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

Case Reference : LON/OOAT/LVL/2013/0013

Property : Flat 1 – 6 , 520 -530 Chiswick High Road, Chiswick, London W4 5RG

Applicant : Business Flats Limited

Representative : Mr K F Davis FRICS and Mr S Dempsey, solicitor with Shakespeares LLP

Respondent : Julia Bowe (flat 1); Siobhan Baigey and Mary Cronin (flat 2); Phyllis Joyce-Hasham (flat 3); Anup Sodhi (flat 4); Eric Sitbon (flat 5) and Allan Ryan (flat 6)

Representative : Mr S Birks – Counsel: Mr J Matossian solicitor with Lancaster; Mr B Maunder-Taylor FRICS MAE

Type of Application : Application to vary leases pursuant to section 35 Landlord and Tenant Act 1987

Tribunal Members : Tribunal Judge Andrew Dutton
Mrs Sarah Redmond BSc (Econ)
MRICS

Date and venue of Hearing : 16th October 2013 at 10 Alfred Place, London WC1E 7LR

Date of Decision : 16th October 2013 and 17th January 2014

DECISION

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The Tribunal finds that the Applicants did act unreasonably in continuing with their application and that accordingly are liable to pay a part of the Respondents' costs in the total sum of £ 5,472. This is made up of £ 1,272 in relation to the costs of the solicitors and £4,200 in connection with the Counsel's fees. The Tribunal declines to make any order for costs in respect of the fees of Mr Maunder-Taylor. Payment of these costs should be made by the Applicants within 28 days.

BACKGROUND

1. On 16th October 2013 we issued a decision indicating that we did not have jurisdiction to determine the Applicants' request for a variation of six leases at Flats 1 – 6, 520-530 Chiswick High Road. The reasons for such determination are set out in that decision and there is no need for us to repeat those.
2. At the conclusion of those findings we issued directions following the Respondents' request for an order for costs as provided for in Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 (the Rules).
3. Those directions were complied with by the parties and the matter came back before us for determination on those written submissions. The first in time was from the solicitors acting on behalf of the Respondents Messrs Lancaster. In a letter dated 28th October 2013 they set out Respondents' submissions, a bundle of correspondence, fee notes from Mr Maunder-Taylor and Mr Simon Birks of Counsel and details of the Respondents' solicitors' costs and client care letter.
4. On 19th November the Applicants wrote to us setting out the reasons why they did not think it was appropriate for the Applicants to be required to make payment for costs and they included copies of correspondence and emails.

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5. We do not consider it necessary to set out in great detail the written submissions made by the parties. Both sides have those and nothing is to be gained by repeating them in full in this decision. We would, however, say that on behalf of the Respondents, it is asserted by them that the application was “wholly misconceived” and that although in September 2013 the Applicants were invited to agree an adjournment, the reasons for such adjournment apparently in part to enter into meaningful negotiations with the Respondents, the application for adjournment was opposed.
6. In early October the Respondents filed their statement of case which contained the assertion that the application was outside the jurisdiction of the Tribunal but a further attempt to proceed by way of negotiation was rebuffed.
7. The submissions by the Respondent alleged that the Applicant had acted unreasonably by (a) making the application when there was no (sic) basis in law for the application; (b) declining to enter into any negotiations; (c) insisting on proceeding when the Respondents sought an adjournment and (d) insisting on proceeding when the Respondents pointed out that the application was outside the Tribunal’s jurisdiction and an offer was made to negotiate.
8. The submissions then went on to deal with the merits of the application which it does not seem to us we need to consider in any detail as of course the initial application was dismissed by us. The conclusion said as follows:- *“The Applicant is the author of its misfortune. It chose to make the application. It made the application in disregard of the jurisdiction of the Tribunal. The application had no prospect of success. It was bound to cause the Respondents unnecessary expenditure and resisting the application. The situation was entirely of the freeholder’s making when it chose to draft the leases for Flats 7 – 20 in a form different from the leases to Flats 1 – 6. The proposed drafts were so unsatisfactory that it is doubtful whether they would have been approved even if the Tribunal had jurisdiction.”*
9. In support of the figures we were provided with a fee note from Maunder-Taylor’s showing a charge of £2,400 inclusive of VAT for the preparation of an expert’s report, this being dated 4th October 2013, and a further fee note in the sum of £1,260 inclusive of VAT, this being

for additional documentation and attending the Tribunal on 16th October 2013.

10. Mr Simon Birks' fee note was included showing a brief fee of £3,500, although indicating that attendance before the Luton County Court which is clearly in error. The brief fee would have included the preparation of the skeleton argument and any pre-hearing correspondence.
11. Finally, we had the statement of costs from Lancasters showing Mr Matossian as the solicitor having the conduct of the matter charging an hourly rate of £190. The statement of costs is in a very shortened form and merely sets out the time spent in respect of attendances, letters and telephone calls. The total fees claimed by the Respondents inclusive of disbursements and VAT are £12,703.
12. The Applicants' response dealt with something of the history of the matter both as to the alleged problems with regard to the computation of service charges in particular relating to the garaging, the instigation of negotiations by Mr Camarigg purportedly on behalf of the other leaseholders although denied, and the lack of progress made in those negotiations. In respect of Mr Maunder-Taylor's report they say that this was as a result of instructions received from Mr Baigley in the afternoon of 4th October and confirmed that Mr Maunder-Taylor did not inspect the property. The contention by the Applicants is that this was "a last minute reaction." If property instructions had been given to Mr Barry Sworn, the matter could possibly have been resolved.
13. The submissions went on to deal with the compliance with Tribunal directions and the concerns that we expressed in our first decision as to the increase in costs that may potentially arise to the other leaseholders.
14. The Applicants then responded specifically to the costs, in particular the history relating to the proceedings and the negotiations or lack of those as alleged by the Applicants.

15. At the conclusion of the submissions we are asked to consider the following:

- “1. The Applicants have at all times endeavoured to co-operate with the lessees to their advantage and have not acted in an unreasonable or vexatious manner bringing or conducting these proceedings.*
- 2. The Applicants make no objection to the handling of the hearing and the decision of the Tribunal. However, the Applicants expressed disappointment at the fact that the Tribunal members hearing this case did not receive the paperwork until 9.00am on the day of the hearing. It is appreciated that had they had a grasp of the case that perhaps on reflection and reading the papers in more detail, they may reflect that the Applicants made no financial gain and have acted reasonably towards the lessees of Flats Nos 1 – 6.*
- 3. The Business Flats Limited refutes any claim whatsoever for costs as the company has acted honourably and with expedition throughout and it was the lessees who first started the process.”*

THE LAW

16. Until 1st July 2103 the ability for a Tribunal to award costs was governed by the Commonhold Leasehold Reform Act 2002, schedule 12 paragraph 10. This limited any costs that could be awarded to a maximum sum of £500 on the terms of paragraph 10 and the behaviour, whether it be vexatious, abusive etc., of a party.
17. Rule 13 of the new rules provides that the Tribunal may make an order in respect of costs only *“(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in (ii) a residential property case or (iii) a leasehold case.”*
18. Sub-paragraph 7 of the rules states as follows *“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”) and (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; such assessment to be on the standard basis or, if specified in the costs order, on the indemnity basis.”*

FINDINGS

19. Although the sum which can be awarded by a Tribunal from 1st July is without limit, it seems to us that the basis upon which a finding can be made must mirror the considerations given under the 2002 Act. At schedule 12 paragraph 10(2) the circumstances provided for under paragraph 10(2)(b) is that a party has acted "*frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings*", it is still the basis upon which we consider the question of unreasonableness within the new rules. It seems to us it would be unnecessarily harsh to punish a party because they commenced an application which subsequently was dismissed for lack of jurisdiction. We have in mind a lay person commencing proceedings on what they considered to be perfectly valid grounds subsequently finding that those grounds in fact did not give the Tribunal jurisdiction. In this case the Applicants are a commercial company who are experienced in residential accommodation matters. The directions issued by the Tribunal on 1st August 2013 appeared not to have the benefit of the attendance of either party, which is a pity. However, in our findings even if the Applicants thought that their case had merit, they were put on notice by the statement lodged on behalf of the Respondents on 7th October 2013, that the question of jurisdiction under Section 35 of the Landlord and Tenant Act 1985 needed to be considered. Suggestions as to an adjournment were made but these were rejected by the Applicants, which in hindsight is unfortunate.

20. As we understand it, the Applicants had the services of solicitors who had assisted in the preparation of the proposed draft deed. At the commencement of the hearing on 16th October we asked Mr Davies, representing Business Flats Limited, what sub-sections of Section 35 of the Landlord and Tenant Act 1987 he relied upon and it was only after a short adjournment that he was able to indicate the two that they thought appropriate. It seems to us that the Act is clear as to what variations can be made to a lease under provisions of Section 35. It must have been clear to the Applicants, or they should have taken full legal advice if not, that their application was in danger of failing. It would have been sensible in those circumstances to have agreed an adjournment to see whether negotiations could have been entered into. Instead we find that the Applicants, although stating that the Respondents had not negotiated as they should, attempted to steam roller the matter through. The onus is not on the Respondents to necessarily negotiate where their lease satisfactorily deals with the question of service charges. If the Respondents choose not to seek to investigate the arrangements with regard to other parts of the property, in particular the garage, that is a matter for them. It may well be that an application under another section of the 1987 Act could have been made if the majority of the leaseholders agreed. We take the view that in pressing on the with proceedings in the face of a clear warning as to

jurisdiction contained in the Respondents' statement of 7th October is unreasonable within the definition of that word as we highlighted above.

21. For those reasons, therefore, we consider that the Applicants should pay the Respondents some costs, but not all. We have assessed the costs on a standard basis.

22. We do not, however, think that they should pay the fees of Mr Maunder-Taylor. He appears to have been instructed at the last minute and provided a report which we did not consider was terribly helpful, even if we had gone on to determine that the application had merit. As we indicated at paragraph 11 of our original decision, Mr Maunder-Taylor had not visited the premises and appeared to be suggesting variation to leases which were not within the application. We therefore take the view that Mr Maunder-Taylor's involvement was unnecessary and was something of a knee jerk reaction by the Respondents. Mr Birks' skeleton argument is quite clear that the main plank of their opposition to the application was the jurisdictional point. The need for Mr Maunder-Taylor in those circumstances seems to us to be otiose and accordingly we do not find that the Applicant should pay a contribution towards his fees.

23. Insofar as the solicitors costs are concerned, we cannot take issue with the hourly rate of £190 suggested by Messrs Lancasters for Mr Matossian who is, we are told, a solicitor. Although the grade is not set out in the assessment, in a schedule of works the time spent is put under paragraph A and we assume, therefore, it is intended that Mr Matossian is a grade A fee earner. Considering that schedule it does seem to us that some of the costs are excessive. Having nailed their colours to the mast with regard to the jurisdictional point, it seems to us to have spent four hours perusing and analysing the deed of variation is somewhat excessive. Four hours also for the preparation of the Respondents' statement of case seems to be on the high side. Doing to best we can with the information provided we find that the two hours spent perusing the application, the directions and the lease are reasonable and proportionate giving a figure of £380. The preparation of the Respondents' statement of case which runs to six pages we think perhaps could have been deal with in a couple of hours and accordingly another £380 would seem appropriate and proportionate for that matter.

24. Insofar as attendance at the hearing is concerned, we would have thought that as Counsel was instructed, the matter could have been dealt with either by a lower fee earner attending or indeed leaving Counsel to his own devices given that the clients were there to instruct him and the merits were based on arguments of law. Accepting perhaps that a junior fee earner might have been utilised we would allow say £300 for the attendance at the hearing to include travel. We accept that these are somewhat arbitrary figures but we are dealing with matter on a summary assessment on the standard basis and on the information that is to hand. We, therefore, conclude that inclusive of VAT the total sum payable in respect of the solicitors' costs should be £1,272 .
25. Insofar as Mr Birks' fees are concerned, the fee note sets out the brief fee and that presumably is what was negotiated by Lancasters with Counsel's clerk. It seems to us to be at the top end of a brief of this nature but Mr Birks was called in 1981 and as we indicated earlier we are assuming that the brief fee included the preparation for the hearing and the preparation of the skeleton argument. In those circumstances we are prepared to accept Mr Birks' fees of £4,200 inclusive of VAT. Accordingly the total sum that we find the Applicant should pay to the Respondents is £5,472, which should be settled within the next 28 days.

Judge: Andrew Dutton
A A Dutton

Date: 17th January 2014