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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/42UD/LRM/2015/0007**
Property	:	**Burnham Lodge, Oakstead Road, Ipswich IP4 4HJ**
Applicant	:	**Burnham Lodge RTM Co. Limited**
Representative	:	**Stevensons Solicitors**
Respondent	:	**HND Investments Limited**
Representative	:	**None**
Type of Application	:	**Costs – Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Members	:	**Judge John Hewitt** **Mr Gerard Smith MRICS FAAV** **Mr John Francis QPM**
Date of Decision	:	**8 March 2016**

DECISION

Decision

1. The decision of the tribunal is that:

   1.1 insofar as may necessary the applicant is granted an extension of time for serving its application for costs dated 15 January 2016 seeking a penal costs order pursuant to rule 13(1)(b) on the respondent, so that the application was served in compliance with rule 13(4); and

   1.2 the applicant's said application for a costs order is refused.

Reasons

Background

2. The applicant made a substantive application pursuant to section 84 Commonhold and Leasehold Reform Act 2002 seeking a determination that it was, on the relevant date, entitled to acquire the right to manage the development known as Burnham Lodge.

3. The applicant succeeded in that application and our substantive decision is dated 22 December 2015 on which date it was sent out to the parties.

4. By an application dated 15 January 2016 (and received by the tribunal on 18 January 2016) the applicant made an application for a penal costs order pursuant to rule 13(1)(b).

   The applicant seeks to recover £4,206.62 being the whole of its costs of the substantive application and its costs of the penal costs application.

   Directions on the costs application were given on 20 January 2016.

   In response to those directions the respondent's answer is dated 11 February 2016 and the applicant's reply is dated 18 February 2016.

   Neither party has requested an oral hearing. We have therefore determined that application on the papers pursuant to rule 31.

The basis of the application

5. Section 29 Tribunal's Courts and Enforcement Act 2007 (TCEA 2007) empowers First-tier tribunals to exercise a discretion to make awards of the 'costs of and incidental to the proceedings' before it. That power is subject to the rules of the particular tribunal.

   As regards this tribunal, Rule 13(1) provides, so far as material, as follows:

   "13(1) The Tribunal may make an order in respect of costs only:-
   (a) ...
   (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in:-

(i) ...
(ii) ...
(iii) *a leasehold case, or*

(c) ..."

[The subject case is a 'leasehold case' as defined in rule 1.]

(4) *A person making an application for an order for costs—*

(a) *must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and*

(b) *may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.*

(5) *An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—*

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

Was the application made in time?

6. In paragraph 5 of its answer, the respondent raises the question whether the application was served in time. It submits that the first it knew of the application was when it received a copy of it along with the directions dated 20 January 2016. The respondent does not say on what date that was but argues it was more than 28 days after the day on which the substantive decision was sent out to the parties.

   We note that the directions were sent on or about 20 January 2016 along with the application. The respondent will have received it on or about 21 or 22 January 2016. If the 28-day receipt rule applies to the receipt by the respondent of the application, the respondent would have received it 2, possibly 3 days late. The subject 28-day period spanned the Christmas/New Year period and included 3 bank holidays.

7. In answer the applicant says that the application was first made at the hearing and was 'parked' as made clear in paragraph 58 of the decision on substantive hearing.

8. The applicant is correct in its answer. The reason it was 'parked' was because in order to make full submissions on it the parties really needed to know what our substantive decision was and the reasons for it. We concluded that, at the hearing, it would have been sterile to have heard oral submissions on a penal costs application which would have been based on a wide range of permutations.

9. We are therefore satisfied that the application was made in time within the rules.

10. We are reinforced in that finding because rule 13(4)(a) does not impose a time limit on the date by which the application is to be sent to the opposite party. Rule 13(5) imposes a time limit when the application is to be made to the tribunal. An application is made to a tribunal when it is received by the tribunal. As noted in direction 3 the application was received on 18 January 2016 and was deemed as having been made within the time limit imposed by rule 13(5).

11. However, if it be held that we are in error in making these findings, we have granted the applicant an extension of time so as to ensure that the application for a penal costs order has been served on the respondent in compliance with rule 13(4). We have done so in order that the application can be determined on its merits. Our reasons for doing so are for avoidance of doubt. If the application was served late it was only a few days late, the subject 28-day period spanned Christmas/New Year, the respondent does not assert any prejudice has arisen to the late service, the fact of a penal costs application was raised at the hearing and justice and the overriding objective are clearly in favour of the application being determined on its merits, rather by a technical knockout due to the very strict application of a time limitation.

The basis of the application

12. In this case the party against whom a penal costs order is sought is the respondent. Thus the applicant will to show that the respondent *'acted unreasonably in ... defending or conducting the proceedings'*

13. In essence the applicant complains that:

    13.1 Prior to the issue of the substantive proceedings the respondent gave counter-notices simply asserting that the claim notice was invalid and simply mentioning a number of sections of the Act but not indicating any reasoning as to why or in what respects the claim notice was invalid; and raising a human rights point which was not, in the event, pursued at the hearing. A further complaint was that the respondent declined to expand upon the points raised in its counter-notices and this left the applicant uncertain as to whether it should give a further (and compliant) claim notice;

    13.2 The respondent failed to comply with directions in that its statement of case was served late and that in consequence the applicant was required to file two statements of case in reply;

    13.3 The applicant's claim notice sought to acquire the right to manage on 8 October 2015 and that as a result of the respondent's behaviour and conduct in the proceedings that right will not be acquired until a date in April 2016;

13.4 The respondent requested an oral hearing (after the tribunal had indicated that a paper determination might be appropriate) and the applicant alleges the request was made simply to increase costs;

13.5 The respondent's conduct throughout has been unhelpful and unreasonable causing the matter to become unnecessarily protracted which has led to substantially increased costs. In consequence and *"... given the multifarious reasons stated above it is clear that the Respondent's behaviour in conducting these proceedings has been unreasonable ..."*

13.6 If the substantive application had been unsuccessful the respondent would have been entitled to recover it costs from the RTM company and/or its members.

The gist of the respondent's answer

14. The respondent argues that:

14.1 By virtue of section 29 TCEA 2007 the tribunal only has jurisdiction to determine costs 'of and incidental to' the proceedings. This excludes any power to award costs in respect of matters which took place prior to the issue of the proceedings;

14.2 Guidance on what is meant by the expression 'acted unreasonably in ... defending or conducting the proceedings' was given by Judge Colin Bishopp sitting in the Upper Tribunal (Tax and Chancery Chamber) in the context of the First-tier Tribunal (Tax Chamber) Rules 2009 in which, so far as material, their rule 10(1)(b) is in substantially the same terms as rule 13(1)(b) of this tribunal's rules. In paragraph 14 he said of *"... the phrase 'bringing, defending or conducting proceedings'"*

"It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side."

14.2 It is axiomatic that an order for costs should not be made simply because a party has run a case that has not been successful;

14.3 Matters concerning the counter-notice were matters which preceded the proceedings;

14.4 An extension of time to serve its statement of case was sought and obtained and that one isolated act cannot properly be categorised as 'persistent failure to comply'.

14.5 It was not unreasonable to request an oral hearing, the issues were complex and the case was plainly suitable for oral argument.

14.6 The costs position in the substantive application is irrelevant to consideration of a penal costs application under rule 13(1)(b).

Discussion of the competing arguments

15. We prefer the submissions made on behalf of the respondent.

16. The penal costs application is made against a respondent. The subject 'unreasonable conduct' must be 'of and incidental to the proceedings'. The conduct complained of by the applicant as regards the content of the counter-notices and the respondent's failure to explain itself is not, in our judgment, conduct 'of and incidental to the proceedings'. It was conduct prior to the issue of the proceedings.

Further, the exercise of the right to manage has been held by the Upper Tribunal (Lands Chamber) to be akin to a loss by a landlord of a property right. Some landlords are keen not to lose such rights and some do serve counter-notices which are less than helpful to the RTM company and some do take arcane points. There may be several motives for a landlord adopting such a strategy and whilst it may not be helpful to those wishing to exercise the right to manage it does not seem to us to be unlawful for a landlord to do so and thus we do not find it can be said to be unreasonable for a landlord to do so.

17. As regards conduct during the proceedings we find that it cannot be properly be said that serving a statement of case late after the respondent had obtained an extension of time from the tribunal amounts to conduct by which the respondent 'persistently' failed to comply with directions.

18. The applicant's paperwork in this case was by no means in perfect order and it required explanation and argument. In particular, the implications arising from the applicant's letter (and enclosure) dated 22 June 2015 [p181 of the hearing bundle]. The letter raised a complex point which the tribunal was unaware of when it intimated the application appeared suitable for determination on the papers.

19. In the circumstances we find it was not unreasonable of the respondent to have served a statement of case opposing the application and it was not unreasonable for the respondent to have requested an oral hearing.

It should be noted that the respondent's statement of case did not pursue some of the more arcane points taken in the counter-notices and instead it focussed on points which were plainly arguable. The fact that in the event the arguments did not succeed does not render it unreasonable of the respondent to have taken them.

20. We have considered the brief comments made in reply on behalf of the applicant but we do not find them persuasive.

21. For the reasons set out above we have come to the conclusion on the basis of the materials and arguments presented to us that the applicant's application for a penal costs order must fail and we have thus refused it.

22. Having arrived at that decision we have tested it against the general background to penal costs orders in leasehold cases. For the convenience of the parties this is set out below.

23. The predecessor of this tribunal as regards its leasehold case jurisdiction was the leasehold valuation tribunal (LVT).

When originally created the LVT had no jurisdiction to award costs or to make costs orders in connection with proceedings before the LVT.

The LVT was regarded as a 'no costs' jurisdiction.

24. The LVT's jurisdiction as to costs was modified by paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act). That paragraph empowered an LVT to make an award of costs limited to £500 if it concluded that a party had, in its opinion, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with proceedings before it.

25. As of 1 July 2013 the functions and jurisdictions of the LVT were transferred to this tribunal. This tribunal's rules are bespoke for the Property Chamber but were modelled on a generic set of rules applied across a number of chambers of the First-tier tribunals in order to provide some level of uniformity of approach and practice.

26. Rule 13 still imposes a threshold to be met before an award of costs can be made but now there is no limit on the amount of costs which this tribunal may award.

Rule 13 is only applicable where an award of costs is to be made of a penal nature. In the case of rule 13(1)(a) where a 'wasted costs' order is sought against a representative (professional or otherwise) and in the case of rule 13(1)(b) where a costs order is sought against a party alleged to have acted 'unreasonably' in some respect.

27. The above summary and the concept of a tribunal determining issues and disputes in the residential sector, often where the parties are not professionally represented, leads to the conclusion that an award of costs under rule 13 should only be made in exceptional circumstances and where a party has clearly behaved unreasonably and that such conduct has increased the amount of costs incurred by the other party.

28. There is a view that the transition of jurisdictions from the LVT to this tribunal was not intended to bring about a major shift in the approach

to costs arising in the determination of residential leasehold cases, and that, in essence, the tribunal would continue to be a 'no costs' jurisdiction. However, rule 13 was cast to enable and empower a tribunal to make an award of costs in those exceptional cases when it considered it appropriate to do so.

29. It is considered that rule 13 should be reserved for those cases where, on any objective assessment, a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having some of their costs paid. The bar is thus set quite high.

30. There is reinforcement for this view by the general approach taken by civil courts when making orders as to costs which are intended to be of a penal nature, as opposed to orders for costs which simply follow the event.

31. The question then arises as to what level of conduct is characterised by the expression in rule 13(1)(b) *"... if a person has acted unreasonably in bringing, defending or conducting proceedings ...".*

Where the landlord is the respondent the applicant tenant must show that it was unreasonable for the respondent to have opposed the application and that some aspect of the landlord's conduct of the proceedings was unreasonable.

In both circumstances the behaviour complained of must be out of the ordinary. In *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd,* HHJ Huskinson sitting in the Lands Tribunal considered the provisions of paragraph 10 of Schedule 12 to the 2002 Act and the meaning of the words "otherwise unreasonably".

He concluded that they should be construed "*ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10, behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour".

32. Judge Huskinson adopted the analysis of Sir Thomas Bingham MR in *Ridehalgh v Horsfield* [1994] 3 ALL ER 848 which concerned the approach to the making of a wasted costs order under section 51 of the Supreme Court Act 1981, where dealing with the word "unreasonable" he said as follows:

"Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply

because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable"

33. The approach outlined above is more detailed than that adopted by Judge Bishopp in *Catana* cited by the respondent in the subject application but it seems to us that in essence all three judges are saying the same thing and giving the same guidance as the meaning of the expression 'has acted unreasonably' in context.

Judge John Hewitt
Judge John Hewitt
8 March 2016