Case No: D00CT632

IN THE COUNTY COURT AT DARTFORD

Court House
Home Gardens
Dartford
Kent, DA1 1DX

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Before:

HIS HONOUR JONATHAN SIMPKISS

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Between:

WILLIAM OFFLEY HINCHCLIFFE FRIEND **Claimant**

- and -

PETER ROBERT MILES **Defendant**

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MR JONATHAN McNAE (instructed by **Furley Page LLP**) for the **Claimant**
DR TIM SAMPSON (instructed by **Wellers Reece-Jones Solicitors**) for the **Defendant**

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Approved Judgment

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JUDGE SIMPKISS:

1. This case has been listed before me today to deal with a trial of a Part 8 claim. The background is that the Defendant brought proceedings against the Claimant in the FTT in relation to a shared access right of way between the Defendant's and the Claimant's properties. There were also other proceedings and various other issues between the parties in a bitter dispute which has raged backwards and forwards between the parties for, I am told, about 30 years.

2. Just before the hearing in front of the FTT, the parties had a meeting and in July 2013 they came to an agreement to settle the FTT proceedings and a Tomlin Order was made on 16 July 2013. The Schedule to that Tomlin Order (which I will call "the Schedule") makes certain recitals and provides definitions.

> "3. The parties agree to enter into a Deed of Grant in respect of the following rights set out in paragraphs 4 to 6 below and in the manner as set out in paragraph 8 below.
>
> 4. Those rights will be over land coloured blue and a part of the land called 'the road' [which is defined earlier] and the property to be benefited …
>
> 6. In order to give effect to the terms of the contract dated 1 June 1982 and transfer dated 9 November 1982, the parties agree that the Applicant shall pay a quarter of the annual Council Tax obligation or any successor thereto for Mockett Cottage and East Northdown House to the Respondent towards the upkeep of the road payable on 1 April each year in substitution of the provision referring to rateable value.
>
> 7. The parties hereby agree that, for so long as the Applicant remains the freehold title owner of the Orchard, Paddock and East Northdown House, then the Respondent shall request no sums due in accordance with the road maintenance levy, as set out in the transfer dated 9 November 1982 or the covenant above in substitution thereof. Further, for as long as this personal agreement shall be in place, the Applicant shall by his servants, agents or otherwise make no complaint in relation to the road or the quality of the maintenance of the road to the Respondent or any others, including any public authorities or neighbouring landowners.
>
> 8. The Deed of Grant shall be prepared by the respondent's solicitors who shall provide a draft to the Applicant by 8 August 2013. The Applicant shall respond with any comments thereon and an amended draft Deed of Grant, if any, by 2 September 2019. Liberty to apply to either party to the Property Tribunal for determination of the terms of the grant. The parties shall bear their own costs of preparing and executing the Deed of Grant and, if necessary, referral for determination, save that, in the event that the Respondent's costs exceed £1,000, the Applicant

> shall be responsible for the payment of any additional fees, such payment to be made prior to the execution of the Deed and the Applicant shall indemnify the Respondent to the extent therein set out".

And then a contribution to the Respondent's costs:

> "10. The Respondent shall waive his right to enforce a payment by the Applicant of all past road maintenance payments owed to the Respondent in accordance with the provision of the transfer dated 9 November 1982".

3. Paragraph 11 related some nuisance proceedings which the Applicant had brought, and then paragraph 16:

> "16. This Agreement represents the entire Agreement between the parties and the parties hereby confirm that they have not relied on any representations made by the other party in entering into this Agreement, save as contained herein".

4. Following the making of the Tomlin Order and the Schedule coming into force, the Respondent to those proceedings - who is the Claimant in these proceedings - instructed his solicitors to get on with the draft of the Deed of Grant. A draft was drawn up by his solicitors and sent to the Claimant's solicitor. The draft included provisions for the payment of the contribution towards the maintenance of the road, namely one quarter of the Council Tax, from time to time.

5. Clauses 4 and 5 set out requirements that, if the Defendant's property freehold was sold, then the transaction could not proceed without the consent of the Claimant unless and until the purchaser had entered into positive covenants with the Claimant in relation to the obligations to contribute to the upkeep of the road. In other words, the scheme of the Schedule was that there would be a contribution towards the maintenance of the road in return for the grant of the right of way over it, that it would not be enforced while the Defendant owned the freehold of his property and that if he sold it in the Deed this situation was covered with the addition of clauses 4 and 5.

6. Following receipt of the draft, the Defendant's solicitors responded by varying the terms, in particular the terms which required positive covenants to be entered into by the successor in title as a pre-condition of any sale of the property. This dispute and disagreement continued and then there was a lapse of communication between the parties.

7. The Defendant rapidly reached the position that he was not prepared to agree anything that did not fit precisely within the wording that was set out in the Schedule to the Tomlin Order. It is also the case that the Defendant's solicitor put forward additional terms on his behalf beyond the strict terms set out in the Tomlin Order. Matters resuscitated in 2016, but again there was a failure of the parties to agree the form of the Deed.

8. The Claimant then submitted a referral to the Tribunal with a view to getting the Tribunal to determine what the terms of the Deed should be. Rather surprisingly, the Tribunal said that it no longer had any jurisdiction in the matter because of the Tomlin

Order and washed its hands of that aspect of the dispute. This led the Claimant to bring these proceedings for the court to determine the terms of the Deed of Grant.

9. This matter was listed for trial for one day starting this morning and on 22 April 2020 the Defendant issued an application to put in two more witness statements in support of his case. Previously, he had made an application to strike out the claim on the grounds that it should have been brought in the Lands Tribunal, notwithstanding that the Lands Tribunal had refused to entertain the referral and that, absent that, the court had no jurisdiction.

10. A deputy district judge dismissed that application and this is why the matter proceeds before me today. Although Dr Sampson for the Defendant has contended that the court did not have jurisdiction, that has not been persisted with today in front of me.

11. I will come to the application in a minute. It is an application to admit additional evidence after the time for the filing of evidence has long passed. What the Defendant says is that, in order to properly challenge the Claimant's arguments about the Deed to be drawn up pursuant to the Tomlin Order, it is 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.

12. During the course of this long and drawn out dispute, the Claimant has 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, matches the requirements of the Defendant, irrespective of whether those concessions are necessary, simply in order to bring these convoluted proceedings to an end.

13. In October 2019, they removed the provisions which most offend the Defendant, namely clauses 4 and 5. Even then, the Defendant issued an application and in his skeleton argument his counsel, Dr Sampson, still contends, firstly, that the court has 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.

14. It is 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 I raised the point and gave Dr Sampson an opportunity to discuss matters further with his client, 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.

15. It is not anticipated that that causes 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.

16. Costs is what this case is now all about and I will now deal with the issues of costs. Before doing so, the issues on costs are as follows. Firstly, the indemnity contained in the Tomlin Order. The Claimant submits that he is entitled to the costs of drawing up the Deed of Grant and of any referral of this case to the court for the court to resolve disputes between the parties. The indemnity covers all costs exceeding £1,000, but if that is not right then the Claimant claims his costs of these proceedings.

17. The Defendant counters that by submitting that the Claimant has unreasonably insisted at an earlier stage, until October 2019, in including terms in the Deed of Grant which was not open to it to include under the Tomlin Order. This means that the Tomlin Order has to be construed to see what terms have been agreed and whether the terms that were disputed and have now been removed were open for argument in the process set out in paragraph 8 of the Schedule to the Tomlin Order.

18. In short, it is accepted by the Claimant that the indemnity is not an open-ended indemnity, but that there is a rebuttable presumption that the costs will be reasonably incurred and are reasonable in amount subject to the possibility that those costs could be assessed on the indemnity basis - *Gomba Holdings UK Limited*, referred to in the White Book at paragraph 44.5.1. In my judgment, it is implicit in the indemnity that the costs incurred that are recoverable under it should be reasonably incurred and of a reasonable quantum. It is not a licence for the Claimant to print money.

19. Dr Sampson raised a number of points in the defence to the claim which, to a significant extent, no longer arise. Firstly, he submits that the Schedule in the Tomlin Order gives the FTT exclusive jurisdiction over issues connected to the terms of the grant. That is what the Schedule expressly says. Unfortunately, the FTT has declined jurisdiction, leaving the court as the only option for the Claimant to resolve the dispute.

20. In construing a contract, the court will take a purposive and commercial approach to it and attempt to give effect to the terms of an agreement between the parties rather than strike down what would otherwise work as an agreement on technical grounds. An example of that is *Arnold v Britton* [2015] AC 1619 at paragraph 14.

21. In the absence of any assistance from the FTT, the courts will regularly do its best to provide an alternative source of resolving disputes. In, for instance, a specific performance action the court will push through the conveyancing procedure - and this is no different, in my judgment. What has happened here is that the county court has been substituted for the FTT but, in any event, this matter was dealt with by Deputy District Judge Eyley and there is no appeal against his decision.

22. The next point raised by Dr Sampson is that the terms of the proposed grant exceed the terms agreed in the Tomlin Order. Helpfully, the various stages of the negotiation of the Deed of Grant have been included in the bundle and the most relevant one is dated 16 November 2016. The amendments are shown in red and further amendments by the Defendant cross out points that he has objected to through his solicitors.

23. Paragraph 4 is in the following terms, headed up, "Grantor's obligations":

> "The grantor covenants with the grantee that the grantor or his successors in title or assignees shall provide written consent for the registration of a disposal at the Land Registry immediately upon receipt of a deed of covenant, promptly executed by the person to whom the disposal is being made, provided that there are then no outstanding obligations due from the grantee under the terms of this deed or other deeds or documents referred to in this deed. Following any disposal, the grantee or, as appropriate, any successor who has subsequently executed a deed of covenant, shall, on full compliance with the obligations, set out herein or clause having the same effect in any deed of covenant

> and, unless liability to make a payment has arisen but not been discharged, be released from all further liability to make payments hereunder".

24. Dr Sampson makes two points. Firstly, that, under the terms of the Schedule, there is no similar obligation and his client at an early stage said that he was not prepared to depart from the precise terms that are set out in the Tomlin Order. In my judgment, when one looks at the Tomlin Order (which I have cited above) it is quite clear that the parties intended that there should be some contribution by the Defendant in relation to the Defendant's property towards the maintenance of the track. How this was to be quantified was set out in the Tomlin Order: a quarter of the Council Tax for two properties.

25. There was then a provision in clause 7 waiving any claim to that contribution from the Defendant during the Defendant's ownership of the freehold of his properties. What possible reason could there have been for including clauses 6 and 7 unless it had been intended that successors in title were to be bound by these covenants and, therefore, the proposal to include a covenant such as clause 4 in the draft Deed of Grant was necessary in order to comply with what had been agreed in the Schedule.

26. Dr Sampson submits that clause 5, namely a reference to having complied with all obligations in other transfers, would open up the possibility of the Claimant refusing to agree to a sale of the Defendant's property until the Defendant had complied with a whole lot of obligations that he was under in relation to earlier transfers such as the transfers in 1982.

27. The flaw is that there is an express provision in the Tomlin Order that waives any entitlement to past maintenance charges but, if this is a good point, it was never raised by the Defendant or by his solicitor. Indeed, the Defendant has never put forward any proposals apart from those drafted by his solicitor in 2016 - and originally, to some extent, in 2013 - but no proposals in relation to this provision.

28. Had it been suggested that it was cast too widely and might be used to obstruct a sale on grounds other than that current maintenance charges had not been met and paid, then I am sure that was a matter for a simple redraft to meet the point. The reality is that the Defendant has not put forward any reasons for his stance other than that he is only going to agree what the Schedule said - and that is all he was bound to agree - until January 2020.

29. In my judgment, putting forward these terms in the context of this sort of Deed was perfectly straightforward and one would expect any competent conveyancing solicitor to include them and for them to be agreed in most documents. Dr Sampson submits that there has been no agreement for any terms other than those expressly covered by this Schedule; in other words, if the Claimant is right then this is an Agreement to agree.

30. This matter is disposed of by the decision in *Associated British Ports v Tata Steel UK Limited*. In that case, there was an agreement between the Claimant and the Defendant steel company relating to the use of a tidal harbour near Port Talbot where the Defendant operated his steel works. In that licence there was a provision for the renegotiation of certain of its terms after a period of time if there were changes in the

financial circumstances. It was argued that this was an agreement to agree, therefore the provision was void for uncertainty.

31. Rose J, as she then was, emphasised that each case turned on its own facts but found that the authorities supported the principle that such provisions could be enforceable, and in paragraph 34 she says this:

> "In my judgment, this case clearly falls in the second category of cases, where the court is particularly reluctant to find a clause is void for uncertainty. It is not difficult to see the commercial sense behind including a clause of this kind. ABP and Tata are in a relationship of mutual interdependence. Tata's ability to operate its steel works is dependent on acquiring the jetty services from ABP and the viability of the Tidal Harbour is currently dependent on the imports of a large tonnage of material by Tata through its facilities".

32. It was then argued that there were no criteria either within or outside the licence by which the arbitrator to whom any dispute about the terms to be agreed was to be referred could decide how to amend the terms of the licence and that point did not amount to an insuperable hurdle. Where parties agree to sell particularly land or other disposals relating to land, it was common before the extension of land registration across all freehold property for arguments to arise about the wording of conveyances - similarly, with leases - and, ultimately conveyancing counsel appointed by the court might have to draft the document.

33. But there has been no difficulty historically in the courts working out the standard form of words to be used and I see no such problem in this case relating to a Deed of Grant of a right of way, particularly when the only point really in dispute between the parties has been the wording and enforcement of an agreed covenant to contribute to the upkeep of the road.

34. It is fair to say on behalf of the Defendant that until October 2019 the Deed of Grant that is, in fact, going to be drawn up in this case was not in the form that it now is and, even in October 2019, since then, a further tweak has been made. But, in my judgment, the Claimant has not behaved in any way improperly or unreasonably in proposing the terms that he put through his solicitors in any of the drafts that have gone to date. They are within the ambit of the Tomlin Order. They are sensible terms and at no stage does it appear that the Defendant has properly engaged in the process of trying to resolve this longstanding and protracted dispute.

35. I, therefore, turn to deal with the costs issues that arise. I will start with the application issued on 22 April 2020. By the application, the Defendant sought the permission of the court to rely on a further witness statement from Mr Miles dated 22 April 2020. Witness statements for the trial, which were directed by Deputy District Judge Eyley and fixed some time ago, were to be served by 17 January 2020.

36. The Defendant says that it was not until then that he was aware that, in fact, his solicitor had been told by the Claimant's solicitor during the negotiations which led to the Tomlin Order that all the other people in the road contributed to its upkeep. In his witness statement, he asserts that this was a fraudulent misrepresentation.

37. I have looked at the witness statement carefully and I can see absolutely no substantiation for that allegation. The highest that the Defendant can put his case is that he, or someone, has looked at the land registration documents for the other properties and found no indication of any covenant in any transfer to contribute to the upkeep. That does not mean that the other owners have not contributed to the maintenance of the track.

38. Where a track is in shared ownership - particularly where heavy commercial vehicles are using it, as apparently is the case here - then it is the interests of all parties using it to pay something towards the cost of maintaining it, since otherwise it will become impossible. Simply all that the Defendant is doing is asserting that this was a fraudulent misrepresentation. Furthermore, and more significantly, he is prepared to put forward allegations of that nature but not to do anything with them.

39. At the start of this hearing, I asked Dr Sampson if his client was seeking to set aside the Tomlin Order on the grounds of fraudulent misrepresentation or, alternatively, seeking to rectify it in some way. After taking instructions, I was told that that was not the case. The other purpose of this evidence is to put before the court the parties' discussions leading up to the Tomlin Order. None of that is admissible.

40. It is well-established that, in construing a contract or an agreement such as a Tomlin Order Schedule, the court can look at the background factual matrix but it cannot look at the parties' negotiations in order to decide what they really intended. In this case, there is a fatal flaw in any argument that this material is relevant because there is an entire contract clause at the end of the Schedule.

41. In my judgment, the application was doomed to fail on its merits but was, in any case, far too late. It should be treated as an application for relief from sanctions. I have seen no justification for this evidence, if it was relevant, not being obtained a long time ago since the Defendant was a party to the negotiations and if this was a matter that was of importance to him he should have investigated it in 2013 or 2014. Furthermore, he has sought to enforce the Tomlin Order in some respects. The upshot is that the application would not have succeeded, even though it was not pursued in the end and, in my judgment, was totally without merit.

42. This leaves the indemnity. There are two ways in which the Claimant can recover costs. One is under the indemnity and the other is under CPR 44, under the normal rules for costs of proceedings. It has not, in my judgment, been established that the Claimant has behaved unreasonably in submitting the additional wording in the Deed of Grant going beyond the precise wording of the terms of the Tomlin Order.

43. All that has been sought is to give effect to the underlying agreement in the Tomlin Order, namely that, after the Defendant had ceased to occupy the freehold, it was agreed that successors in title would be contributing towards the maintenance of the track. There is no point in such a provision unless it is binding on successors in title. 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.

45. Dr Sampson suggested that the county court referral was not within the ambit of the indemnity, but that cannot be right. If the county court has any jurisdiction, then the indemnity must also apply. It is only if the wording of the Schedule meant that the Tribunal had exclusive jurisdiction that it could be argued that the indemnity does not apply.

46. But, even if it had not applied, 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.

This Judgment has been approved by the Judge.