Case 2
Strachey
v
Ramage

[2009] 1 Costs LR 9

Neutral Citation Number: [2008] EWCA Civ 804
Court of Appeal (Civil Division)
16 July 2008

Before:
Sedley and Rimer LJJ and Sir Paul Kennedy

Headnote

The Court of Appeal was asked to consider the costs of the appellant, the court below having ordered the appellant to pay the respondent's costs of the claim. The appellant sought an order that her costs of the claim and of the appeal be paid by the respondent; the latter sought no order for costs in respect of the claim or the appeal.

Judgment

RIMER LJ (delivering the ruling of the court):

1. We delivered our reserved judgment on the appeal in this boundary dispute on 18 April 2008. We requested sequential written submissions on various points that arose on the form of the order, having indicated that we would rule on those matters on paper. We are grateful for the submissions provided by both sides. This is the court's ruling, which assumes a prior reading of our main judgment.

[…]

6. We come to costs. In the court below, the judge ordered the appellant to pay the respondent's costs of the claim, with a payment of £8,000 on account within seven days. The rival positions before us are (i) that the appellant asks us to order the payment by the respondent of her costs both of the claim and of the appeal; and (ii) that the respondent asks that there should be no order as to costs in respect of the claim or the appeal.

7. We deal first with the costs of the claim. We have been provided with part of the pre-trial correspondence said to be relevant to costs. The respondent's stance is that the claimant pursued the claim aggressively and unreasonably and made no serious attempt to compromise the parties' differences. As Sedley LJ explained in his judgment, at para 54, those differences were readily capable of compromise in a manner that would have given each side all that he/she could reasonably need. The appellant's position is that she conducted the case in a reasonable manner and should not be criticised for doing so in the establishment of her proprietary rights.

8. The story opened with what we regard as an aggressive letter of 19 September 2005 from MFG, solicitors for the appellant. It was written to the respondent. MFG acknowledged that the February and October 1988 conveyances showed the fence to be in the wrong place, but said that a new fence had been erected before the October 1988 conveyance. That perhaps suggested that it was erected *after* the February conveyance, which was wrong. The letter asserted, without explaining why, that as MFG could establish there was an error in the conveyancing, the appellant was entitled to ask HM Land Registry to rectify the appellant's title, although that needed the respondent's consent. MFG warned that, if the respondent refused to consent, the appellant could prove a title to the disputed land by adverse possession.

9. What had apparently provoked the letter was the respondent's threat to remove the fence. MFG warned that any attempt to do so would be met by an injunction, that the court could order the respondent to pay the costs of such an application, which could be more than £2,000, and that: "Furthermore, the court may seek from you an undertaking that you pay into court sufficient monies to compensate our client for any losses she may suffer from being kept from her land until the issue is tried by the court." We do not follow that. If the appellant had sought and obtained an injunction, there

could be no question of her suffering any such losses; and in that event the only person who theoretically (but in practice improbably) might be required to pay money into court would be the appellant, in fortification of her cross-undertaking in damages. MFG did not explain on what basis the court might require the respondent to pay money into court. The letter was essentially unreasoned but demanded capitulation by the respondent by 4 October 2005, failing which "we will advise our client to issue proceedings immediately for rectification of the title which proceedings will be at your cost."

10. We regard an opening letter of that nature to a lay opponent as unjustifiably heavy-handed. It made little attempt to explain why the appellant was entitled to have the title rectified, it made the unjustified point about the possibility that the respondent might be required to pay money into court and it made an unqualified assertion that the respondent would have to pay the costs of any proceedings when, as MFG would know, costs are always in the discretion of the court. A letter of that sort written to the other side's solicitors is one thing: they can explain its exaggeration to the client. Such a letter written to the individual direct is another matter. It would be calculated to cause immediate worry and concern, much of which would be unjustified.

11. The response from Nigel Pullen Solicitors, on 3 October 2005, was that they wanted time to investigate the matter for the respondent. MFG replied on 6 October 2005 giving the respondent a further seven days within which to capitulate, failing which proceedings would be issued in the High Court and a speedy trial sought. There could have been no basis for seeking an expedited trial. That was just another aggressive gesture, in line with the assertion that "[o]ur client will establish title by adverse possession and unless your client has significantly deep pockets to fight this claim and lose we would invite the obvious sensible course of action that a joint application for rectification be made." The response from Nigel Pullen, on 12 October 2005, was that the respondent wanted until 9 November 2005 to respond and it questioned why any proceedings had to be in the High Court rather than the County Court. Nigel Pullen followed that up on 21 October 2005, raising various substantive points on which they sought clarification as to the appellant's case. MFG's long response on 27 October 2005 advised that proceedings were being settled by counsel for issue in the Chancery Division of the High Court.

12. There was then a gap until on 16 January 2006 MFG wrote that

they were awaiting a response to their letter of 27 October 2005 and that pleadings were being finalised for issue shortly. Proceedings were issued on 25 January 2006. Extensive correspondence continued. On 2 March 2008, in another long letter, Clarke Willmott (for the appellant) invited the respondent to concede the appellant's claim and to pay her costs, which stood at £11,300 excluding VAT. They said the costs would be set at this level until 13 March 2006. The invitation was not accepted. Clarke Willmott made a further proposal on 24 April 2006, which again required the respondent to concede the appellant's claim and pay her costs in full. Nigel Pullen made a counter-proposal on 5 May 2006, including that there should be no order as to costs, one that was rejected on 31 May 2006.

13. On 1 August 2006 Nigel Pullen wrote to Clarke Willmott. They offered to concede the appellant's claim, with a contribution of £2,500 to her costs. The offer was not accepted because the appellant's costs were by then more than £16,000, disclosure and the exchange of witness statements having taken place since May. For the appellant to have run up costs of that order by then was, we consider, on the face of it disproportionate. There is nothing in the material before us to indicate that the appellant made any sensible or reasonable counter-proposal as to the costs basis on which she would be prepared to settle, or that she even responded to the offer of 1 August 2006 at all. At a case management conference on 4 August 2006, the district judge made a strong mediation recommendation, which the respondent's solicitors also took up on the same day. There was no positive response from the appellant to that proposal.

14. We consider that the case ought to have been capable of being settled at that point. The only inference we can draw as to why it was not is that the appellant was holding out unreasonably for all or most of her costs and was not prepared to make a sensible concession with a view to achieving a settlement. Put the other way, there is nothing before us to satisfy us that she made any reasonable response to the respondent's overtures to concede her claim; and the overt aggression with which the appellant had run her case to date suggests it is unlikely that she did. We consider that that was unreasonable conduct on her solicitors' part. Whilst we consider that, following our decision on the appeal, the appellant is in principle entitled to her costs of the claim, we will reflect those considerations by limiting her to the recovery of

66% of those costs, to be the subject of a detailed assessment on the standard basis if not agreed.

15. As for the costs of the appeal, we accept that the appellant is entitled to her costs and we will order the respondent to pay them, again to be the subject of a detailed assessment on the standard basis if not agreed. We had considered making a summary assessment of those costs, but having reviewed the parties' rival submissions, we have decided that a detailed assessment is the more appropriate course.

16. In so directing we record our concern as to the level of the appellant's solicitors' base costs of the appeal (there is a CFA with the solicitors, as with counsel, each providing for a 100% uplift if the appeal was won). Whereas counsel's base costs for the appeal amount to £4,500, which appears to us to be reasonable, the solicitors' base costs are £21,955.50, which appears to us to be overall disproportionate, as does almost every component item making up that total of the base costs. We are also not satisfied that the risks to the appellant justified anything like a 100% uplift.

17. The appellant asks us to order the respondent to make an interim payment on account of costs. We will order a payment of £17,500, to be paid within 14 days of our order.

[…]

Serena Gowling (instructed by Clarke Willmott) appeared for the appellant.

Robert Sheridan (instructed by Nigel Pullen Solicitors) appeared for the respondent.