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Court of Appeal endorses £200k indemnity costs order in dispute over reading a gas meter built on a neighbour's land

Frank & Carol Dickinson v. Mojgan Cassillas
[2017] EWCA Civ 1254

Article by David Bowden

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Executive speed read summary

This was a neighbour dispute concerning 2 detached houses. The owner of one refused access to her neighbour to read the gas and electricity meters located on her land. Gates were built to prevent access. An iron and wood decorative feature was built so that no guttering could be built on a porch. The defendant brought a court claim for a declaration of her rights and an injunction. She made an offer pre-issue to settle in 2008. 2 part 36 offers were not accepted. The defendant succeeded at trial. The trial judge made an order for indemnity costs ordering these to run from January 2009. He also made an order for a 10% uplift for failing to beat the Part 36 offer. An appeal to the Court of Appeal has been roundly rejected. Lord Justice David Richards rules that there was no basis for interfering with the findings of the judge below. The rulings below on indemnity costs and 10% uplift were upheld. However the Court of Appeal expressed concern at the high level of the defendant's costs which were said to exceed £200,000. The defendant's solicitors acted on a CFA basis. As this claim was issued before April 2013, a success fee of up to 100% of base costs can be claimed.

Frank & Carol Dickinson v. Mojgan Cassillas
[2017] EWCA Civ 1254 *11 August 2017*
Court of Appeal, Civil Division (Lords Justices Longmore and David Richards)

What are the facts of the case?

The Dickinsons and Mrs Cassillas lived in adjoining detached houses in an estate in Davenport built in the late 1980s. One of the flank walls to Mrs Casillas' house was built on the boundary of the Dickinson's land by the developer. The developer put the gas and electricity meters for Mrs Cassillas house on the Dickinsons' land – this was done as the Dickinsons' house was built first. Mrs Cassillas tried to build a front porch but was thwarted because the Dickinsons built an iron and wood decorative feature on their house that prevented her from putting any guttering on the porch. The Dickinsons then kept their drive locked from 2003 and refused all access to their land even for Mrs Cassilllas to read her gas or electricity meters. Mrs Cassillas brought a claim in the county court to determine her rights under her title deeds. The judge below made declarations in Mrs Cassillas' favour and also granted her an injunction against the Dickinsons.

How was the case funded?

The solicitors for Mrs Cassillas acted for her on a 'no win, no fee' conditional fee agreement. As this claim was issued before April 2013, a success fee of up to 100% of base costs can be claimed.

What costs were incurred?

By the time the case reached the Court of Appeal, counsel for Mrs Cassillas said her costs amounted to '*well over £200,000'*.

What offers were made to try and settle this case before proceedings were issued?

Mrs Cassillas made an offer to the Dickinsons to settle in December 2008. This was on the basis that she could put up guttering to her porch, have access to read her meters and access too to check that her own property was not being harmed by anything done on the Dickinson's land. That offer went unheeded.

What Part 36 offers were made?

Proceedings were started in May 2013. In those proceedings Mrs Cassillas made 2 part 36 offers – one in December 2013 and the other in July 2014 – but again these offers were not accepted.

What order did the judge below make on costs?

Following the end of a 2 day contested trial in which Mr Recorder Khan heard evidence and cross examination of all 3 neighbours, he reserved his judgment. On 20 March 2015 he handed down his judgment in favour of Mrs Cassillas. He then gave a separate judgment on costs in these terms:

- Indemnity costs from 9 January 2009 and standard basis costs before in Mrs Cassillas favour, and
- 10% uplift on costs because the Dickinsons had failed to beat the Part 36 offers.

What were the grounds of appeal?
There were these 4 grounds of appeal, namely that the judge below was wrong:

- on his interpretation of '*inspection rights'* under the title deed,
- in ruling that Mrs Cassillas had a right of access to read her gas and electricity meters,
- in ruling that Mrs Cassillas could erect guttering on her porch which overhung the Dickinsons' land, and
- to make the order for indemnity costs that he did.

What ruling did the Court of Appeal make on the property rights?
Lord Justice David Richards gave the judgment of the Court of Appeal. He agreed with the ruling below made by Recorder Khan. He ruled that the words in property transfer document were '*clear and unambiguous'* and that the judge below '*was right to say that it would be absurd if there were no right to inspect the property*'.

On the gas/electricity meter, David Richards LJ noted that these '*were positioned by the developer on the boundary wall*' and that it '*cannot have been intended that the purchaser of Number 96 and their successors in title would be unable to read the meters'* because that '*would be an absurd situation'*. He ruled that the '*legal position is clear'* and referred to a ruling made by Lord Neuberger in a House of Lords case (*Moncrieff v. Jamieson* **[2007] UKHL 42**) that **'***the law will imply a term into a contract, where, in the light of the terms of the contract and the facts known to the parties at the time of the contract, such a term would have been regarded as reasonably necessary or obvious to the parties'*. Applying this David Richards LJ ruled that this was **'***a clear case for the application of this principle'* and that '*even if a right of access to read the meters cannot be spelt out'* of paragraph 4 of the transfer document then it was '*implicit in the transfer'*.

On the positioning of the porch gutter, David Richards observed that '*given that the flank wall of the house at Number 96 was built on the boundary line, it was inevitable that gutters on the house as constructed would overhang the land at Number 98*'. He ruled that he thought the decision of the judge below on this '*was right'*. Because of the locked gates preventing access, David Richards LJ agreed with the trial judge that this '*amounted to a substantial interference with the exercise by Mrs Cassillas of her rights of access*' and that there was '*no basis for interfering with the Recorder's findings'*. The Recorder ordered the iron and wood decorative feature be removed so that Mrs Cassillas could put up guttering.

What ruling did the Court of Appeal make on costs?
On indemnity costs, David Richards LJ agreed with the finding of the judge below that the approach of Mr & Mrs Dickinson 'had been driven by a collateral reason or agenda, which was to get the meters moved' and that they '*had not come to court to assist the court in resolving the dispute but to assist themselves*'. David Richard LJ ruled that Mrs Casillas had '*overwhelmingly succeeded'*.

David Richards LJ said the judge below was right to take into account these 4 factors:

- Mrs Casillas' pre-issue offer in December 2008,
- the failure of Mr and Mrs Dickinson to engage in any genuine or realistic attempt to settle the case,
- the conduct of Mr and Mrs Dickinson, and
- the recorder's '*adverse assessment of the honesty of their evidence'*.

David Richards LJ agreed with the judge below that the '*order at trial was at least as advantageous as the offers made by Mrs Casillas so that she was entitled to indemnity costs'* from 21 days after the 1st part 36 offer. He ruled that the judge below '*was entitled to take into account'* these 4 factors not just in deciding to award indemnity costs but also to order them from 9 January 2009. David Richards LJ concluded that it could '*not be said that the recorder has exercised his discretion on an incorrect basis or that his order is outside the wide discretion given to judges on issues of costs*' and that accordingly there were '*no grounds for this court to interfere with his order'*.

On the 10% uplift, David Richards LJ rejected a submission that this was inapplicable because the December 2008 offer predated paragraph 22(7) of the Civil Procedure (Amendment) Rules 2013 - **SI 2013/262 (L. 1).** He ruled that in relation to part 36 offers that there was '*no restriction in 36.17(4)(d) as to the indemnity costs to which the uplift applies*'. However he cautioned that even allowing for

assessment of the costs on the indemnity basis, £200,000 '*appears to be an extraordinarily high figure for a case involving a minor property dispute*'. He went on to point out that although an assessment on the indemnity basis '*removes the requirement that the costs should be proportionate to the matters in issue*' nevertheless they must '*still be reasonably incurred and reasonable in amount'* and that the '*burden of showing that they are unreasonable lies on Mr and Mrs Dickinson*'. In what may fan the flames of this dispute still further David Richards said that both sides '*can expect the costs to be scrutinised on assessment'*.

What will happen next with this case?
There is the possibility that costs may be agreed. If not, then in view of their amount, they will no doubt be assessed in due course by the SCCO.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.