

UPPER TRIBUNAL (LANDS CHAMBER)



LC-2021-000472

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPLICATION UNDER SECTION 84, LAW OF PROPERTY ACT 1925

BETWEEN:

(1) COLLEEN CAIRNS

(2) KIM MOORE

Applicants

-and-

**THE COMMITTEE OF THE PAINSHAWFIELD, BATT HOUSE
AND BIRCHES NOOK ESTATE AND OTHERS**

Objectors

On 26 May 2023 the Tribunal handed down its decision dismissing the applicants' application filed on 23 September 2022 for the discharge or modification of restrictions affecting 21 Cade Hill Road

The Tribunal has received an application from the Estate Committee for the payment of its costs and for a payment on account and submissions dated 7 June and 12 and 29 July have been exchanged by the parties

No application for costs has been received from any other objector

Having considered the application and the submissions received:

IT IS ORDERED:

- 1. That the applicants do pay the costs of the Estates Committee to be the subject of detailed assessment by the Registrar if not agreed**
- 2. That the applicant do pay the sum of £50,000 on account of their final liability, by 30 September 2023**
- 3. No order is made in respect of the costs of any other party**

REASONS

- 1. It is not in dispute that the Estate Committee has succeeded in the proceedings and, in principle is entitled to its reasonable costs.**

2. It is suggested on behalf of the applicants that (a) the extent to which the Committee failed in the points it chose to argue, and (b) its suggested unwillingness to engage in mediation, are reasons for the Tribunal to limit the proportion of its costs which the applicants should be required to pay.
3. There was only one issue in the proceedings, namely, whether the restrictions should be modified or discharged to enable the applicants' proposed development to proceed. The fact that the Committee did not succeed on every point it took is not a reason why it should not recover its costs without any deduction. The observations of other judges on issue-based costs orders cited by the Committee in its submissions of 12 July reflect the Tribunal's usual approach, and there is nothing in this case which justifies a departure from it.
4. Having read the "without prejudice" correspondence between the parties' solicitors, and directly between the Committee and the applicants, we do not think it is accurate to suggest that the Committee refused to engage in alternative dispute resolution or mediation. On the contrary, immediately after the application commenced Mrs Rae offered mediation in her letter of 21 November 2021. The correspondence in June and July 2022 shows that the Committee was willing to engage with the detail of the applicants' proposals. The Committee's concern about the costs of mediation was understandable but would not in itself have been a good reason to refuse to participate (since the alternative was the much more substantial cost of these proceedings). It is clear from Mrs Rae's email of 8 August 2022, however, that the Committee remained open to mediation or to a meeting without solicitors, as the applicants had suggested. That offer marks the end of the "without prejudice" exchanges which we have been shown. Nothing in those exchanges demonstrates that the Committee was unwilling to explore alternative ways of resolving the dispute or provides any justification for reducing the costs it is entitled to recover.
5. It is regrettable that, for whatever reason, the parties did not engage the assistance of a trained mediator. It is apparent from the correspondence that the Committee was not hostile to the principle of two dwellings being constructed on the plot and was open to persuasion that an exception to its usual guidelines should be made. The conditions which the applicants sought to attach to any mediation were unhelpful and would have diminished the weight which we would have given to a refusal by the Committee to engage, but there was no such refusal.
6. It is appropriate that the Committee should receive an interim payment in respect of its costs. The total costs incurred by the Committee are said to exceed £132,000 (including VAT), which, by way of guidance to the Registrar, we regard as a disproportionate figure for a case of this nature. We are not in a position to comment on the components of that total other than (1) that it is not clear to us what role Charles Morgan played (he was not a witness and any fee payable to him was omitted from the total originally given by the Committee's solicitors, and (2) this was not a case in which the services of leading counsel were necessary. We fully appreciate the significance of the issues for the Committee, which was free to instruct whichever counsel it chose, but there was nothing of such legal or factual complexity as to justify imposing the additional cost of counsel of special standing on the applicants.

7. Bearing these matters in mind the interim payment we consider appropriate is £50,000

Martin Rodger KC,
Deputy Chamber President

Peter D McCrea FRICS FCI Arb

3 August 2023