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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBD/OLR/2016/0094**
Property	:	**Flat 74 Lichfield Court, Sheen Road, Richmond, Surrey TW9 1AX**
Applicant	:	**Miss Yvonne Charman**
Representative	:	**Howell Jones LLP Solicitors**
Respondent	:	**Festalfine Limited**
Representative	:	**John May Law**
Type of Application	:	**Application for costs pursuant to Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Members	:	**Tribunal Judge Dutton**
Date of Decision	:	**6th February 2017**

DECISION

DECISION

1. **The Tribunal determines that the Respondent has acted unreasonably within the provisions of Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 (the Rules) and accordingly orders that it shall pay to Miss Charman the sum of £3,494.40, as set out below.**

BACKGROUND

1. By a determination dated 24th October 2016 the Tribunal made certain findings in connection with the terms of a lease following a lease extension application by the Applicant. It is not relevant to this decision to go into detail as to the findings made on that occasion suffice to say that the Tribunal found, by and large, in favour of the Applicant.

2. The matter had come before the Tribunal on 5th July 2016 for a substantive hearing but had to be postponed. The directions given following such postponement indicated that a claim under the provisions of rule 13 would be made by the Applicant. The reason for such claim was the late delivery of evidence by the Respondent, which was admitted by the Tribunal, but necessitated the additional time for the Applicant to respond and thus the adjournment of the hearing on 5th July. Such an application for costs under the Rules was indeed proceeded with and came before me for consideration on 6th February 2017.

3. I had been supplied with a small bundle which included the decision, some stand alone directions dated 24th October 2016, a short statement by Miss Charman, details of the costs incurred by her through Howells-Jones LLP, some emails, a copy of Counsel's fee note, the Respondent's response to the claim and a short reply by Miss Charman.

4. In Miss Charman's initial statement she alleges that the Respondent acted unreasonably both in refusing to grant her a lease under s57 of the Leasehold Reform, Housing and Urban Development Act 1993 and by providing further witness and expert evidence the day before the hearing in July 2016, which resulted in the adjournment. The said adjournment resulted in Miss Charman incurring additional costs in the form of Counsel's fees and solicitors costs for the hearing in September. According to the statement of costs some 4.1 additional hours were spent at £240 per hour and additional Counsel's fee were incurred for the September hearing of £3,500 plus VAT. The total amount of costs said to have been incurred by the Applicant as a result of the Respondent's unreasonable conduct was £5,380.80. It is right to record that the solicitors for Miss Charman attempted to negotiate a lower sum, in the region of £2250, for Counsel's fees for the September hearing but were rebuffed by Counsel's clerk.

5. In response to the Applicant's short statement the Respondent replied in a fulsome form. It addresses two points. One relating to a possible claim that the application in respect of the lease terms was in itself unreasonable and the second the costs for the adjournment. I do not propose to dwell on the first point as I do not consider

that Miss Charman is saying that the Respondent acted unreasonably in connection with the lease terms. It is the cost associated with the adjournment of the July hearing which gives rise to her claim. If I have misunderstood I will deal with that matter shortly in the findings section of this decision.

6. The submission from Mr May, in effect repeats the reasons for the wish, on the part of the Respondent, to have certain terms included in the new lease. It is from paragraph 10 onwards that he addresses the circumstances surrounding the adjournment. I have noted all that has been said.

7. Miss Charman's response dated 9th January 2017 adds little to the facts.

8. In reaching my decision I have considered the Upper Tribunal findings in the case of *Willow Court Management Company (1995) Limited v Mrs R Alexander and others under reference [2016]UKUT290(LC). (Willow case)*

THE LAW

9. The law applicable to this matter is set out below.

FINDINGS

10. There are some paragraphs of the Willow case that are worth repeating. The first is at paragraph 24 and follows on from a discussion as to the impact of the Court of Appeal case in Ridehalgh v Horsefield where the comments were couched in terms of the conduct of professional lawyers. Paragraph 24 says, *"We do not accept the submission. An assessment of whether the behaviour is unreasonable requires a value judgement 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 part from the guidance given in Ridehalgh at 2.3(2)(e) 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."*

11. The decision in Willow goes on to consider how the three stages under the rule should be considered. At paragraph 28 it says as follows, *"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 on the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will be properly judged to be unreasonable and the threshold for making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves on to a second stage of the enquiry. At that second stage, it is essential for the Tribunal to consider whether in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order*

that a third stage is reached when the question is what the terms of that order should be". The decision goes on to consider the position of a party that acts without legal advice (paragraph 32 onwards) and says at the end of paragraph 4, after agreeing with the observations of the Court in the Cancino case as follows. *"We also find support in Cancino for our view that Rule 13 (1)(a) and (b) should be reserved for the clearest cases and that in every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable."*

12. I have reviewed the submissions put to me and the facts of the case. I bear in mind that both sides were represented by experienced solicitors and Counsel. As I indicated before I consider that the complaint relates solely to the postponed hearing and indeed Mr Walsh, Counsel for Miss Charman at the postponed hearing in July 2016 put all on notice that an application under the Rule 13 would be made. If I am wrong and the complaint is also aimed at the alleged unreasonable behaviour of the Respondent in proposing certain lease terms then I would have found that such conduct was not unreasonable. As stated in the decision and in the directions in July, some 200 leases had already been issued following agreed lease extensions outside the Act and it is reasonable for the Respondent to wish to attempt to include the same terms in the new lease with Miss Charman. The fact that we did not agree does not make the conduct unreasonable.

13. I therefore confine myself to considering the conduct of the Respondent which led to the adjournment of the July hearing. There is no suggestion that the complaint lies under rule 13(1)(a), wasted costs. I have to consider the matter under the provisions of rule 13(1)(b). There is no suggestion that the application is out of time. Despite all that has been said in the Respondent's statement in response I do consider that the delivery of a substantial witness statement and an experts report the day before the hearing is unreasonable. Although it is said that there was no direction for the filing of witness statements commonsense would indicate that to deliver a substantial witness statement from Mr May and an experts report the day before the hearing will put the Applicant in considerable difficulty in dealing with that evidence the next day. Indeed the Tribunal agreed as they adjourned to allow the Applicant the chance to respond, having allowed the late introduction of this evidence. This position I find must have been one that would in all probability occur and the Respondent could and should have filed this additional evidence earlier so that the adjournment could have been avoided. It seems to me that it matters little what steps the Applicant took to respond. She was entitled to sufficient time to consider all that was being said and this necessitated the postponement. I find therefore that the first step of the process under Willow has been established by the Applicant.

14. I find that the conduct of the Respondent is such that an order under rule 13 should be made. Although the eventual findings of the Tribunal do not, of themselves result in an order for costs, the decision of the Tribunal was quite clear that the proposed lease terms were not appropriate. Miss Charman has been put to considerable costs in defending the Respondent's request for certain terms to be included. Those costs have been increased as a direct result of the postponed hearing, the fault for which I put fairly and squarely at the door of the Respondent. Accordingly I find that step two has been crossed and I move on to consider what

element of the costs that the Applicant says have been incurred should be paid by the Respondent. I have noted what has been said about the level of fees and the time taken. My findings are set out below.

15. The appropriate fee rate for Walton upon Thames would appear to be £217 per hour under the latest guidelines issued in 2010. I have some sympathy with the Respondent's argument on time spent. The bundle preparation could have been dealt with by a lower rate fee earner but I have no indication as to what such a fee might be other than considering the guidelines which would indicate that a Band D might charge £118 per hour. As to Counsel's fees I do consider, as it would seem did the Applicant's solicitors, that Counsel's clerk has taken a hard line on the fee. The original fee of £4,500 is handsome. Given that the additional papers were represented by a witness statement from Mr May and an experts report, which would need consideration, an additional £3,500 seems high. I have no breakdown of the time spent, or the hourly rate of Counsel, although the fee for considering the papers initially indicated £200 per hour. I note that the Applicant's solicitors thought something in the region of £2,250 was reasonable. A refresher had been agreed at £1,750.

16. Taking these matters into account I find that a reasonable method of determining the amount that the Respondent should pay is to adopt an hourly rate of £217 for solicitors fees, with £118 for the time spent preparing the bundle. I will allow 3 units for reviewing the bundle at the £217 rate, because it is reasonable for the fee earner to spend time checking the papers and 18 minutes would seem reasonable. Accordingly, I find that there are 15 units for attendances at £21.70 per unit, giving a fee of £325.50. I will allow a further 3 units for work on the bundle at £21.70, giving a further fee of £65.10 and 23 units at £11.80 for preparing the bundle giving a figure of £271.40. This gives a total of solicitors costs of £662.

17. As to Counsel's fees, as I indicated above they are I find high, given the work that I anticipate would have been required, having no evidence before me on this aspect. The email from instructing solicitors is indicative of what they thought the fee might be. Having already received a fee of £4,500, which using the £200 per hour rate indicates some 22.5 hours work and the fee for the postponed hearing of £3500 being some 17.5 hours, results in a weeks work. I find that it is reasonable for the Respondent to reimburse the Applicant with Counsel's fees of £2,250, being the amount that Miss Charman's solicitors thought reasonable.

18. This, with VAT, gives a total of £3,494.40 which I find are costs that the Respondent should pay to Miss Charman under the provisions of rule 13.

Andrew Dutton

Judge:

A A Dutton

Date: 6th February 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 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 to 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 (ie 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.

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.
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.
(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.
(6) The Tribunal may not make an order for costs against a person (the paying Person) without first giving that person an opportunity to make representations.
(7) The amount of costs to be paid under an order under this rule may be determined by
(a)summary assessment by the Tribunal;
(b)agreement of a specified sum by the paying person and the person entitled to receive the costs (the receiving person);
(c)detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.
(8) The Civil Procedure Rules 1998(1), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(2) and the County Court (Interest on Judgment Debts) Order 1991(3) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.