

IN THE COUNTY COURT AT CANTERBURY

VAT NUMBER 201 3357 19

Claim No. D00CT632

B E T W E E N

William Offley Hinchliffe Friend

Claimant

- and -

Peter Robert Miles

Defendant

Bill of Costs of the Claimant to be assessed on the indemnity basis and paid by the Defendant pursuant to the Order dated 26th May 2020 and to be paid on the standard basis and paid by the Defendant pursuant to order dated 5th November 2019

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Mr and Mrs Friend live in East Northdown Farm. It is separated from East Northdown House by a private road in Mr Friend's ownership ('the Road'). Mr Friend's father sold East Northdown House to Mr Miles in 1982. It is common ground between the parties that there have been numerous disputes on a range of matters since the 1980s.

By 2013, two principal matters were the subject of ongoing litigation. The first was a claim brought by Mr Miles in nuisance and in relation to Mr Friend's use of his land; including the manner in which the Road was used. The second was Mr Miles' claim before the FTT in relation to various rights claimed in respect of land owned by Mr Miles in relation to and over land owned by Mr Friend.

As part of the determination of the second claim, on 15 July 2013 (the day prior to the scheduled hearing of the application), a site view was held at East Northdown. Once the Adjudicator had left, the parties sought to resolve their differences over the course of the day. This resulted in a settlement agreement concluded on 15 July 2013, which was subsequently incorporated into a Tomlin Order in settlement of the FTT proceedings produced to the tribunal and approved by the Adjudicator on 16 July 2013. The operative provisions of both the settlement agreement and Order are in broadly identical form, but the paragraph numbering differs. References herein are to the terms as set out in the schedule to the Order, which will be referred to as 'the Schedule'.

The Schedule provided, amongst other things, for the following:

- (a) At Paragraph 3, that the parties would enter into a Deed of Grant;
- (b) At Paragraph 6, that the parties would enter into a Deed of Grant within 14 days;
- (c) At Paragraph 11, an indemnity in respect of costs incurred in excess of £1,000 in relation to concluding the Deed of Grant;
- (d) At Paragraph 7, that Mr Miles would make no further complaint over the Road or its maintenance;
- (e) At Paragraph 13, mutual undertakings were given not to harass or defame.
- (f) At Paragraph 8, a liberty to apply to the FTT for determination of the terms of the Deed of Grant; and at Paragraph 18, a liberty to apply to the County Court for enforcement of the Agreement.

In accordance with the obligations relating to the Deed of Grant, Mr Friend's solicitors (Furley Page) drafted an initial draft and provided this to Mr Miles' then solicitors (Templetons) on 3 September 2013. Templetons responded on 5 September 2013. Furley Page replied to this on 10 October 2013. Correspondence continued until February 2014, and lay with Mr Miles to respond. Negotiations petered out, and Furley Page wrote again on 16 November 2016, but no response was received to that letter.

The upshot was that the Deed of Grant was yet to be agreed; and much money has been spent in trying to do so. Save in respect of the first £1,000 spent by Mr Friend in trying to bring about this outcome, Mr Miles is obliged to indemnify Mr Friend for his costs of so trying.

As a result of the failure to agree upon the wording of the Deed of Grant, Furley Page approached the FTT under the 'liberty to apply' provision. On 18 January 2017, the FTT indicated that they considered that they lacked jurisdiction following determination of the initial application by the Tomlin Order, and observed that an application should therefore be made to the Court. Therefore, Mr Friend issued these proceedings in August 2017. By these proceedings, Mr Friend sought either that the Court determine or decide the terms of the Deed of Grant; or that the Court approved the version sent

to the Defendant's solicitors in November 2016; and that the parties execute the same.

Furley Page wrote to Mr Miles (who was at the time without a solicitor on the record) on 1 December 2017 asking Mr Miles to confirm whether he was in fact challenging the Court's jurisdiction. It seems that as a result, Mr Miles made an application, amongst other things, to strike out the Claim. Following a number of stays and adjournments, the strike out application was heard in August 2019. DDJ Eyley reserved judgment, by which he comprehensively dismissed all parts of the application on 5 November 2019, and gave further directions to trial. There then followed a further round of witness evidence, with Mr Friend concluding the evidence.

Prior to the Trial, listed for 26 May 2020, on 22 April 2020 the Defendant issued an application to put in two more witness statements in support of his case to admit additional evidence after the time for the filing of evidence had long passed. The Defendant's stance was that in order to properly challenge the Claimant's arguments about the Deed to be drawn up pursuant to the Tomlin Order, it was necessary for the court to have before it his solicitor's notes of the discussions and negotiations which took place leading up to the agreement of the settlement incorporated in the Tomlin Order. However, during the course of this long and drawn out dispute, the Claimant had gradually knocked out provisions that had previously been included in the Deed in order to present a Deed of Grant that, as closely as possible, matched the requirements of the Defendant, irrespective of whether those concessions were necessary, simply in order to bring these convoluted proceedings to an end.

In October 2019, the Claimant removed the provisions which most offended the Defendant, namely clauses 4 and 5. Even then, the Defendant issued an application and in his skeleton argument his counsel, Dr Sampson, still contended, firstly, that the court had no jurisdiction and, secondly, that there had been fraudulent misrepresentations - an allegation introduced for the first time - leading to the Tomlin Order in the first place. It was not at all clear from the skeleton argument or from the evidence on the Defendant's side what the Defendant was continuing to dispute about the Deed of Grant. When His Honour Jonathan Simpkins raised the point at the Trial it was eventually accepted by the Defendant that the Deed of Grant proposed in October 2019 was acceptable subject to a relatively trivial amendment by removing reference to a property. It was not anticipated that that caused either side any problem. Therefore, Dr Sampson submitted, on instructions, that the application was no longer of any substantive importance but that the matters raised in the application and in the witness statement were relevant to costs. His Honour Jonathan Simpkins thereafter proceeded to deal with costs.

Within His Honour Jonathan Simpkins' Judgment he determined that the Defendant had simply failed to engage in this process. The Judgment states, *inter alia*:

43. "The Claimant has resiled and conceded ground purely in order to try and bring this matter to an end. The Defendant has failed to engage and has not, until January, put forward what he says is his real objection."

44. This was a straightforward matter that should have been resolved in a matter of a few weeks after it was agreed, but has led to strike-out applications, other proceedings and recriminations. In my judgment, the indemnity covers that and the Claimant is entitled to be indemnified on the indemnity basis because of the Defendant's conduct as set out above and to be indemnified both for the costs of the drawing up of the Deed of Grant, the negotiations for it and the referral to the county court."

46. "I would have awarded indemnity costs of these proceedings in any event because of the failure of the Defendant to engage and put an end to this

dispute which should have been put to an end to back in July 2013 or shortly afterwards and which after no doubt considerable hard work by his lawyers at that time and by the Claimant's lawyers should have been put to sleep."

47. "I should just mention one further point, which is the without prejudice correspondence. In July 2017, the Claimant's solicitors made an open offer to the Defendant explaining the urgency of completing the Deed of Grant and pointing out that the costs incurred so far were over £15,000. On the same day, a without prejudice save as to costs offer was made offering to accept 75 per cent of the costs, which they said were covered by the indemnity."

48. "That was rejected, but not for nine months when on 20 March 2018 the Defendant's then solicitors wrote inviting mediation but not offering anything of substance and indicating that he wanted the Deed of Grant to follow precisely the Tomlin Order. On 12 June 2018, the proposals were put forward for the Deed of Grant and the Defendant was asked for his comments and counter proposals but none were forthcoming until January 2020."

49. "In my judgment, the Defendant has simply failed to engage in this process and, therefore, the costs are as I have indicated above."

A final order was made on 26 May 2020 which provided for the following:

1.The Deed of Grant in the form annexed to this Order ('the Deed') is to be validly executed by the Defendant and an original version shall be returned to the Claimant's solicitors by 4.00pm on 9 June 2020.

2.In default of the Defendant's compliance with the requirements of Paragraph 1, above, the Claimant may request a District Judge of the County Court sitting in Canterbury to execute the Deed on the Defendant's behalf pursuant to s.39(1) Of the Senior Courts Act 1981 and s.38 of the County Courts Act 1984 by submitting any such request to HI-IJ Simpkins.

3.The Defendant's application is dismissed as being totally without merit.

4.It is hereby declared that the Claimant is entitled to his costs of and incurred in relation to the preparation, execution and referral for determination of the terms of the Deed pursuant to the terms of the indemnity contained Paragraph 8 of the Schedule to the Order dated 16 July 2013 in proceedings between the parties before the Property Chamber, Land Registration Division, First-Tier Tribunal under Ref 2012/0164 ('the Indemnity'). For the avoidance of doubt, the Claimant's entitlement under the Indemnity includes all of his costs incurred within these proceedings.

5.The Defendant shall pay the Claimant's costs falling within the Indemnity pursuant to CPR 44.5; with such costs to be subject to a detailed assessment if not agreed; and with such assessment to be conducted on the indemnity basis.

6.The Defendant shall pay the Claimant's costs of the proceedings, if and to the extent that they are not covered by the Indemnity; with such costs to be subject to a detailed assessment if not agreed; and with such assessment to be conducted on the indemnity basis.

7.The Defendant shall make a payment on account of the costs payable in the sum of £40,000 by 4.00pm on 9 June 2020.

8. For the purpose of case management, the Claim between the parties issued under Claim No FOCT621 shall stand automatically dismissed without further Order upon the execution in valid form of the Deed annexed hereto, or 26 July 2020, whichever is sooner. The costs of those proceedings shall be subject to a detailed assessment if not agreed; and with such assessment to be conducted on the standard basis. If there has been no agreement to costs, then the detailed assessment of the costs of both proceedings shall be managed and heard together.

This matter was conducted by David Hall (Retired) and subsequently Jeremy Ferris, Partner/Solicitor.

Letters written and telephone attendances have been charged at 1/10th the hourly rate.