Case No: A2/2014/3359

Neutral Citation Number: [2016] EWCA Civ 1375
IN THE COURT OF APPEAL
ON APPEAL FROM CHICHESTER COMBINED COURT CENTRE
(DISTRICT JUDGE ELLIS)

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Wednesday, 12 October 2016

Before:

LORD JUSTICE RICHARDS

LORD JUSTICE LONGMORE

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Between:

POWLES & ANR **Appellant**

and

REEVES & ORS **Respondent**

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Mr Joshua Swirsky (instructed by Duncan Lewis) appeared on behalf of the **Appellant**

Mr James Sutherland (instructed by Irwin Mitchell) appeared on behalf of the **Respondent**

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Judgment (Approved)

LORD JUSTICE DAVID RICHARDS:

1. This is an appeal brought with permission granted by Sales LJ against an order for the costs of an action made after the parties settled the substantive claims in the action shortly before trial.

2. The proceedings concerned a disputed boundary between two residential properties in Bognor Regis. The claimants, Mr and Mrs Powles, have at all material times owned 23 Shrubbs Drive, Middleton-On-Sea, Bognor Regis. From May 2010 to April 2014 the first defendant and appellant, Mr Reeves, owned a neighbouring property at 25 Old Point, Bognor Regis. In April 2014 Mr Reeves sold his

property to the second and third defendants, Mr Lyons and Ms Myers, who are not parties to this appeal and who I will call "the purchasers".

3. The dispute concerned the boundary between the two properties at the rear of their respective gardens. The claimants maintained that the boundary between the properties lay along the centre line of a hedge. Mr Reeves maintained that the boundary lay along the line of a screening fence that the claimants' predecessor in title had erected in 2004 on what they said was their side of the boundary.

4. The dispute arose shortly after Mr Reeves purchased his property, when he began works which the claimants said encroached on their property. Attempts to resolve the issue failed and relations between the parties deteriorated, as is apparent from some of the claims made in the proceedings.

5. The proceedings were issued in December 2012. In their claim form and particulars of claim the claimants sought a declaration that the boundary lay along the line of the hedge and they also sought damages for trespass and an injunction restraining any future trespass.

6. In his defence and counterclaim Mr Reeves denied that the boundary was as alleged by the claimants in their particulars of claim. He asserted that the true boundary lay along the line of the fence, but he offered a resolution of the dispute in his defence, saying that he would accept a boundary close to the hedge, although not along its centre line. He also claimed damages for trespass on the basis that the land between the hedge and the fence was his land, and there were also claims made, amongst other things, for damages for slander, libel and blackmail.

7. Experts were instructed by both parties. In due course they met pursuant to an order of the court and produced a joint report in November 2013 in which they agreed the location of the conveyance boundary line. In broad terms, it ran close to the hedge but not along its centre line. The precise position of the boundary that the experts

agreed was changed slightly following a question raised by the claimants.

8. The line that the experts actually pinned out on the ground, rather than marking on a plan, was, as I say, not one that accorded with the position of either party in their pleadings, and it was in dispute whether it was the same as the boundary line that the defendant offered by way of compromise in his defence. It was the claimants' intention, if the matter went to trial, to challenge the conclusion of the experts at trial and it was their intention to maintain that the boundary lay along the midline of the hedge, as they had always contended.

9. Following the sale by Mr Reeves of his property to the purchasers, the claimants were granted permission in July 2014 to join the purchasers as additional defendants and to amend their claim form and particulars of claim so as to delete the claim for a declaration as to the true position of the boundary as against Mr Reeves but to claim a similar declaration as against the purchasers. They took the position, rightly as I would think, that as Mr Reeves no longer had any interest in the property the proper parties to the claim for a declaration were the purchasers, not him. In any event, neither Mr Reeves nor the purchasers objected to the amendments and they were allowed, as I have mentioned, by the court.

10. It would appear that the purchasers had no interest in maintaining that the boundary was anywhere other than the centreline of the hedge, as the claimants had asserted, and the proceedings as between the claimants and the purchasers were settled on the terms set out in a schedule to a consent order made on 15 September 2014, albeit probably agreed a few days earlier. That consent order stayed the proceedings, save for the purposes of carrying the agreed terms into effect, and further provided that there should be no order for costs in respect of the claim as between the claimants and the purchasers.

11. There remained the claims and counterclaims for damages as between the claimants and Mr Reeves and they were settled by a consent order made on 15

September 2014. The order provided that the claims and counterclaims be stayed for the purpose of enforcement of the scheduled terms. The scheduled terms provided for Mr Reeves to pay £200 in full and final settlement of the claims against him and further provided that he discontinued his counterclaims.

12. The consent provided in paragraph 2 that "the costs of the claim and the counterclaims be determined by the court at the hearing listed for the trial of this matter on 15 September 2014". Accordingly, the only issue that fell to be determined on 15 September 2014, which, as that order recited, was the date fixed for trial of the action, was the order for costs.

13. In her judgment District Judge Ellis, sitting in the County Court at Chichester, reviewed the history of the dispute and the proceedings and the various offers and counter-offers for settlement that had been made. Having rejected two preliminary submissions made on behalf of Mr Reeves, against which there is no appeal, the judge dealt with a submission on behalf of Mr Reeves that if the case had proceeded to trial the most likely outcome would have been a decision that followed the boundary on which the experts were agreed. It was submitted that in view of offers made by Mr Reeves it would not therefore be appropriate to make a costs order against him. As to this, the judge said in paragraph 27:

> "This is a difficult matter to comment on because nobody knows what the outcome of the trial would have been because we have not had a trial. Insofar as it is relevant, it does seem to me that if this matter had gone to trial then it is likely that a judge would have accepted Mr Reeves' argument, or the argument put forward on behalf of Mr Reeves, that the most likely outcome would have been an acceptance of the joint experts' report. But where I disagree with Mr Swirski is where he said that this would have meant that there would have been no costs against the first defendant. I cannot accept that the offer that he put forward in his defence, as being prepared to accept the boundary along the north of the hedge, is the same as the joint experts' recommendation which follows a slightly different line. These matters may only be matters of millimetres, but as the correspondence shows, as sadly many boundary disputes show, every millimetre matters on these occasions. Also the offer put forward by Mr

> Reeves in his defence is an offer to settle and as the correspondence to which I have been referred shows, it has not been possible for a settlement to be reached in this case. It would always have been the consequence for Mr Reeves putting forward an offer to settle after proceedings had been issued that he would have to have paid the costs of the claimants and he has not been prepared to do so."

14. The judge then considered whether it could properly be said that the claimants had been successful in the case. She considered that they had been, because they had obtained a declaration in the terms they were originally seeking. When Mr Reeves sold the property without imposing any terms or requirements on the purchasers as to this dispute, he took the risk that they would settle the action.

15. For these reasons, which I have briefly summarised, the judge ordered Mr Reeves to pay the claimants their costs of the action. In reaching her decision the judge had regard to without prejudice correspondence between the parties containing offers and counter-offers, to which she was taken by counsel for both parties, and also to the terms of settlement scheduled to the Tomlin orders.

16. In paragraph 3 of her judgment the judge records that there had been some discussion before her on the extent to which it was appropriate for her to consider the terms of settlement and, while she said that she would come to that later, she did not in terms discuss whether it was appropriate for her to do so. Clearly, however, she concluded that it was, because she did in fact do so.

17. The grounds of the present appeal are as follows: (1) the district judge was wrong to hold that the respondents had been a successful party when (i) there had been no determination by a court as to the correct line of the boundary, (ii) the appellant had not been party to the agreement between the respondents and the second and third defendants as to where the boundary lay between the properties, and (iii) the statement of the experts following their meeting was to the effect that the boundary was nearer to the boundary contended for by the appellant than that contended for by the respondents; (2) in determining which party was the

successful party the district judge was wrong to have regard to the schedule to the Tomlin order settling the trespass claim brought by the respondents against the claimant and the counterclaims brought by the appellant against the respondents; (3) in determining who was the successful party the district judge was wrong to have regard to (i) the schedule to the Tomlin order agreed between the appellant and the respondents, and (ii) the schedule to the Tomlin order agreed between the respondents and the second and third defendants.

18. Before going to the grounds of appeal, it is appropriate to consider first the approach to be taken to an order for costs made in the circumstances of this case. Generally, judges are called upon to decide issues of costs after they have heard an application or tried an action, and the conclusions which they have reached on the substantive issues will usually determine or have a very important bearing on the appropriate order for costs. So much is stated in the Civil Procedure Rules. It does, however, sometimes occur that, as in this case, the parties reach a settlement of the substantive issues between them but are unable to agree the appropriate order for costs, and as part of their settlement invite the court to determine the question of costs.

19. I think it is fair to say that, deprived of the compass normally provided by the outcome of the case, judges often find this to be a difficult exercise. It is neither desirable nor generally practical for the whole case to be heard solely for the purpose of determining costs and it would usually be an unacceptable waste of the court's resources, as well as the parties' resources, to do so. The judge instead has to look for other factors to determine the appropriate order for costs, prominent amongst them being the result of the settlement, the conduct of the parties in the course of the litigation, any reasonable offers of settlement that may have been made and, in any case where it is tolerably clear, which party would have succeeded at trial.

20. The proper approach to be adopted by a court asked to determine costs in these circumstances is set out in the guidelines stated by Scott Baker J in R (Boxall) v Waltham Forest LBC [2001] 4 CCLR 258, adopted by this court in the context of private civil litigation in Brawley v Marczynski and another No.1 [2002] EWCA Civ 756 and discussed further by this court in the R (M) v Croydon Borough Council [2012] EWCA Civ 595, [2012] 1 WLR 2607 in the judgment of Lord Neuberger MR and the short concurring judgment of Stanley Burnton LJ.

21. Even after a case has been fully tried an appellate court is reluctant to interfere with the judge's order for costs, unless the decision on substantive issues is reversed. In what is now a much cited passage from the judgment of Davis LJ in F&C Alternative Investments (Holdings) Ltd v. Barthelemy [2013] 1 WLR 548, [2012] EWCA Civ 843, he said at paragraph 42:

> "Decisions on costs after a trial are pre-eminently matters of discretion and evaluation. Further, it is particularly important to bear in mind that a trial judge – especially after a trial such as this one – will have a knowledge of and feel for a case which an appellate court cannot begin to replicate. The ultimate test, of course, for the purposes of an appeal of this kind is whether the decision challenged is wrong. But it is well established that an appellate court may only interfere if the decision on costs is wrong in principle; or if it involves taking into account a matter which should not have been taken into account or failing to take into account a matter which should have been taken into account; or if it is plainly unsustainable."

22. The correct approach to be adopted by an appellate court in a case such as the present where the court has been invited to determine costs as part of a settlement was addressed by this court in BCT Software Solutions Ltd v C Brewer & Sons Ltd [2003] EWCA Civ 539, [2004] 2 CP Reports 2. Giving the lead judgment, Mummery LJ said at paragraph 8:

> "This court is entitled to approach an appeal against a costs order, which has been made as part of a compromise, with an even greater degree of reluctance than is usually the case when it is asked to interfere with the discretion of the trial judge. […] If there is a point of principle in this case, which I very much doubt, it does not arise from the way in which the judge exercised his discretion, but from whether he should ever have embarked on this particular exercise at all. As both parties

> agreed that he should undertake the task, it is reasonable to expect them to accept his decision, unless it can be shown that the result is, in all the circumstances, manifestly unjust. I would certainly not be inclined to interfere with the judge's decision simply because it is possible to detect imperfections in his approach or in his reasoning."

23. At paragraph 15, having referred to the general approach to costs orders after a contested hearing, Mummery LJ added this:

> "In the absence of manifest injustice, an appellate court should not interfere with a discretion, which has not been exercised at the end of the trial, as is usually the case, but with the agreement of the parties when they have settled the case."

Chadwick LJ delivered a concurring judgment and Brooke LJ agreed with both judgments.

24. The requirement to show a manifest injustice was followed by this court in Venture Finance Plc v Mead & Anr [2005] EWCA Civ 325 and in Bray (t/a the Building Company) v Bishop & Anor [2009] EWCA Civ 768. In both cases the appeals were allowed, this court finding errors of principle made by the court below that had led to a manifestly unjust result.

25. In the recent decision of this court in Patience v Tanner & Anr [2016] EWCA Civ 158, Gross LJ, with whom the President of the Queen's Bench Division and Black LJ agreed, at paragraph 33 questioned whether the reference to manifest injustice imposed a further threshold requirement, although he was content to proceed, and did proceed, on the basis that a test of manifest injustice was additionally applicable in a case such as the present. I should note that it does not appear from Gross's LJ judgment that the decisions of this court in Venture Finance Plc v Mead and Bray v Bishop were cited.

26. However the approach is expressed, I consider that these authorities show that an appellate court will be even more reluctant than in the case of a costs order after a contested hearing to interfere with a costs order made at the request of the parties after they have settled the substantive issues between them.

27. Turning to the grounds of appeal advanced on behalf of Mr Reeves, I start with the first ground, that the judge was wrong to hold that the claimants had been the successful party in the light of the three factors to which the first ground of appeal refers. The judge approached this issue in a straightforward way. The claimants had issued proceedings claiming a declaration that the boundary line lay along the centreline of the hedge. Proceedings concluded with a declaration in their favour that the boundary line did indeed lie along that centreline. On the face it, it would appear that the claimants were clearly successful in the proceedings. Mr Reeves relies on the fact that it was not he, but the purchasers, who agreed to that declaration. Mr Swirsky, who appears today as he did below on behalf of Mr Reeves, has submitted that it is for that reason an irrelevant consideration in determining the costs between the claimants and Mr Reeves.

28. I do not accept this submission. The outcome of the litigation is a vindication of the claimants' position. The outcome, in the sense of an agreement with the purchasers, can properly be said to be the result of the voluntary action of Mr Reeves in selling the property to the purchasers and thereby divesting himself of any interest in the property and any continuing interest in the location of the boundary line without any reservation of rights in his contract with the purchasers to protect his position.

29. It appears to me that the claimants were successful in the litigation, having regard to the agreed declaration, and I do not see how it could be said that their success is not a relevant factor, indeed a highly relevant factor, in determining the appropriate order for costs. It is submitted for Mr Reeves that if he had not sold the property and the action had gone to trial it might have resulted in a boundary line more favourable to the owner of his property, although certainly not as favourable as Mr Reeves originally contended. But that possibility, or even strong possibility, cannot, in my judgment, have any effect on the conclusion that the claimants were, in the events that happened, the successful parties in this case.

30. It follows, in my judgment, that the judge was right to hold that the claimants had been the successful party and to accord substantial weight to that factor in determining the appropriate order for costs. The judge did address the question as to what the outcome might have been in the event that the matter had gone to trial, and, while she accepted that there was a strong likelihood that the outcome would have been in accordance with the experts' report, she did not consider, for the reasons that she gave, that that would necessarily result in any order other than one for Mr Reeves to pay the claimants' costs.

31. Ground 2 of the grounds of appeal challenges the reliance placed by the judge on the terms agreed between the claimants and Mr Reeves as regard the claims and counterclaims for damages. In my judgment, the judge was right to take account of the facts that Mr Reeves had paid a sum, albeit only £200, to settle the claims for damages against him and had unconditionally dropped his counterclaims against the claimants. As I read her judgment, the judge fully recognised that the location of the boundary was the principal issue in the case, and she regarded the declaration agreed between the claimants and the purchasers as being probably the most significant factor in the case. She did not therefore treat the terms of settlement reached with Mr Reeves as being in any sense the principal factor, but she was right, in my judgment, to take them into account.

32. Ground 3 challenges the decision of the judge to read and have regard to the schedules to the two Tomlin orders settling the action. It is of course right that the court is not generally concerned with the terms of settlement scheduled to a Tomlin order. They do not have the effect of an order of the court and they take effect as a contract between the parties. The purpose and effect of a Tomlin order is to provide a convenient means of enforcing the terms of the settlement agreement. It does not, however, follow that the court is not entitled to look at the scheduled terms and, in appropriate circumstances, to have regard to them. Of course, the court will be directly concerned with the terms if either party seeks to enforce them, but that is not,

in my judgment, the only circumstance in which the court can have regard to them.

33. I can see no reason why the court cannot have regard to those terms in determining the issue which the parties have invited the court to decide in this case, namely the appropriate order for costs.

34. For these reasons, in my judgment the judge was entitled in all the circumstances of this case to make the order appealed against, and there are no grounds on which this court should interfere with it. I would therefore dismiss the appeal.

LORD JUSTICE LONGMORE:

35. Questions of costs in boundary disputes are often difficult and, alas, easily escalate beyond the value of the disputed territory. Another judge might not have come to the same conclusions as this judge did in this case, but it is important for litigants to realise, especially perhaps boundary dispute litigants, that if they ask the judge to determine the instance of costs when a settlement is otherwise reached, it will be very seldom that this court will interfere with any such determination.

36. The judge has a particularly difficult task, and should be encouraged to get on with it without any fear that the decision will be reversed on appeal unless there is some very obvious error which can be easily demonstrated without having to delve into the details of the case which had never been determined at trial.

37. I agree with my Lord, there is no such error here, and therefore I also agree that the appeal must be dismissed.