4423

**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | **LON/00AN/OLR/2016/0927** |
| **Address** | : | **Flats 1A, 15, 23, 24, 51, 61, 62, 70, 128, 129, 143, 165, 166, 169, 177, 178, 180, 181, 187 Kings Court, Hamlet Gardens W6 ORN** |
| **Applicant** | : | **Kings Court (London) Association Limited** |
| **Representative** | : | **Mr Fieldsend (Counsel) instructed by Teacher Stern solicitors** |
| **Respondents** | : | **The various leaseholders of the above flats** |
| **Representative** | : | **Mr Loveday (Counsel) instructed by Bishop & Sewell LLP solicitors** |
| **Type of Application** | : | **Costs – Rule 13, The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013** |
| **Tribunal Members** | : | **Mr M Martyński (Tribunal Judge)**<br>**Mr L Jarero BSc FRICS** |
| **Date and venue of Hearing** | : | **9 March 2017**<br>**10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **22 March 2017** |

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**DECISION**

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## Decision summary

1. The Applicant's application for an award of costs is dismissed.

## Background

2. The subject flats are contained within Kings Court ('the Block') which is a purpose-built block of flats. There are 193 flats in total. All those flats are let on long leases.

3. The Applicant to this costs application, Kings Court (London) Association Limited ('Kings Court') has a headlease ('the Headlease') of the residential and common parts of the Block.

4. The membership of the Kings Court is made up of some, but not all, of the long leaseholders in the Block.

5. The Respondents to the costs application are various long leaseholders ('the Leaseholders') who claimed new leases from Kings Court.

6. Kings Court holds the intermediate leasehold interest in respect of each of the Leaseholders' flats.

## The enfranchisement proceedings

7. The Leaseholders made applications to this tribunal to determine the sums payable in respect of the grant of new leases. The Respondent to those applications was Kings Court and the holder of the freehold interest in the Block. The individual leaseholders' applications were consolidated. The freeholder took no part in the proceedings.

8. The hearing of the Leaseholders' claims was held on 4 October 2016. The Leaseholders all instructed the same Solicitors, Barrister and Valuer.

9. Valuation reports were produced for each party by; Stephen R Jones BA (HONS) MRICS for the Leaseholders and Miss Jennifer Ellis FRICS for Kings Court.

10. The issue between the parties was the Capitalisation Rate to be applied to the lost ground rent for each flat following the grant of each new lease.

11. Mr Jones, Valuer for the Leaseholders argued that the Capitalisation Rate should be a dual rate of 6% with a 2.25% sinking fund.

12. The Valuer for Kings Court, Miss Ellis, argued that the Capitalisation Rate should be a single rate of 2.84% or 2.78% depending, in accordance with each flat, as to when the Claim Notice was served.

13. It was accepted by both sides that the decision in *Nailrile*[1] was directly relevant to the issue in question.

14. *Nailrile* is a decision of the Lands Tribunal dating from December 2008. It dealt with five separate applications that had been made to the, then, Leasehold Valuation Tribunal, regarding the terms of acquisition of new leases granted pursuant to section 48 of the Act.

15. The Tribunal in *Nailrile* set out by way of introduction the following:-

> [6] In the course of 2006 and 2007 the LT received a number of appeals in which the valuation of [Intermediate Landlord Interests] under Chapter II of part I of the 1993 Act was in issue, and it was thought appropriate to attempt to group these for hearing together, thus enabling a representative variety of cases to be considered with the objective of producing a decision that would have general application. In the event, we were able to hear together five appeals.

16. The five appeals heard concerned:
One case where the lease extensions in question would create a negative rent flow for the first time
Three cases where there was a positive rent flow at all times.
One case where there were negative rent flows before and after lease extensions.

17. In considering negative rent-flows, the tribunal commented as follows:-

> [125] However, the intermediate lease will not always have a positive profit rent after the grant of a new lease.....The use of a sinking fund to value a negative income is therefore redundant and the use of any dual-rate yp is wrong in principle.
>
> [140] We conclude, therefore, that where neither the MILI provisions nor a commutation of rent apply, an [Intermediate Landlord Interest] should be valued after the grant of a new lease as follows:
> (a) .....
> (b) Where the leaseholder's profit rent in the whole intermediate interest is negative following the grant of a new lease, the diminution in the value of the [Intermediate Landlord Interest] should be calculated by the single-rate approach. Where the head rent is either fixed or increases by fixed amounts throughout the term of the [Intermediate Landlord Interest], we consider that the discount rate should be that of 2.5% consolidated stock.

18. The Leaseholders' problem with the single-rate approach using the NLF rate as advocated by Miss Ellis was that this approach, in the current climate of very low interest rates, meant that the effect on premiums was disproportionate and those premiums were subject to fluctuations depending on the valuation date.

19. Further, it was argued on behalf of the Leaseholders that the factual situation in this case is significantly different to those in the various appeals considered in *Nailrile*.

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[1] *Nailrile Limited v Earl Cadogan and another* and similar appeals [2009] 2 EGLR

20. For the Respondent it was argued that *Nailrile* is not fact specific. The tribunal in that case considered cases covering a variety of factual situations so as to lay down general principle. That decision should be followed by this tribunal.

21. This tribunal issued its decision on 11 October 2016. In that decision we adopted the valuation prepared by Ms Ellis on behalf of Kings Court. In so doing, we reasoned as follows;

> 37. We do not consider that, because there are difficulties identified in the NLF rates, that the dual-rate can be adopted in the light of the comments in *Nailrile* that such an approach is wrong in principle in negative rent-flow cases.
>
> 38. We do not consider that *Nailrile* is fact specific and consider that it lays down principle to be followed by this tribunal – a point specifically made by the Lands Tribunal.

## Procedural history

22. Kings Court's application for an order for costs (pursuant to Rule 13(b) of the tribunal's rules) against the Leaseholders is dated 7 November 2016 and runs to some seven pages. This however was stated only to be a preliminary application with a fuller Statement of Case to follow.

23. We gave directions on this costs application on 14 November 2016. Those directions allowed for a full written Statement of Case to be filed on behalf of Kings Court; a Statement of Case in response to the application on behalf of the Leaseholders and a Statement of Case in reply to that response. The directions stated that we would consider the costs application on the papers alone.

24. Kings Court was not satisfied with a paper process to determine the costs application and requested that the application be decided in a hearing.

25. Following this request, further directions were given allowing an oral hearing with a time estimate of 4 hours.

26. The parties complied with the directions. Kings Court filed a Statement of Case running to 12 pages. The costs claimed by Kings Court amounted to £39,355.74.

27. The Statement of Case in response from the Leaseholders ran to a total of six pages.

28. There was then a three page Statement of Case in reply from Kings Court.

29. In preparation for the hearing of the costs application, Counsel for each party filed skeleton arguments; nine pages from Mr Fieldsend for Kings Court and 13 pages from Mr Loveday for the Leaseholders.

30. The hearing itself proceeded by way of submissions from each Counsel who made full use of the four hours allocated.

31. As one would expect from the two highly regarded specialist and experienced Counsel, their submissions were detailed, thorough, informative and even, on (limited) occasions, entertaining. We have to say however that in our view, we could have decided the costs application on the papers alone without the need for a hearing.

## The relevant law

32. The power to award costs is contained in Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant part of Rule 13 provides as follows:-

> **Orders for costs, reimbursement of fees and interest on costs**
> **13.**—(1) The Tribunal may make an order in respect of costs only—
> (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
> (i) an agricultural land and drainage case,
> (ii) a residential property case, or
> (iii) a leasehold case; or
> (c) in a land registration case.

33. The Upper Tribunal, in the decision of *Willow Court Management Company (1985) Limited v. Mrs Alexander* [2016] UKUT 290, gave comprehensive guidance on the principles to be applied in the consideration for an order for costs pursuant to Rule 13.

34. It its Statement of Case, Kings Court stated that its application was made pursuant to Rule 13(1)(b) of the tribunal's rules. The Statement of Case continues as follows:-

> It is the Second Respondent's [Kings Court] case that the Applicants [the Leaseholders] have acted "unreasonably" in the initiation and/or pursuance of the Proceedings in so far as they (the Proceedings) relate to the determination of the amount payable to the Second Respondent.
> .....
> In the Proceedings, the Applicants have, on the application of an objective standard, acted "unreasonably" for the following reasons.....
>
> First, the Applicants' case in relation to the sole issue that required determination, was fanciful. The answer to the issue had been given by the Lands Tribunal in Nailrile which was a decision that the tribunal was bound to follow.
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> Secondly, the Applicants' case in relation to the sole issue, was bound to fail. Again, the answer was to be found in Nailrile.

35. In his skeleton argument, Mr Fieldsend for the Applicant, stated that it was common ground between the parties that there are three stages in the tribunal's exercise of its power to award costs and those three stages had to be approached sequentially as follows;

(a) Has a person acted unreasonably?
(b) If yes, in the light of that conduct, should the tribunal make an order for costs?
(c) If yes, what should the order be?

He pointed out that the first stage involves the application of an objective standard. The later stages involve an exercise of judicial discretion.

36. Mr Fieldsend then quotes from *Willow Court* as to the test for stage one. At paragraph 28 of that decision the tribunal say the following;

> At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.

37. Later in the skeleton argument, Mr Fieldsend sets out the reasons why the threshold for unreasonable conduct on the part of the Leaseholders is made out in this case. We summarise those reasons as follows:-

(a) The Leaseholders' case for the application of a dual rate was at all times fanciful.
(b) The case for a dual rate was at all times bound to fail.
(c) Mr Jones' (Valuer for the Leaseholders) had regard to *Nailrile* in his report but in doing so considered that *Nailrile* was limited to its own facts. Having formed that view, Mr Jones then sought to distinguish the facts at Kings Court from those in *Nailrile*. Mr Jones fell into a clear error. In applying a dual rate within his valuation exercise, Mr Jones' valuation approach was fanciful and bound to fail and the errors in his valuation approach constitute serious failings.
(d) A reading of *Nailrile* reveals that it is a decision not confined to its facts. A failure to appreciate that the decision was one of general application is a serious failing. A failure to apply *Nailrile*, irrespective of whether that failure was based on an error of understanding as to general application, is a serious failing.

38. We do not refer to the remainder of Kings Court's Statement of case or Mr Fieldsend's skeleton argument because we are of the view that neither the Leaseholders nor Mr Jones himself have acted unreasonably when judged on an objective standard.

## Decision

39. We begin by reminding ourselves of the important comments made by the Upper Tribunal in *Willow Court* when it commented specifically on the wording of Rule 13(1)(b) of this tribunal's rules and have taken particular account of the following comments.

> 20. The leading authority on wasted costs is *Ridehalgh v Horsefield* [1994] Ch 205 in which the Court of Appeal examined the origin and exercise of the jurisdiction conferred on civil courts by section 51(7) of the 1981 Act. At page 232 C – 233 F Sir Thomas Bingham MR, giving the judgment of the whole court, considered the expressions "improper, unreasonable or negligent" the meanings of which, he considered, were not open to serious doubt:
>
> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalties. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "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 judgment, but it is not unreasonable.
>
> .....
> *Unreasonable behaviour*
>
> 22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in *Ridehalgh*. We therefore restrict ourselves to mentioning *Cancino v Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). *Cancino* provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.
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> 23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in *Ridehalgh* on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with

"improper" or "negligent" conduct and it was submitted that unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship.

40. We next make some general observations which bear upon the question of reasonableness in these proceedings and note that;

(a) The original proceedings were brought by the Leaseholders who were represented by a specialist firm of solicitors and who were at the hearing of those proceedings represented by specialist and highly experienced Counsel. Both Valuers were experienced professionals. No suggestion was made that the Respondents were pursing a (hopeless) case to harass or pressure Kings Court into a settlement.

(b) Mr Loveday for the Leaseholders filed a substantial skeleton argument for the original proceedings which set out, in detail, why we should not follow *Nailrile*, setting out a full legal argument for Mr Jones' valuation.

(c) Whilst Mr Fieldsend, in his skeleton argument prepared for the original proceedings, described Mr Jones' reasoning as 'flawed', there was no suggestion, at that stage, that the pursuance of Mr Jones' argument constituted unreasonable conduct.

(d) The hearing of the original proceedings was fully argued on both sides and took a full day.

(e) Although our decision on the original proceedings was relatively short and although we rejected the case put forward on behalf of the Leaseholders, the issues put before the tribunal caused us to pause and carefully consider the arguments put to us. Further, beyond rejecting his argument, we did not consider it necessary to criticise Mr Jones in our decision. When making the original decision, it did not occur to us that Mr Jones had behaved unreasonably or that a completely untenable legal argument had been put to us.

All of these factors suggest that we are not in the territory of unreasonable behaviour.

41. Dealing now specifically with Mr Jones' valuation. It is significant that in his valuation report prepared for the tribunal and in his evidence to the tribunal, he specifically referred to *Nailrile*. He acknowledged the significance of *Nailrile*. He pointed out, quite properly in our view, that the application of *Nailrile* to the facts of the case before us led to some difficulties and oddities and argued that, given the nature of the unusual circumstances in this case, we should conclude that *Nailrile* did not apply. There was nothing illogical or unreasonable in this line of argument. It could not be said that Mr Jones tried to hide anything of significance in his report nor were we of the impression that he had failed in his professional duty to assist the tribunal in his capacity as expert.

42. For the sake of completeness, we add, as will be apparent from the above comments, that we did not find Mr Jones' argument to be 'fanciful' or that his argument was bound to fail. Mr Jones set out his proposition that the situation at Kings Court was unique and supported that proposition with full reasons as to why he took that view. He was entitled to argue that the application of general valuation principles as set out in *Nailrile* produced, in his view, the wrong result so that the guidance in *Nailrile*

could be side-stepped or *Nailrile*, to the extent of the unusual facts at Kings Court, be treated as confined to the different scenarios involved in that case.

43. Having arrived, objectively, at the view that there was no unreasonable conduct on the part of Mr Jones for the Respondents, it is not necessary for us to consider whether the unreasonable behaviour of an expert can be the basis of a costs award against that expert's clients; nor do we have to move on to the other stages set out in *Willow Court* to consider whether a costs order should be made and the amount of that order.

**Mark Martyński, Tribunal Judge**
**22 March 2017**

## ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.