



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

Case Reference : **CAM/22UG/LSC/2015/0062**

Property : **19 Mortimer Gardens, Colchester CO4
5ZG**

Applicant : **Miss Mary A Cottis**

Representative : **Ms M A Cottis In Person**

Respondent : **Chime Properties Limited**

Representative : **First Port Property Services Limited -
Managing Agents**

Type of Application : **By applicant – Rule 13(1)(b) – penal
costs application**

Tribunal Member : **Judge John Hewitt
Mr Stephen Moll FRICS
Mr John Francis QPM**

Date of Decision : **11 February 2016**

DECISION

Decision

1. The decision of the tribunal is that the applicant's application for a penal costs order pursuant to rule 13(1)(b) is refused.
2. The reasons for our decision are set out below.

Procedural Background

3. The substantive application was made by the applicant (Ms Cottis) pursuant to section 27A Landlord and Tenant Act 1985 (the Act). Our substantive decision on that application is dated 2 November 2015 which sets out full reasons. In essence Ms Cottis achieved a £10 credit adjustment to her service charge account and an order pursuant to section 20C of the Act. It is however, fair to say that the communication from the landlord's managing agents was not good, indeed it was very poor. Shortly prior to the hearing the landlord made concessions on a major plank of Ms Cottis' case. At the hearing representatives of the managing agents explained some of the service charges in dispute such that Ms Cottis was able to withdraw her challenge to them. Thus, in the event, there was relatively little left in dispute.
4. Following the hearing Ms Cottis made enquiry of the tribunal about a costs claim and in reply the tribunal sent out some notes explaining that the tribunal was essentially a 'no-costs tribunal' but indicated that in exceptional circumstances the tribunal had power to make a penal costs application under rule 13(1)(b).

On 18 November 2015 the tribunal received a letter dated 13 November 2015 from Ms Cottis which was taken to be an application for a penal costs order pursuant to rule 13(1)(b).

5. The application was plainly received by the tribunal within the time limit imposed by rule 13 (5).
6. Directions for the disposal of the application were given on 7 December 2015. The parties were notified that the tribunal proposed to determine the application on the papers to be filed and served pursuant to the direction unless any objection to the tribunal doing so was filed by Friday 8 January 2016. No such objection has been filed.
7. Pursuant to the directions there is before us:

Applicant's opening statement of case:	13 November 2015
Respondent's statement of case in answer:	undated
Applicant's reply:	2 January 2016

Legal background

8. Rule 13 concerns costs and provides:

“13(1) The Tribunal may make an order in respect of costs only:-

- (a) ... [wasted costs] ...*
- (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in:-*
 - (i) ...*
 - (ii) a residential property case, or*
 - (iii) ...*
- (c) ...”*

9. The predecessor of this tribunal as regards its residential property 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.
16. 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.
17. 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 "*ejusdem 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".

18. 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"

The gist of the case for Ms Cottis

19. Ms Cottis sought to recover: Postage £ 48.20

Photocopying £173.40

20. The gist of the case for Ms Cottis was that:

20.1 The tribunal recognised how deeply she cared for the development, and had an eye for detail;

20.2 Ms Cottis had raised accounting errors and discrepancies that the managing agent should have spotted, drew attention to them but they were not taken up robustly by the managing agent;

20.3 One of the reasons why she brought the case was that the managing agent had retracted a promise to apply a credit of £500 to her account to reflect accounting errors, and that if they had kept their word things would never have got as far.

20.4 Ms Cottis also made submissions about the failure on the part of the managing agent post the hearing to do certain things it had promised to do during the course of the hearing.

21. We observe at this stage that the offer to pay £500 was to reflect accounting errors and that whilst the managing agent had reneged on its promise to credit that sum to Ms Cottis the managing agent abandoned that position and in its statement of case dated 25 August 2015 stated that the £500 would be credited to the account after all. As at the hearing the respondent had not provided any evidence that the £500 had been credited to Ms Cottis' account. Ms Cottis was prepared to continue the hearing on the premise that a credit would be made and we understand that post hearing the managing agent has provided evidence that the £500 has been credited to Ms Cottis' account.

The gist of the case for the respondent

22. In its answer the respondent made several submissions seeking to justify its retraction of the promise to credit £500 to Ms Cottis' account and argued that this issue was not within the jurisdiction because it was connected to an investigation made by the Property Ombudsman. It was contended that the tribunal was not the appropriate forum to address that issue and the related stress alleged by Ms Cottis.

23. The respondent also complained that Ms Cottis had not complied with directions and had not identified and particularised the service charges in issue and that in consequence it faced an impossible task.

24. The respondent then set out legal submissions drawing attention the authorities mentioned in paragraphs 17 and 18 above.

Discussion

25. To some extent both parties have rather missed the point. On a rule 13(1)(b) application for penal costs the focus should be on the alleged unreasonable conduct on the part of the party against whom the application is made in 'bringing, defending or conducting' the proceedings and the extra or additional costs that conduct has caused the party making the application to incur.
26. Ms Cottis brought the proceedings, the respondent did not. Thus the only criteria left is 'unreasonable conduct' on the part of the respondent in defending or conducting the proceedings. There was plainly a degree of inept management on the part of the respondent's managing agent in the period prior to the commencement of the proceedings and the retraction of the promise to credit Ms Cottis' account with £500, which promise Ms Cottis had relied upon to her detriment, as the managing agent well knew, was conduct verging on the shameful but it was all pre-proceedings and thus outside the scope of rule 13(1)(b).
27. The main thrust of Ms Cottis in bringing the proceedings was the retraction by the respondent's managing agent to fulfil its promise to credit Ms Cottis' account with £500 but that retraction was fairly swiftly reversed by the respondent in its statement of case dated 25 August 2015 from which date it was not a live issue in the proceedings.
28. Nevertheless Ms Cottis pressed on with the proceedings but did not identify clearly the service charges in issue. The respondent defended the proceedings as best it could. We cannot see that it was unreasonable for it to do so. Ms Cottis has not identified any conduct on the part of the respondent in its defence of the proceedings which falls within rule 13(1)(b). We cannot see that there was any. Let alone any conduct that caused Ms Cottis to incur more costs than she was going to incur in any event.
29. The bulk of the costs incurred by Ms Cottis related to photocopying and postage of the trial bundles. Having decided to press on with the proceedings after the respondent had reversed its retraction of the promise to credit Ms Cottis account with £500, Ms Cottis was always going to incur the costs of the trial bundles because it was her application and the directions required her to prepare the trial bundles.
30. It seems to us that the significant 'unreasonable conduct' on the part of the respondent complained by Ms Cottis occurred prior to the commencement of the proceedings and that is outside the scope of rule 13(1)(b). Similarly, the post hearing conduct complained of is not unreasonable conduct in defending or conducting proceedings and in any event such conduct has not caused Ms Cottis to incur more costs than she would otherwise have done. The costs which Ms Cottis seeks to recover were all incurred prior to the hearing. Thus conduct during the hearing or post hearing cannot have any effect on the costs in issue as claimed by Ms Cottis.
31. We acknowledge that if Ms Cottis is right and that promises made by the managing agent during the hearing to provide documents or information have not been kept, that is reprehensible and may be a further example of inept

management, but it is not a ground which enables the tribunal to apply a penalty or impose a sanction in respects of costs incurred prior to the hearing.

32. Similarly, whilst we recognise that Ms Cottis cares deeply about the development and has spent a good deal of her time observing contractors on site and drawing attention to accounting errors and discrepancies these are not factors that we can properly take into account on an application for a penal costs order under rule 13(1)(b). The focus has to be on the respondent's conduct (or that of its managing agent) not on Ms Cottis' conduct.
33. For these reasons we have no alternative but to dismiss Ms Cottis application for penal costs.

John Hewitt

Judge John Hewitt

11 February 2016

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.