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Case No: LC-2023-684

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: 2022/0118

29th July 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Land Registration – Easements – claim to the acquisition of a right of way by prescription – what is required to prevent the use relied upon being use as of right – appeal and cross appeal of the decision of the First-tier Tribunal – decision on the incidence and assessment of costs in the First-tier Tribunal and the Upper Tribunal (Lands Chamber)

BETWEEN:

ADAM THOMAS NICHOLSON (1)
GAVIN STAFFORD (2)

Appellants

-and-

IAN REGINALD HALE (1)
JACQUELINE HALE (2)

Respondents

4 Derby Terrace,
The Park,
Nottingham,
NG7 1ND

The Chamber President, Mr Justice Edwin Johnson
17th July 2024
(by remote hearing)

Paul Wilmshurst, instructed by direct access, for the Appellants
The First Respondent (Ian Hale), in person, for the Respondents

The following case is referred to in this decision:

Knight v Maggioni [2006] EWHC 90056 (Costs)

DECISION ON COSTS

Introduction

1. This case is concerned with a dispute over whether a prescriptive right of way has been acquired by the Respondents over part of the Appellants' property. The FTT, by a decision dated 20th July 2023, decided that the right of way had been acquired by the Respondents and made an order directing that the Chief Land Registrar give effect to the Respondents' application to register the right of way, as a prescriptive easement, against the title to the Appellants' property. The case came before the FTT by reason of the decision of the Chief Land Registrar to refer to the FTT the application for registration of the claimed right of way.

2. The appeal and cross appeal against that decision (**"the FTT Decision"**) came before me on 14th May 2024. I produced my decision on the appeal (**"the Appeal"**) and the cross appeal (**"the Cross Appeal"**) on 14th June 2024. For the reasons set out in my decision (**"the UT Decision"**) I allowed the Appeal, on one of the two grounds advanced by the Appellants, and dismissed the Cross Appeal.

3. By an order made on 14th June 2024 (**"the UT Order"**) I allowed the Appeal, on the basis of the ground of appeal identified in the UT Decision as Ground 1, and dismissed the Cross Appeal. I also set aside the FTT Decision and the consequential order of the FTT directing the Chief Land Registrar to register the right of way claimed by the Respondent. By the UT Order I re-made the FTT Decision as a decision that the claim to the Right of Way (as defined in the UT Decision) failed because the use relied upon by the Respondents had not been *"as of right"* for the required period of 20 years.

4. So far as costs before the FTT were concerned the FTT made an order (**"the FTT Costs Order"**) on 13th November 2023 that the Appellants, as the unsuccessful parties in the FTT, pay the Respondents' costs, summarily assessed in the sum of £10,481.60. The FTT Costs Order was stayed by the FTT, pending the outcome of the Appeal and the Cross Appeal.

5. By the UT Order I set aside the FTT Costs Order. There was however considerable disagreement between the parties as to what order I should make in relation to costs, both in respect of the proceedings in the FTT (**"the FTT Proceedings"**) and in respect of the costs of the Appeal and the Cross Appeal. In these circumstances I directed a further hearing to consider these various costs.

6. I heard the parties on the issues in relation to costs at a hearing on 17th July 2024. The hearing was held on a remote basis. Mr Wilmshurst, counsel, appeared for the Appellants. The Respondents appeared in person. Mr Hale, the First Respondent, spoke on behalf of the Respondents.

7. This is my decision on the costs of the FTT Proceedings and the Appeal and the Cross Appeal, following the hearing on 17th July 2024 (**"the Costs Hearing"**).

8. What follows is as short a statement as I can achieve of my reasons for the costs order which I have decided to make. The background to the Appeal and the Cross Appeal and my reasons for allowing the Appeal and the Cross Appeal are set out in the Decision. In these reasons I assume familiarity with the Decision and the FTT Decision. Save for the expressions defined in this decision on costs, defined expressions in the UT Decision have the same meaning in this statement of my reasons. I will refer to the Upper Tribunal (Lands Chamber), in which I am sitting, as **"the Tribunal"**. Italics have been added to quotations.

9. I repeat the point that my reasons for the decisions on costs which I have made are shortly stated in this decision. I received a good deal of documentation for this hearing, in the form of written submissions, statements of costs, authorities and other documents. I also heard oral argument which occupied half a day. All this was well in excess of what would normally be permitted in relation to argument over the costs of a case of this kind. While all of the material put before me (written and oral) has been taken into account in reaching this decision, my reasons are stated as shortly as possible, without detailed exposition.

10. So far as the costs of the Appeal and the Cross Appeal (**"the UT Costs"**) are concerned, I have jurisdiction to make a costs order in relation to the Appeal and the Cross Appeal because both were appeals from the FTT in relation to a reference by the Chief Land Registrar; see Rule 10(6)(g)(i) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

11. I take the view that I have jurisdiction to make an order in relation to the costs of the FTT Proceedings (**"the FTT Costs"**). I take this view because, following my setting aside of the FTT Costs Order, I have the ability to re-make the FTT Decision pursuant to Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. I have already exercised that power by re-making the FTT Decision as a decision that the claim to the Right of Way failed because the Use was not as of right for the required period of 20 years. I note that my powers under Section 12 include, where I am acting under subsection (2)(b)(ii), the power to make any decision which the FTT could have made if the FTT were re-making the FTT Decision. This seems to me include making a decision in relation to the FTT Costs.

12. In theory the FTT Costs could be remitted to the FTT for determination in light of the UT Decision. So far as the incidence of the FTT Costs was concerned, the parties were agreed that I should deal with the incidence of the FTT Costs for myself, rather than remitting this issue to the FTT.

13. Turning to the assessment of the UT Costs and the FTT Costs, the parties were agreed that I should make a summary assessment of the UT Costs, so far as I decided to make an order for their payment. The Appellants' position was that I should also make a summary assessment of the FTT Costs, so far as I decided to make an order for their payment. The Respondents' position was that I could make a summary assessment of

the FTT Costs, but that I might take the view that their assessment raised issues which were better remitted to the FTT, for consideration by the Judge.

14. So far as both the incidence and assessment of costs are concerned, I am satisfied that I should decide the incidence and (so far as I decide to make an order for the payment of any costs) the assessment of both the UT Costs and the FTT Costs for myself. I do not think that it would be either proportionate or sensible to put the parties to the time and expense of a remission of the FTT Costs to the FTT. It seems to me that these considerations substantially outweigh the fact that, as I readily acknowledge, I have the disadvantage of not having heard this case in the FTT.

15. A complicating factor in relation to the Costs Hearing itself was that the Appellants' claim for their costs included a claim for the costs of Costs Hearing itself. Prior to the Costs Hearing there was an exchange of correspondence between the parties, on a without prejudice save as to costs basis, which I understood to involve offers made in relation to the costs issues to be resolved at the Costs Hearing. The Appellants included this correspondence in their bundle of documents for the Costs Hearing. Fortunately, when reading this bundle, I noticed that the correspondence was on a without prejudice save as to costs basis, and did not read this correspondence prior to the Costs Hearing. My inability to consider this correspondence at the Costs Hearing, before I had made my decisions on costs, meant that I could not make a decision on the incidence of the costs of the Costs Hearing or, if required, on the assessment of the costs of the Costs Hearing until after I had made my decisions on the remainder of the costs.

16. In order to manage this problem, I deferred my decisions on the incidence and assessment of the costs of the Costs Hearing until after I had circulated this decision in draft to the parties, for corrections on the usual confidential basis. In addition to suggesting corrections to the draft version of this decision, I permitted the parties to make brief further submissions on the costs of the Costs Hearing, with the benefit of my decisions on the remainder of the costs, with those brief submissions including such reference to the without prejudice save as to costs correspondence as the parties wished to make. So far as the assessment of the costs of the Costs Hearing was concerned, I heard argument on the assessment of these costs at the Costs Hearing itself, without prejudice to the question of whether such assessment would be required.

17. Following circulation of this decision in draft form, the parties duly submitted brief submissions on the costs of the Costs Hearing, which made reference to the without prejudice save as to costs correspondence. This final decision on costs therefore includes my decision on the costs of the Costs Hearing. My decision on the costs of the Costs Hearing was not in the draft version of this decision circulated to the parties.

18. For the reasons explained in my three previous paragraphs, my decision on the costs of the Costs Hearing is to be found at the end of this decision. Where I refer to costs in the remainder of this decision, I am excluding the costs of the Costs Hearing from such reference, unless I indicate to the contrary.

19. Both parties were agreed that, in making my decisions on costs, I was entitled to apply the relevant provisions of the Civil Procedure Rules 1998 (**"the CPR"**). This rendered it unnecessary to address the question of what ability I have to apply the provisions of

the CPR, in making my decisions on costs in relation to a case in the FTT and Upper Tribunal (Lands Chamber). A point I would make in this context is that I plainly do have a discretion as to the costs which I am considering in this decision. What I can say is that, in the exercise of my discretion over costs, it seems to me appropriate to apply the relevant provisions of the CPR, whether or not, technically, they apply to a decision of this kind.

The incidence of the FTT Costs and the UT Costs

20. I start with the incidence of costs. The application of the Appellants is for an order for payment by the Respondents of the Appellants' costs of the Appeal and the Cross Appeal (**"the Appellants' UT Costs"**) and the Appellants' costs of the FTT Proceedings (**"the Appellants' FTT Costs"**). Mr Wilmshurst's position, on behalf of the Appellants, was a simple one. The Appellants had won in relation to the Appeal and the Cross Appeal and, by reason of the UT Decision, it was apparent that the Appellants should have won in the FTT, thereby justifying a complete reversal of the FTT Costs Order. By reference to the usual principle of costs following the event, Mr Wilmshurst submitted that the Appellants were entitled to the Appellants' UT Costs and the Appellants' FTT Costs.

21. Mr Hale did not dispute the basic principle that the Appellants should have their costs, but he submitted that there were good reasons for applying substantial discounts to the Appellants' costs. His submissions fell into three broad parts. First, taking an issues based approach, the Appellants had lost on significant issues in the FTT and in the UT, which justified substantial discounts. Second, the Appellants had, without good reason, refused offers of alternative dispute resolution (**"ADR"**) in relation to both the FTT Proceedings and the Appeal and the Cross Appeal, which should be reflected in the costs orders which I make. Third, the Appellants had not come to the FTT Proceedings with clean hands, in the sense that the Appellants had removed the Staircase without prior warning or notice to the Respondents, thereby presenting the Respondents with a fait accompli. The submission was that I should reflect the disapproval of this kind of conduct on the part of the Tribunal by applying a discount to the Appellants' costs.

22. So far as the Appeal and Cross Appeal are concerned, I can see no case for applying an issues based approach to the UT Costs. It is true that the Appellants lost on Ground 2, but I agree with Mr Wilmshurst that there was a considerable overlap between the arguments in relation to Ground 1 and the arguments in relation to Ground 2. I cannot see that the time and costs of the Appeal and the Cross Appeal would have been materially different if Ground 2 had not been pursued by the Appellants. To my mind Ground 2 qualifies as an incidental issue, lost by the Appellants along the way to victory in the Appeal and the Cross Appeal. In those circumstances I conclude that there is no justification for an issues based approach to the UT Costs. It seems to me that the principle of costs following the event is not displaced by the Appellants' defeat on Ground 2. I therefore apply no discount to the Appellants' UT Costs for this factor.

23. Turning to the FTT Proceedings, the position seems to me to be different. Although the hearing in the FTT only lasted a day, it is clear, both from the FTT Decision itself and from the submissions of counsel for the Appellants, to which I was taken by Mr Hale, that considerable time was taken up with the question of whether the Respondents could demonstrate the required period of 20 years use of the Staircase. It is clear that the

evidence and the argument were not confined to the issue of the legibility of the Sign, on which the Appellants won, or the effect of the Wording, on which the Appellants should, by reference to the UT Decision, have won. It is clear that the Judge had to spend some considerable time dealing with issues relating to the question of whether the Use had occurred for the required period of time. The Respondents were successful in demonstrating, on the evidence, that the Use had endured for the required period of time. In my judgment, this is a factor which does justify a departure from the principle of costs following the event. I consider it appropriate to apply a discount to the Appellants' FTT Costs to reflect this factor. The amount of the discount is necessarily a rough and ready assessment. I have decided that a 25% discount to the Appellants' FTT Costs is a fair reflection of this factor.

24. I come next to offers of ADR. In relation to the FTT Costs, Mr Hale referred me to a letter from the Respondents, dated 3rd December 2020, which offered ADR, albeit on the following terms:

> *"Our clients are prepared to engage in Alternative Dispute Resolution (ADR) in an effort to resolve this matter without litigation. You should note however that the likely loss of property value at the Western end of the terrace if the steps are not replaced makes it unlikely that our current or anticipated clients would be able to accept anything less by way of settlement than reinstatement or replacement of Steps to the Terrace. We anticipate that the Nottingham Park Estate Ltd would to be represented at any such ADR."*

25. In relation to the UT Costs Mr Hale referred me to an email which he sent to the Appellants on 25th July 2023, following the FTT Decision, in which the Respondents offered a round table meeting to try to resolve the dispute.

26. Mr Hale's submission was, in summary, that the Respondents had offered ADR in relation to both the FTT Proceedings and the Appeal and Cross Appeal, which the Appellants had not accepted. The refusal to participate in ADR was, so Mr Hale submitted, unreasonable, and should attract a sanction in costs.

27. I was taken to a good deal of the correspondence between the parties in this context, and the submissions were fairly detailed. Ultimately however I am not persuaded that this is a case where it is appropriate for me to apply a sanction to the Appellants, in terms of costs, on the basis of a failure to engage with ADR. So far as the letter of 3rd December 2020 was concerned, it did receive a lengthy response from the Appellants, which set out their case at length and made reference to what was alleged to have been a previous offer to re-site the Staircase. This letter in reply did not respond specifically to the offer of ADR, but what is apparent from this letter, and from the terms of the offer of ADR which I have quoted above, and from subsequent correspondence between the parties is that this was, unfortunately, one of those cases where neither side were willing commit themselves to a negotiation where meaningful concessions could or might be made. The positions of both parties appear to me to have been pretty entrenched from the outset. Unfortunately, this case seems to have been one of those cases where the dispute was always going to have to be resolved by a decision of the FTT and any appeal against that decision.

28. So far as the later offer of the round table meeting was concerned it appears, from the correspondence which I was shown, that this offer was not actually rejected by the Appellants. Rather, the offer does not appear to have been pursued by the parties. The correspondence which I was shown did not appear to reach any final position, but instead petered out. Again, however it seems to me that the appeal proceedings were always going to have to be resolved by a decision of the Tribunal.

29. I therefore conclude that there should be no discount in respect of either the FFT Costs or the UT Costs on the basis of unreasonable refusal of ADR.

30. This leaves pre-action conduct. I do not consider that it is appropriate to apply any discount in relation to pre-action conduct. As matters have turned out, the Appellants were entitled to remove the Staircase. So far as the circumstances in which that removal took place are concerned, I do not think that there is any justification to apply a discount to the Appellants' recoverable costs.

31. I therefore conclude, so far as the incidence of costs is concerned, that the Respondents should pay the Appellants' UT Costs, and that the Respondents should pay **75%** of the Appellants' FTT Costs.

The assessment of the FTT Costs and the UT Costs

32. This leaves the question of assessment. The costs which the Appellants sought to recover were set out in three statements of costs, one relating to the FTT Costs (**"the FTT Statement"**), one relating to the UT Costs (**"the UT Statement"**), and one relating to the costs of the Costs Hearing (**"the Costs Hearing Statement"**). The total sum claimed across these three statements (together **"the Statements"**) is substantial, amounting to £60,512.02, by my calculations. By way of comparison, the Respondents were awarded the sum of £10,481.06 by the FTT, in respect of their costs of the FTT Proceedings. The equivalent figure for the Appellants' FTT Costs, as claimed by the Appellants in the FTT Statement, is £32,564.22.

33. The Statements were not signed, or at least were not properly signed, as they were presented at the Costs Hearing. It seemed to me however that it would have been wrong to reject the Statements on this behalf. I therefore permitted the Appellants to address this problem by the Appellants, by Mr Wilmshurst, giving an undertaking to the UT to file with the Tribunal and serve on the Respondents further versions of the Statements with the signature box on each Statement properly completed. I should record that this undertaking was complied with prior to my circulating this decision in draft.

34. I start with a generic issue, which is the extent of the costs which can be recovered by the Appellants in respect of the work done by Mr Nicholson, the First Appellant, in relation to the FTT Proceedings and in relation to the Appeal and the Cross Appeal. The Appellants did not instruct solicitors to act for them in the FTT Proceedings and the Appeal and Cross Appeal. The Respondents did instruct counsel on a direct access basis. Mr Taylor was instructed in relation to the FTT Proceedings. Mr Wilmshurst was instructed in relation to the Appeal and the Cross Appeal, and also made submissions on behalf of the Appellants in relation to the FTT Costs when the same were considered in the FTT Proceedings. The Appellants have made a substantial

claim for the time said to have been spent by Mr Nicholson, as a litigant in person, in dealing with the case both in the FTT Proceedings and in the Appeal and Cross Appeal. The claim is a hefty one. Mr Hale told me that the total number of hours which Mr Nicholson was shown as having spent on the case was just over 178 hours. I believe that this figure, which was not challenged by Mr Wilmshurst, excludes the time shown for Mr Nicholson in the Costs Hearing Statement. All this time, so it is submitted, represents work done by Mr Nicholson on the case which would have been done by solicitors, if the Appellants had instructed solicitors. All of this time is claimed at a rate of £130 hour, which is said to be a substantial discount from the rate at which Mr Nicholson's time is charged out by the company for which he works, McLaren Construction Ltd (**"McLaren"**). Mr Nicholson, who I understand to be a qualified architect, is Group Pre-Construction Director of McLaren.

35. There is what appears to be an unsigned letter from McLaren, dated 13th May 2024, expressed to be from Maurice Archer, Group Strategic Director, which provides the following confirmation:

> *"This letter confirms that the Main Board of McLaren Construction Limited Company (number 05377750) is aware that Adam Nicholson Ba Arch (HONS) MRICS has been involved in Court proceedings and expended 118.7 hours of time during office hours, and utilised company resources that would have otherwise been devoted to his work."*

36. The Appellants' ability to recover costs in respect of Mr Nicholson's time is governed by CPR 46.5, which the parties are agreed I can apply, and which provides as follows:

> *"(1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.*
>
> *(2) The costs allowed under this rule will not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.*
>
> *(3) The litigant in person shall be allowed—*
>
> > *(a) costs for the same categories of—*
> >
> > > *(i) work; and*
> > >
> > > *(ii) disbursements,*
> >
> > *which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;*
> >
> > *(b) the payments reasonably made by the litigant in person for legal services relating to the conduct of the proceedings; and*
> >
> > *(c) the costs of obtaining expert assistance in assessing the costs claim.*
>
> *(4) The amount of costs to be allowed to the litigant in person for any item of work claimed will be—*
>
> > *(a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work; or*
> >
> > *(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46.*

(5) A litigant who is allowed costs for attending at court to conduct the case is not entitled to a witness allowance in respect of such attendance in addition to those costs.

(6) For the purposes of this rule, a litigant in person includes—

(a) a company or other corporation which is acting without a legal representative; and

(b) any of the following who acts in person (except where any such person is represented by a firm in which that person is a partner)—

(i) a barrister;

(ii) a solicitor;

(iii) a solicitor's employee;

(iv) a manager of a body recognised under section 9 of the Administration of Justice Act 1985; or

(v) a person who, for the purposes of the 2007 Act, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act)."

37. Concentrating on Mr Nicholson's time it can be seen that the Appellants are entitled to recover for Mr Nicholson's time spent doing the work which would have been done by solicitors, had solicitors been instructed, in the amount permitted by CPR 46.5(4). This amount is limited to an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46, unless the Appellants can prove financial loss, in which case the amount is the amount that the Appellants can prove to have been lost for the time reasonably spent on doing the work.

38. Practice Direction 46, at paragraph 3.4, prescribes the following rate, where financial loss cannot be shown:

> *"The amount, which may be allowed to a self represented litigant under rule 46.5(4)(b), is £19 per hour."*

39. I should also set out paragraph 3.2 of Practice Direction 46, which provides as follows, in relation to the evidence of financial loss:

> *"Where a self represented litigant wishes to prove that the litigant has suffered financial loss, the litigant should produce to the court any written evidence relied on to support that claim, and serve a copy of that evidence on any party against whom the litigant seeks costs at least 24 hours before the hearing at which the question may be decided."*

40. It is clear from the above provisions that the burden is upon the Appellants to prove financial loss in this case, in order to avoid being pegged back to the prescribed rate of £19 per hour. I stress the requirement for proof. What constitutes satisfactory proof of financial loss is clearly a case sensitive question. There must however be satisfactory evidence which demonstrates, on the balance of probabilities, that the relevant litigant in person has suffered financial loss.

41. In the present case the Appellants claimed that Mr Nicholson had suffered such financial loss. The evidence relied upon by the Appellants was a letter dated 12th July 2024, marked for the attention of the Tribunal, and expressed to come from Maurice

Archer, the Group Strategic Director of McLaren, referred to above. I quote the letter in full:

> *"Employee: Mr Adam Nicholson Ba Arch (HONS) MRICS, Group Pre-Construction Director*
>
> *This letter confirms that the Main Board of McLaren Construction Limited Company (number 05377750) is aware that Adam Nicholson Ba Arch (HONS) MRICS has been involved in Court proceedings and expended 128 hours of time during office hours up to 12 July 2024, utilising company resources that would have otherwise been devoted to his work.*
>
> *McLaren Construction Limited contract of employment and staff handbook (relevant paragraphs extracted below) require Mr Nicholson to repay McLaren Construction Limited costs for the excessive hours expended upon this case during working hours.*
>
> *Contract of employment para 19:*
>
> > *"If at any time the Employee is indebted to the Employer in any way the Employer may deduct from the Employee's renumeration all sums as may be due and by such instalments (if any) as may have been agreed".*
>
> *Staff handbook para 2.10:*
>
> > *"Using the company's materials, equipment and time to carry out work for clients, customers, or excessive personal commitments without permission, is a gross misconduct offence and would result in summary dismissal. McLaren reserves the right to recover any cost or loss incurred by the company due excessive outside of work activities".*
>
> *There are four options (or a combination of) for costs to be repaid by Mr Nicholson in readiness for our financial year end July 31, 2024:*
>
> *1. Buy back annual holiday (max five days)*
> *2. Pay cash sum to McLaren Construction Limited*
> *3. Agree to deduct the sum from any annual bonus*
> *4. Convert the sum into a loan*
>
> *With the case now being resolved, and reviewing actual costs (appended) we have agreed a reduced cost of £130 / hr totalling £16,640 ,the repayment of which needs to be resolved by 29 July 2024.*
>
> *Regards*
>
> *Maurice Archer*
> *Group Strategic Director"*

42. In common with the letter of 13th May 2024, this letter did not appear to have been signed. By this, I mean that there was a gap at the end of the letter (reproduced above) where one would expect to see a wet signature of Mr Archer. Mr Wilmshurst suggested that the printing of Mr Archer's name at the foot of the letter constituted the signature, but there was no actual evidence to this effect, and I was left in the dark as to whether Mr Archer had actually signed the letter or not. The same applies to the letter of 13th May 2024.

43. The Appellants' case, on the basis of this letter and the earlier letter, is that out of the 178.1 hours spent by Mr Nicholson on the case, 128 of these hours were spent during office time, using the resources of McLaren. I should mention, in case of doubt, that 16,640 divided by 130 does equal 128. By reference to the letter the Appellants say that Mr Nicholson is now indebted to McLaren, pursuant to the terms of his contract of employment, in the sum of £16,640. This constitutes a financial loss, within the meaning of CPR 46.5(4)(a), which permits the Appellants to recover for Mr Nicholson's time at a rate higher than £19 per hour, up to 128 hours (assuming 128 hours are allowed as reasonable). The Appellants say that £130 per hour is more than reasonable as the equivalent of an hourly rate for the services of a solicitor, even after making the one third deduction required by CPR 46.5(2).

44. I am not able to accept this case. The reason for this is that the Appellants have not proved, to my satisfaction and on the balance of probabilities, that Mr Nicholson has suffered the alleged financial loss. I have no witness statement from Mr Nicholson to confirm what is said in the letter, nor from Mr Archer, nor from anyone else at McLaren. All I have is a letter, produced by the Appellants, which may or may not have been signed.

45. The problems with the absence of proof of the alleged financial loss do not end there. Mr Nicholson filed written submissions, dated 13th May 2024 (the day before the hearing of the Appeal and the Cross Appeal), which dealt with costs and were described as *"Submissions in relation to exceeding the hourly charging rate for a Litigant in Person"*. In these submissions Mr Nicholson sought to make the case that his time should be recoverable, by way of costs at a rate in excess of £19 per hour. The submissions quoted CPR 46.5 and Practice Direction 46. These provisions would have been familiar to the parties in any event, because they were the subject of argument in the context of the Respondents' claim to recover the costs of their time, as solicitors, following their victory the FTT. Mr Nicholson's submissions make no reference to the financial loss which is now alleged. So far as loss was concerned, Mr Nicholson said this:

> *"Mr Nicholson expended the time on this matter during his office hours and using company resources. This time would have otherwise been devoted to his work. Accordingly there is a loss, which even at a rate of £150.00 per hour, is only a partial recovery. Indeed, it was open to the Appellants to instruct solicitors in this matter. Had they done so, then the costs claimed would have been far in excess of those now sought. To deprive the Appellants of such costs is unjust."*

46. There was no evidence to explain why there was no mention, in these written submissions, of the financial loss which is now alleged. If this paragraph disclosed any loss, it was a loss to McLaren, although this was not stated. I find all this extraordinary.

In the Costs Hearing Mr Wilmshurst sought to explain the situation, on instructions, on the basis that the submissions had been prepared in haste. I did not find this a satisfactory explanation and, in any event (and this is of course no reflection on Mr Wilmshurst), I consider that I should make my decision on the question of whether financial loss has been suffered on the basis of evidence, not information provided on instructions. So far as evidence was concerned, there was none to explain the absence, in the written submissions, of reference to the financial loss now alleged. A claim is now made that Mr Nicholson has suffered substantial financial loss as a result of his work on this case, on the basis that he owes McLaren a very substantial sum, namely £16,640. At the time when Mr Nicholson was preparing his written submissions in support of the hourly rate claimed for his work, at a time when he would have known the importance of being able to demonstrate financial loss, no mention was made of the alleged debt to McLaren. There is no evidence to explain the absence of reference, in the written submissions, to the financial loss which is now alleged. As I have already pointed out, those submissions made specific reference to CPR 46.5, which states clearly the need for a litigant in person to demonstrate financial loss, in terms of recovering for the time spent on the relevant case by the litigant in person, in order to avoid being restricted to the prescribed rate of £19 per hour.

47. Beyond this, there are other features of the letter which puzzle me. By reference to the extracts from Mr Nicholson's contract of employment, as quoted in the letter, Mr Nicholson would have been guilty of gross misconduct in spending so much of McLaren's time and resources on this case, unless he had permission to do so. The letter of 13th May 2024 makes no reference to such permission having been given. It is simply said that the Main Board of McLaren was aware of the time and company resources spent by Mr Nicholson on the case. It seem extraordinary that McLaren, particularly in an employment context, should now be turning round and saying that Mr Nicholson is indebted to McLaren in the sum of £16,640. I have not seen either Mr Nicholson's employment contract or the staff handbook, beyond what is quoted in the letter, but if it is assumed that McLaren does have the contractual right to recover a sum of this kind, I would have expected this matter to have been considered and addressed between Mr Nicholson and McLaren some considerable time ago. If Mr Nicholson was aware that McLaren would be charging him for his time spent on the case, and given the amount of time which it is said that Mr Nicholson was spending on the case, both in the FTT and in the UT, I would have expected the situation to have been addressed by Mr Nicholson and McLaren some time ago. There is however no evidence of any communication between Mr Nicholson and McLaren in this respect, prior to the recent letter of 12th July 2024.

48. Beyond this, I note that the extract from the staff handbook gives McLaren the right to recover any cost or loss incurred by McLaren *"due excessive outside of work activities"*. There is no evidence of what cost or loss McLaren says that it has incurred *"due excessive outside of work activities"*. I cannot see that this cost or loss necessarily equals the company time spent by Mr Nicholson on this case. It might do. Equally it might not. It appears that what needs to occur, for the right of recovery to arise, is excessive outside of work activities. What that means and what loss it is said to have caused to McLaren in this case have not been addressed by the Appellants.

49. I stress that this is not a case where I am making findings that the Appellants' case is fabricated or anything of that kind. The position is a good deal simpler than that. The

Appellants have failed to prove their case that Mr Nicholson has suffered financial loss within the meaning of CPR 46.5(4). All I have, by way of evidence, is the letter dated 12th July 2024. So far as that letter is concerned, it raises a number of questions. The Appellants have provided no evidence to answer those questions.

50. In the absence of any evidence, beyond the letter, I am not satisfied that Mr Nicholson has suffered the financial loss which is alleged. In those circumstances Mr Nicholson's time, so far as I may be prepared to allow it as recoverable time, is restricted to the prescribed rate of £19.00 per hour.

51. For the sake of completeness I should mention that Mr Hale drew my attention to the case of *Knight v Maggioni* [2006] EWHC 90056 (Costs), a decision of Master Simons, Costs Judge. The case was, so Mr Hale submitted, authority for the proposition that the Appellants could not recover anything for the time of Mr Nicholson unless they could demonstrate that Mr Nicholson had spent the relevant time on matters within his own expertise, which would otherwise have required the attention of an expert. I do not read *Knight v Maggioni* as authority for this proposition, which is stated in a part of the judgment where Master Simons was recording the submission of one of the parties. The terms of CPR 46.5 seem clear to me. Litigants in person can recover for their time spent working on a case, provided that the time would have been allowed if the work had been done by a legal representative on behalf of the litigant in person. The key restriction on the ability of the litigant in person to recover for such time is that the litigant in person is restricted to the prescribed rate of £19 per hour, unless financial loss can be shown.

52. This brings me to the question of the number of hours which should be allowed for Mr Nicholson' time. I start with the FTT Statement. The total number of hours shown for Mr Nicholson on the FTT Statement, by my calculations, is just over 136 hours. This includes 5 hours for attendance at the hearing before the FTT itself, which is plainly irrecoverable, given that Mr Nicholson was a party to the FTT Proceedings. This figure also includes 5 hours spent on the FTT Statement, which I understand to represent time spent by a Ms Golding of Chollerton Legal Services on preparing the FTT Statement, I assume by the provision of costs drafting services. This time, if it is allowable, seems to me to be constitute a disbursement, and can be put to one side for the purposes of determining Mr Nicholson's hours. This leaves around 126 hours, which still strikes me as excessive. I accept that a certain amount of work had to be done. I will allow what I regard as a generous figure of **80 hours** for the time of Mr Nicholson. Applying the prescribed hourly rate of £19, this translates to **£1,520**.

53. Moving to the UT Statement, it shows, by my calculations, a total amount of 34.5 hours for Mr Nicholson. Removing 6 hours which is shown for Mr Nicholson's time for attending the hearing of the Appeal and the Cross Appeal, and removing a half hour shown for what I assume to be the time of Ms Golding, brings the total down to 28 hours. This again strikes me as excessive. I will allow a figure for **20 hours** for the time of Mr Nicholson in relation to the Appeal and the Cross Appeal. Applying the prescribed hourly rate of £19, this translates to **£380**.

54. In summary, I allow a total of **100 hours** for the time of Mr Nicholson for the FTT Proceedings and the Appeal and the Cross Appeal. Applying the prescribed hourly rate,

this generates a figure of **£1,900** for Mr Nicholson's time, of which **£1,520** is attributable to the FTT Proceedings and **£380** is attributable to the Appeal and the Cross Appeal.

55. I move next to disbursements. I start with the fees of counsel, Mr Taylor, in the FTT Proceedings. The total claim is for £9,500. This figure did not square with the figure shown in the relevant fee note for Mr Taylor, which showed a figure of £8,500. There was a separate fee note for earlier work done by Mr Taylor, but it appeared to relate to work done by Mr Taylor before the case was referred to the FTT, which I assume to be non-recoverable. In any event, the earlier fee note did not explain the £1,000 discrepancy which I have identified. I do not think that the discrepancy matters because £8,500 seems to me to be a reasonable figure for Mr Taylor's fees. I therefore allow the figure of **£8,500** for Mr Taylor's fees.

56. Turning to the Appeal and the Cross Appeal a total sum of £14,250 is claimed for Mr Wilmshurst's fees. This amount strikes me as too high, particularly by comparison with Mr Taylor's fees. I will allow a figure of **£10,000** for Mr Wilmshurst's fees.

57. I will also allow the VAT claimed on the fees of Mr Taylor and Mr Wilmshurst. I assume that neither of the Appellants is registered for VAT in a personal capacity.

58. Turning to the smaller sums claimed by way of disbursements, my analysis is as follows:
    (1) There is a claim for train fares in the FTT Statement and the UT Statement, which I disallow. I assume that these train fares relate to attendance at the hearings by the Appellants. As such, I cannot see that they are recoverable.
    (2) There are claims for the fees of a Ms Golding in the FTT Statement and the UT Statement which, although inaccurately identified, appear to amount to 5.5 hours at a total cost of £1,045. As I have said above, these costs appear to relate to costs drafting services in relation to the preparation of the Statements. I have been provided with two invoices for Chollerton Legal Services, addressed to the Appellants, each in the sum of £1,045. The first of these invoices, dated 17th May 2024, appears to correspond to the figure of £1,045 which appears as the total figure for what I assume to be Ms Golding's services in the FTT Statement and the UT Statement. I assume that Ms Golding works for Chollerton Legal Services, providing costs drafting services. I should mention that these invoices were not available at the Costs Hearing. They were sent to the Tribunal together with the signed versions of the Statements, which were provided after the Costs Hearing, pursuant to the undertaking given by the Appellants, at the Costs Hearing, to file properly signed versions of the Statements. The covering email sent to the Tribunal by Mr Nicholson claimed that both the Statements and the invoices were filed pursuant to my directions at the Costs Hearing. I do not recall giving any such direction in relation to the invoices at the Costs Hearing. To the contrary, I made it clear that I would not be admitting further evidence or submissions, save for any submissions the parties wished to make in respect of the costs of the Costs Hearing, by reference to the without prejudice save as to costs correspondence which I could not consider at the Costs Hearing. In these circumstances I have considered whether I should admit the invoices at all. In this one instance I have decided to stretch a point and admit the invoices. The relevant figure was identified in the FTT Statement and the UT Statement, and I

do not think that it is prejudicial to the Respondents to allow this particular figure to be substantiated by an invoice. In terms of what I should allow for costs drafting services I am prepared to allow the figure of **£1,045**. It does not strike me as an unreasonable figure, and there will have been a fair amount of material to be assembled for the purposes of the FTT Statement and the UT Statement.

(3) The UT Statement has a charge for a short video tour of the Terrace and other areas, which provided what was effectively a virtual inspection facility for the FTT and for myself when hearing the Appeal and the Cross Appeal. I found this video to be helpful, and I will allow its cost as a recoverable disbursement. By reference to what I believe to be the correct invoice, I will allow what I understand to be the figure, which is **£77.90**.

59. In summary therefore, I assess the Appellants' FTT Costs and the Appellants' UT Costs in the following amount:

<u>Appellants' FTT Costs</u>

Mr Nicholson's recoverable time -	£380
Mr Taylor's fees (plus VAT) -	£10,200
Video tour costs -	£77.90
Total -	£10,657.90
Total (after application of the 25% discount)	**£7,993.42**

<u>Appellants' UT Costs</u>

Mr Nicholson' recoverable time -	£1,520
Mr Wilmshurst's fees (plus VAT) -	£12,000
Costs drafting services -	£1,045
Total -	**£14,565**

60. This leaves the costs of the Costs Hearing itself, to which I now turn.

The costs of the Costs Hearing

61. As I have said, I received brief further submissions from the parties, following circulation of the draft version of this decision (without this section of the decision) which made reference to the without prejudice save as to costs correspondence.

62. The relevant correspondence discloses that both parties made offers in respect of costs prior to the Costs Hearing. With one exception, the amounts offered by way of costs were not better, from the point of the view of the offeree, than the outcome pursuant to this decision, which is that the Respondents have to pay the Appellants the total sum of £22,558.42, by way of the Appellants' FTT Costs and the Appellants' UT Costs.

63. The exception is the last of the offers made in advance of the Costs Hearing. This was an offer made by the Respondents, by which they offered to pay the sum of £26,000 to the Appellants. The offer was made by an email sent by the Respondents to the Appellants on 15th July 2024, at 16:14. Given that the offer was in simple terms, and followed previous offers and counter-offers, it seems to me that the Appellants required only a short time in which to consider and respond to the offer. It seems reasonable to me to treat the Appellants as having been on risk, in relation to this offer, as from and including 16th July 2024; that is to say the working day prior to the Costs Hearing.

Clearly, by this offer (**"the Offer"**), the Respondents offered a better result that the Appellants have achieved.

64. The Respondents say that they should have their costs of the Costs Hearing. They point to the Offer. They also make the point that I should take into account the fact that the costs recovered by the Appellants constitute a significant reduction from the total sum claimed by the Appellants. The Respondents point out that the Appellants have recovered only 40.9% of what they claimed, by way of the Appellants' FTT Costs and the Appellants' UT Costs. In this context the Respondents have referred me to CPR 47.20, which deals with liability for the costs of detailed assessment proceedings. Sub-paragraph (3)(a) of this provision requires the court, amongst other matters, to have regard to the amount by which the bill of costs has been reduced. CPR 47.20 applies to detailed assessment proceedings. The Costs Hearing was not part of detailed assessment proceedings, but I accept the principle that, in considering the costs of the Costs Hearing I am entitled to take into account all the relevant circumstances, including the significant reduction achieved by the Respondents in the Appellants' recoverable costs.

65. Applying that approach, there seem to me to be competing factors.

66. First, there is the Offer. If however one concentrates on the Offer, the position seems to me to be as follows. The Respondents are entitled to their costs of the Costs Hearing, as from and including 16th July 2024. The Appellants are entitled to their costs of the Costs Hearing, up to and including 15th July 2024. This is potentially significant. On the Respondents' side it is apparent, from their statement of costs for the Costs Hearing, that a significant part of their costs of the Costs Hearing was incurred prior to 16th July 2024. On the Appellants' side it is apparent that a significant part of their costs of the Costs Hearing was also incurred prior to 16th July 2024. This includes Mr Wilmshurst's brief fee for the Costs Hearing, in respect of which I have been provided with evidence which demonstrates that this brief fee was deemed earned, and was paid on 12th July 2024.

67. Second, there is the point made by the Respondents, which seems to me to have some force, that they have achieved a very significant reduction in the costs claimed by the Appellants. In particular, the Respondents succeeded on the issue of whether the Appellants could demonstrate financial loss. This had a very significant effect on the costs which the Appellants were able to recover because the Respondents' success on this issue pegged Mr Nicholson's recoverable time to £19 per hour. The resulting figure for Mr Nicholson's recoverable time would have been multiplied many times if the Appellants had been able to prove financial loss.

68. Third, and while I regard this point as having rather less force, there is some merit in the point made by Mr Wilmshurst that the Respondents were unsuccessful in their arguments in relation to conduct (conduct relating to ADR and pre-action conduct) and in arguing that the Appellants were not entitled to anything for Mr Nicholson's time. I think that there is something in the argument that the Respondents' failure on these issues, in particular in relation to the time spent on the conduct issues, should have some impact, in terms of costs.

69. Looking at matters in the round, and bearing in mind all the relevant circumstances and in particular the three competing factors identified above, I consider that the outcome of the Costs Hearing is fairly characterised as a score draw. In these circumstances I accept the primary submission of Mr Wilmshurst, in his further submissions on the costs of the Costs Hearing, which is that there should be no order as to the costs of the Costs Hearing.

70. I therefore conclude that there should be no order as to the costs of the Costs Hearing. The Appellants and the Respondents should bear their own costs of the Costs Hearing.

71. Mr Hale requested a period of 21 days for payment of the costs which the Respondents are required to pay to the Appellants. This was not opposed by the Appellants. I therefore allow a period of 21 days for the Respondents to pay the costs which they are required to pay to the Appellants. The period of 21 days will run from the date of my order for payment of these costs.

Conclusion

72. In summary, my decision on costs is as follows:
    (1) The Respondents must pay 75% of the Appellant's FTT Costs, summarily assessed in the sum of **£7,993.42** (£10,657.90 x 75%), such sum to be paid by 19th August 2024.
    (2) The Respondents must pay the Appellants' FTT costs, summarily assessed in the sum of **£14,565**, such sum to be paid by 19th August 2024.
    (3) There is to be no order as to costs in relation to the Costs Hearing.

The Chamber President
Mr Justice Edwin Johnson
29th July 2024