 proceedings from the date of her objections to the date of their withdrawal; such costs to be assessed by the Registrar on the standard basis if not agreed.

Without doubt, the judgment of Mr Rose is a clear signal from the Tribunal that, an objector whose predominant motive in opposing proceedings for the modification or discharge of restrictive covenants is the extraction of a large sum of money, even though the objector is scarcely affected by the development in question, is at risk on costs. It is also a reminder that the use of threats that go "well beyond fair bargaining" is not a legitimate tactic for a party to proceedings to adopt.

The writer, Andrew Olins, acted for both Jones and Nester. He is a professor associate in law at Brunel University.

Contact

Andrew Olins

Partner

Email andrew.olins@ibblaw.co.uk

Tel 01895 207813

07/07