



REF/2016/545

**PROPERTY CHAMBER, LAND REGISTRATION DIVISION,
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

ELIF BAY

APPLICANT

And

**(1) EMIR OSMAN
(2) INAN BAY**

RESPONDENTS

Property Address: 4 Warmington Close, London E5 0BX

Title Number: EGL284715

COSTS ORDER

UPON the application of the First Respondent for an order that the Second Respondent do pay the costs of the First Respondent

AND UPON reading the written submissions of Mr Roger Mullis of counsel for the Applicant

AND UPON reading the witness statement of the Second Respondent dated 18th October 2017

The Tribunal Orders as follows

(1) That the Second Respondent, Mr Bay do pay 85% of the costs of the First Respondent,

Mr Osman, to be assessed.

(2) The First Respondent, Mr Osman having filed with the Tribunal his Bill of Costs to be assessed do serve the same on the Second Respondent, Mr Bay by 5pm on 17th November 2017.

(3) The Second Respondent, Mr Bay do file with the Tribunal and serve on the First Respondent, Mr Osman his Points of Dispute to the First Respondent's Bill of Costs by 5pm on 17th December 2017

(4) The First Respondent, Mr Osman do file with the Tribunal and serve on the Second Respondent, Mr Bay his Points of Reply to the Points of Dispute (if any) by 5pm on 4th January 2018

REASONS

1. The First Respondent, Mr Osman, having been successful in objecting to the application of the Applicant, Mrs Bay has applied for an order that Mr Bay pay the costs of the proceedings. Mr Bay was made a party as Second Respondent for the purposes of consideration being given to the application that he pay Mr Osman's costs. Written submissions in support of the application were made by Mr Mullis, counsel for Mr Osman. Mr Bay filed a witness statement in answer to the application.

Jurisdiction

2. The power of the Tribunal to make orders as to costs is derived from The Tribunal Courts and Enforcement Act 2007 ("TCEA 2007") s. 29. That section provides so far as is material

“(1) The costs of and incidental to –

(a) all proceedings in the First-tier Tribunal ...

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.”

3. The relevant Tribunal Procedure Rules are the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (“the Rules”). Rule 13 provides (so far as relevant) as follows

“(1) The Tribunal may make an order in respect of costs only –

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

(6) The Tribunal may not make an order for costs against a person (“the paying person”) without first giving that person an opportunity to make representations”.

4. This is a land registration case within the meaning of Rule 13(1)(c). It is a case in which the Tribunal has jurisdiction under the Land Registration Act 2002.

5. Mr Mullis, counsel for the First Respondent, correctly points out that the wording of TCEA 2007 section 29(1) and (2) is in substance identical to that of the Senior Courts Act 1981 (“SCA 1981) section 51(1) and 51(3):

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in – (a) the civil division of the Court of Appeal; (b) the High Court; and (c) the county court, shall be in the discretion of the court.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

I note in particular the use in both TCEA 2007 section 29(2) and SCA 1981 section 51(3) of the words “to determine by whom .. the costs are to be paid”.

6. Rule 46.2 of the Civil Procedure Rules provides

(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –

(a) be added as a party to the proceedings for the purposes of costs only; and

(b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.”

7. The power of the High Court to make an order for costs against a person who was not party to the litigation was considered by the House of Lords in *Aiden Shipping Co. Ltd. V. Interbulk Ltd.* [1986] AC 965. The House of Lords confirmed that the power to make costs orders under SCA 1981 s. 51 extended to making orders against non-parties. Lord Goff of Chieveley said (at p.975F):

“...it is not surprising to find the jurisdiction conferred under section 51(1) ...to be expressed in wide terms. The subsection simply provides that “the court shall have full power to determine *by whom* ...the costs are to be paid”. Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thing it right to do so) by the making of rules of court, and to the appellate courts to establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised. It come therefore as something of a surprise to discover that it has been suggested that any limitation should be *implied* into the statutory provision which confers the relevant jurisdiction”.

At p, 979C his Lordship continued

“had the legislature thought it right to limit the jurisdiction under section 51(1) of the Act of 1981 in this way, it would have been very easy to achieve such a result by drafting the concluding words of the subsection as follows

“...and the court shall have full power to determine *by which party* and to what extent the costs are to be paid”.

8. I have not been referred to any decision of a court or of the Upper Tribunal or of the First-tier Tribunal on the construction of TCEA 2007 section 29.

9. I accept the submission of Mr Mullis that TCEA 2007 section 29 falls to be construed in the same way as SCA 1981 sections 51(1) and (3). TCEA 2007 section 29(2) gives the Tribunal power to determine “by whom and to what extent the costs are to be paid”. It uses the same language as is used in SCA 1981 section 51(3). The power is thus expressed in the same wide terms as the power given to the senior courts. Parliament did not choose to use more restrictive language, notwithstanding the decision of the House of Lords on the meaning of the words in SCA 1981 section 51(3). Parliament did not choose the use restrictive language of the type that Lord Goff of Chieveley pointed out in *Aiden Shipping* could easily have been used.

10. The Tribunal Procedure Rules Committee restricted the power of the Tribunal in proceedings in the Property Chamber to award costs in the ways set out in Rule 13. It could have restricted the power of the Tribunal to award costs against a non-party but it has not done so except to the extent that by Rule 13(6) it required the Tribunal not to make an order for costs against a person without first giving that person an opportunity to make representations.

11. I find that the Tribunal does have power to make an order for costs against a non-party.

12. The next issue to be considered is what are the principles to be applied when deciding whether to exercise the discretionary jurisdiction to award costs against someone who was not a party to the litigation. I have not been referred to any decision of the Upper Tribunal or of the First-tier Tribunal on the exercise of the jurisdiction. However, the principles so far as they relate to the jurisdiction of the courts are well established. They are usefully summarised in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807 . In that case the Privy Council awarded the successful petitioner its costs but since the respondents were unable to pay them, the petitioner applied for an order that they be paid by a third party, a company associated with one of the respondents which had promoted and funded the appeal substantially for its own benefit. Giving the judgment of their Lordships Lord Brown of Eaton-under-Heywood said:

"25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No. 2)* [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence-see, for example, the judgments of the High Court of Australia in the *Knight* case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *T G A Chapman Ltd v Christopher* [1998] 1 WLR 12, 22 as "the defendants in all but name".

13. I can see no reason why different principles should govern the exercise of the discretion in a land registration case in the Property Chamber. Such cases are party and party litigation in which the Tribunal has a full costs-shifting jurisdiction and in which the usual order is that the unsuccessful party pays the costs of the successful party. They are just as much cases in which "the real party" may well be someone other than the named parties as

cases proceeding in the courts. They are cases in which the procedure is very similar to the procedure in the courts, the main difference being that most interlocutory matters are dealt with on paper after written representations and without an oral hearing.

14. If these proceedings were before the court, Mr Bay would be given the opportunity to attend a hearing at which the court would consider the application being made for him to pay the costs. There is no requirement in the Tribunal rules for there to be a hearing where such an application is made, although the Tribunal could hold a hearing if it considered it just to do so. Orders as to costs are usually made in a land registration case in the Tribunal on paper, after considering written representations. In this case, Mr Bay was present throughout the hearing. He was given an opportunity to make written representations on the application that he be ordered to pay the costs. He has taken advantage of that opportunity and made written representations. To hold a hearing to consider the application on which representations have been made in writing on behalf of Mr Osman and Mr Bay would significantly increase the costs. In those circumstances, I do not consider it to be either necessary, proportionate or just to hold a hearing.

15. I have then to consider whether this is an exceptional case in which it would be just to make an order for costs against the non-party, Mr Inan Bay. There are a number of factors for me to take into account.

(1) It is apparent that Mr Bay was controlling the litigation. He initiated the application that was referred to the Tribunal for decision. Mrs Bay's evidence was that Mr Bay made the application in her name. Mr Bay did not deny this in his written statement in answer to this costs application. Mrs Bay's evidence was that Mr Bay had given her the documents that she produced during the course of the proceedings. As mentioned in the Decision, Mr Bay sat in the court room throughout the hearing, conferring frequently with Mrs Bay's solicitors. He produced from his own papers an original Turkish statement made by the Applicant, the English-language version of which had been included in the trial bundle. Mrs Bay's evidence was that Mr Bay was paying the lawyers who had conducted the proceedings on her behalf. Mr Bay did not in his written statement made in answer to the application for an order for costs to be made against him, seek to deny his involvement in the proceedings. Though his reason for not giving evidence was said initially to be that he was suffering from stress, in his statement, he said he did not want to give evidence for fear that he would incriminate himself.

(2) Mr Bay did not himself stand to benefit directly in any obvious way from the litigation. The case advanced by the Applicant was that the First Respondent held the property on trust for her and not that Mr Bay had any beneficial interest in the Property. The evidence was that Mr Bay and the Applicant were separated and had been for several years. However, it is not a requirement for the exercise of the discretion that Mr Bay must have benefitted directly in circumstances where he controlled the litigation. It is quite possible that Mr Bay may have thought he would benefit indirectly from success in the proceedings. If Mrs Bay's application had been successful, the property the subject of the application would have become an asset available to be taken into account in any financial relief proceedings on Mr and Mrs Bay divorcing. Further, there would have been a benefit to Mr Bay in that the property would have been available as accommodation for Mrs Bay and her children and thus would have reduced the prospect of Mr Bay having to make alternative provision for his wife and children.

(3). It is probable that the order for costs made against Mrs Bay may not be capable of being enforced. Mrs Bay does not work and has been claiming housing benefit. She had two young children to look after. There has been no indication in the proceedings that Mrs Bay has any assets which could be used to meet the costs order. On the other hand, there is some greater prospect of an order against Mr Bay being enforced. He has or has at some time in the past had a house other than the property the subject of these proceedings.

16. The statement submitted by Mr Bay to the Tribunal following the receipt by him of notice of the application by Mr Osman for costs consists principally of his account of the facts leading up to the original application to HM Land Registry by Mrs Bay. This is evidence that Mr Bay could have given prior to or at the substantive hearing but he chose not to do so. Mr Bay having chosen not to give evidence and Mrs Bay's application having failed, it is not now up to Mr Bay to seek to re-open the proceedings and give evidence that he chose not to give before. In the light of the Decision of the Tribunal on the merits of Mrs Bay's application, nothing in Mr Bay's witness statement would justify the Tribunal in refusing to make an order for costs against him.

17. I consider that this is an exceptional case in which it is just to make an order for costs against Mr Bay.

18. I must then consider what costs order to make. Mrs Bay was ordered to pay 85 per cent of Mr Osman's costs of the proceedings on the grounds that Mr Osman had been an unreliable and unsatisfactory witness and had lengthened the hearing as a result. It would not be just to order Mr Bay to pay costs attributable to Mr Osman being an unreliable and unsatisfactory witness. Accordingly, I shall order that Mr Bay pay 85 per cent of Mr Osman's costs to be assessed on the standard basis.

Dated this 10th November 2017

BY ORDER OF THE TRIBUNAL