4371

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AC/OC9/2016/0067
Property	:	16 Rasper Road, Whetstone, London N20 0LZ
Applicant	:	Mr Aaron James Smith Ms Galia Solange Cuadros
Representative	:	Mr James Compton Comptons Solicitors LLP
Respondent	:	Mr Ronald Bernard Ludwig Decio
Representative	:	Mr John Sharples Counsel
Type of Application	:	Section 60 Leasehold Reform, Housing and Urban Development Act 1993 – determination of costs payable; and Rule 13(1)(b) – penal costs
Tribunal Members	:	Judge John Hewitt Mrs Helen Bowers MRICS
Date and venue of Hearing	:	23 November 2016 10 Alfred Place, London WC1E 7LR
Date of Decision	:	12 December 2016

DECISION

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Decisions of the tribunal

1. The tribunal determines that:

   1.1 The sum of £960 being the costs of a valuer in respect of lease negotiations referred to in an invoice dated 9 June 2016 rendered by Allied Surveyors to the respondent's solicitors are not costs payable by the applicant to the respondent pursuant to section 60 of the Act;

   1.2 The costs payable by the applicants to the respondent pursuant to section 60 of the Act amount to £2,248.80 as set out in paragraph 46 below;

   1.3 The respondent's application for penal costs pursuant to rule 13(1)(b) in respect of Case Reference LON/00AC/OLR/2016/0283 (the Terms Application) be refused; and

   1.4 The respondent's application for penal costs pursuant to rule 13(1)(b) in these proceedings (the Costs Application) be refused.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. Proceedings in respect of the Terms Application, arose following the long lessee of the subject flat giving notice to exercise the right to a new lease. These proceedings, the Costs Application, concern various applications for costs orders made by the respondent.

4. Unfortunately, we have to recite a background which became complex.

5. In August 2015 the long lessee of the subject flat was Mr Raymond John Waller (Mr Waller). Mr Waller was the original tenant of a lease dated 22 December 1985 granted to him by Mr Ian Vinning and Mr Peter St Clair Gribble. The reversion is now vested in the respondent who is the competent landlord for the purposes of section 40 of the Act.

6. By an initial notice dated 7 August 2015 [27] given by Mr Waller to the respondent pursuant to section 42 of the Act, Mr Waller sought to exercise the right to a new lease of the flat. The notice describes the demised premises to be: *"First Floor Maisonette 16 Rasper Road, Whetstone, London N20 0LZ with staircase leading thereto and more particularly described in the Lease..."*

   The premium proposed was £14,000.

The terms of the proposed new lease were to be the same as the existing lease except that the term would be extended by 90 years from expiry and a substitute rent of a peppercorn rent; save that the existing lease was to be amended to include the words 'and Second' after the word 'First' on the first line of The First Schedule Part A. It was also to have appended to it an up to date floor plan illustrating the current layout of the premises. The effect of those textual amendments, as we understand them, would be that there would be express reference to the second floor of the maisonette being included in the definition of the demised premises.

7. By a counter-notice dated 19 October 2015 [29] the respondent admitted that Mr Waller had the right to acquire a new lease on the relevant date but he objected to the proposed premium of £14,000 and the proposed amendments to the existing lease as regards the description of the demised premises and the proposed new floor plan.

   The respondent counter-proposed a premium of £35,000.

8. There was thus an issue as to whether the terms of the new lease should make express reference to the demised premises including the second floor. It appears that in or about November 1996 [33] Mr Waller wrote to his landlord, Mr Vinning, informing him of an intention for the loft space (which we understand to be on the second floor) to be converted into a usable space. He stated that no structural alterations were proposed save that a small window was to be cut into the roof facing the back gardens and also a proper access trap was to be placed into the ceiling above the stairs.

   A copy of that letter was sent by Mr Waller's solicitors to the respondent's solicitors under cover of a letter dated 26 October 2015 [31] which letter also asserted:

   "There was a subsequent conversation and correspondence between Mr Vinning and our client whereby the works were consented to.

   It was also asserted that after the respondent had acquired the freehold interest he recommended contractors to Mr Waller who might carry out the conversion works. That assertion is denied by the respondent.

9. It appears not to be controversial that at some time the conversion works were carried out and that the loft space was used for storage purposes. In a letter from the respondent's solicitors to Mr Waller's solicitors dated 18 November 2015 a number of points were made to the effect that Mr Waller had no right to, or to use, the loft space and stated:

   "Our client has written to your client on several occasions regarding the use of the loft space and stated that they have never consented to the same."

10. The respective solicitors exchanged correspondence on matters in dispute. In a letter dated 18 December 2015 the respondent's solicitors stated:

"You have stated in previous correspondence that you have evidence of consent being contained [sic] *for the loft conversion. You have failed to date to provide any supporting evidence in this respect.*

If you have any evidence that you wish to rely on with regard to the conversion of the loft then this must be disclosed to us prior to an application to the Leasehold Valuation Tribunal.

If you fail to do so we reserve the right to place this email and previous correspondence before the ... tribunal on the question of costs as we would argue that your conduct is unreasonable in this respect."

11. Further correspondence was exchanged but no further documents were provided by Mr Waller's solicitors.

12. In a letter dated 1 February 2016 [43] the respondent's solicitors complained that Mr Waller was using the loft and certain areas of the gardens and communal areas for storage purposes. It was denied that permission had been given to Mr Waller to utilise those areas and it was stated they were not part of Mr Waller's demise. The letter did, however, state:

"We believe at most there could be said to be an implied licence in place between our client and your client for your client to use certain areas for storage.

Please accept this letter as notice to your client that our client revokes that permission and therefore the licence is terminated.

The letter goes on to require Mr Waller to remove his possessions *"... from the areas listed above..."*

13. Mr Waller and the respondent were not able to agree all of the terms of acquisition and on 16 February 2016 the tribunal received application papers from Mr Waller's solicitors. In those papers, Mr Waller sought a determination of the terms of acquisition in dispute and a determination of the costs the respondent was entitled to, pursuant to section 60 of the Act.

14. By letters to the respective solicitors dated 17 February 2016 the tribunal made clear that the terms of acquisition in dispute would be dealt with under Case Reference LON/00AC/OLR/2016/0283 and that the section 60 costs application would be dealt with under Case Reference LON/00AC/OC9/2016/0067. The tribunal gave notice that directions were to be given as regards the Terms Application and that the Costs Application would be stayed until *"the substantive application is closed."*

Directions were duly given in the Terms Application. A hearing was scheduled for 20 and 21 June 2106

15. By an assignment dated 18 March 2016 [48] Mr Waller assigned the lease to the current applicants together with the benefit of the initial notice of claim.

    On 1 April 2016, the current applicants were registered at Land Registry as the proprietor of the lease [52].

    It seems notice of those assignments was not given to the respondent until 14 June 2016.

16. By a letter dated 29 April 2016 [46] to the applicant's solicitors the respondent's solicitors asked them to confirm the basis of: *"... your client's case with regard to the loft space."* At this time the respondent's solicitors evidently assumed that the 'client' was still Mr Waller.

17. Evidently on 10 June 2016 the premium payable for the new lease was agreed at £19,000 and on 14 June 2016 the terms of the new lease were agreed.

18. By an email from Comptons LLP to the respondent's solicitors dated 14 June 2016 [47] attached a draft lease approved as amended and a copy of an executed deed of assignment. The email confirmed acceptance of the premium of £19,000 and requested that on the basis the lease is agreed, invited agreement that *"... terms of acquisition are agreed as of today's date, 14th June 2016. I will then vacate the hearing listed for 21st and 22nd June."*

    The email also made reference to the Costs Application being stayed and stating that costs directions *"... will follow shortly..."*.

19. We have not been provided with a copy of any draft lease, whether as approved by both parties or otherwise. We have not been provided with a copy of the response to the email dated 14 June 2016.

    However, by letter dated 15 June 2016 to the tribunal bearing the reference for the Terms Application, Comptons Solicitors LLP made reference to the assignment to the applicants, by whom they were also instructed, and said: *"We also write to advise that terms of acquisition have now been agreed. Please kindly vacate the hearing listed for 21st and 22nd June 2016"*. The letter went on to request the '*... issue of costs directions..."*

20. By letter dated 16 June 2016 the respondent's solicitors wrote to Comptons confirming that the terms of acquisition were agreed '*as of 14 June 2016*' and also stating that: '*... our client is also happy with the*

amendments that you have made to the draft lease.' We have not been provided with any details of those amendments.

21. By letter, also dated 16 June 2016, bearing the reference for the Costs Application, the respondent's solicitors wrote to the tribunal informing it that that as of 14 June 2016, the terms of acquisition were agreed.

    The letter went on to say:

    "The issue of costs has not been settled and our client's position is reserved in that respect. Our client will be seeking wasted costs pursuant to Section 29(4) of the Tribunal Courts and Enforcement Act 2007, or, in the alternative, costs pursuant to Rule 13(1)(b) of the [tribunal's rules].

    We would therefore be grateful if the Tribunal could issue directions in this matter."

22. By letter dated 21 June 2016 the tribunal wrote to both parties in the Terms Application stating that having received letters from both parties advising that the terms have been agreed, the tribunal had closed its file and the papers will be sent to remote storage. The letter also stated that direction in the Costs Application will be sent out unless the tribunal is notified that the costs had been agreed.

23. In the absence of notification that costs had been agreed, directions in the Costs Application were issued on 25 July 2016. They were in standard form for a section 60 costs application and made no reference to wasted costs or penal costs pursuant to rule 13(1)(b). Direction 2 required the respondent to send to the applicant a schedule of costs with supporting information and documents by 8 August 2016. We understand this direction was not complied with. At some point, it is not clear when, an oral hearing of the Costs Application was set for 21 September 2016.

24. By letter dated 17 August 2016 to the tribunal, the respondent's solicitors, referred to a telephone conversation with a case officer, and said:

    "In addition to Section 60 costs, our client will be seeking Rule 13 and/or Section 29(4) costs in this matter and we would be grateful if the Tribunal could send out directions in this respect as discussed in our telephone conversation."

    The letter went on to request an oral hearing on the costs issues.

25. Evidently, by letter dated 22 August 2016 [55] the respondent's solicitors again wrote to the tribunal expressing disappointment that they had not received a response to the letter of 17 August 2016. Enclosed with the letter was a schedule of costs which "*... includes the section 60 and rule 13 costs."*

The letter went on to say:

"Upon receipt of directions from the Tribunal with regard to rule 13 costs we may have to amend this schedule but we are serving it at the current time in an effort to save costs."

A check of the tribunal's file shows that this letter was not received by the tribunal.

26. By letter dated 8 August 2016 the respondent's solicitors again wrote to the tribunal expressing disappointment that they had not received a response to the letter of 17 August 2016 and again made reference to *"Rule 13 and/or Section 29(4) costs."* It was stressed for avoidance of doubt that: *"... out client will be seeking Rule 13 and/or Section 29(4) costs."* The letter suggested that 'these costs' and the section 60 costs are dealt with at the same hearing. It was also suggested that the hearing set for 21 September 2016 be vacated: *"... to enable the parties to comply with any Rule 13 directions when they are provided."*

    The respondent's solicitors wrote again to the tribunal, to similar effect, on 13 September 2016, although in this letter reference was made only to rule 13 costs and rule 13 directions were again requested. Evidently, a copy of that letter was sent to the applicants' solicitors on 19 September 2016.

27. On 27 September 2016, a tribunal judge gave directions on the papers [1]. The judge appears to have regarded the letter dated 13 September 2016 as being an application for rule 13 costs.

    At recital (5) the judge recorded that as the tribunal had been advised in June 2016 that terms had been agreed and that any rule 13 costs application in relation to the Terms Application *"... would appear to be out of time."* We infer the judge had in mind rule 13(5).

    At recital (6) the judge recorded that a rule 13 application in respect of the section 60 Costs Application was not out of time as that application had yet to be determined.

    The judge went on to give directions. It appears from those directions that the judge took the view that the rule 13 costs application was to be limited to 'unreasonable conduct' arising in the Costs Application but not the Terms Application and in broad terms the directions given were:-

    Rule 13 application
    Respondent to serve a statement of case by 14 October 2016;
    Applicants to serve a statement of case by 28 October 2016;
    Respondent to serve a reply by 4 November 2016;
    Respondent to prepare the bundles for the hearing and to file and serve them by 11 November 2016; and

The hearing to take place on 23 November 2016.

Section 60 application
Directions dated 25 July to continue to apply, saved as varied;
Applicant to continue to prepare the bundles and to file and serve them by 11 November 2016; and
Hearing to take place on 23 November 2016.

28. In the event and despite those directions for the hearing on 23 November 2016 we were provided with one hearing bundle which appears to have been prepared by the respondent's solicitors.

In broad terms the bundle comprised:

1. Directions (27.09.2016)	[1-5]
2. Respondent's statement of case	[6-11]
3. Respondent's schedule of costs	[12-18]
4. Applicants' statement of case in answer	[19-22]
5. Respondent's statement of case in reply	[23-26]
6. Various notices and correspondence	[27-58]

29. We observe at this point that the respondent's schedule of costs at [12-18] is one global schedule and it does not separate out:

29.1 The section 60 costs claimed;
29.2 The rule 13 costs claimed in respect of the Terms application; and
29.3 The rule 13 costs claimed in respect of the Costs application.

It appears that in broad terms the respondent claims an entitlement to all of his costs incurred in connection with the whole of the enfranchisement process and evidently his solicitors did not see fit to separate the costs out under the respective headings.

The hearing

30. At the hearing the applicants were represented by Mr James Compton, solicitor and partner in Comptons Solicitors LLP and the respondent was represented by Mr John Sharples of counsel. The respondent was present but there was no representative of his solicitors present.

31. On the morning of the hearing, but prior to the commencement of the hearing Mr Compton handed in a witness statement of one of the applicants, Mr Aaron Smith. The gist of his evidence was that in a conversation he had with the respondent's valuer, Mr Gordon Loughran on Friday 10 June 2016, Mr Loughran said that the respondent's section 60 costs amounted to £648 for surveying costs and £1,200 for legal costs. In support of that Mr Smith produced an email dated 13 June 2016 which he had sent to Trevor Jackman, Tim Wild, and copied to James Compton and Ray Waller, in which he said, amongst other things:

"On Friday I contacted Gordon Loughran, the other sides Surveyor myself. After some discussion I offered £19,000 for the lease extension + reasonable costs. I also requested a 12 month option over the loft space for £12,000. After Gordon discussed this with his client the response was that they would accept the £19,000 reasonable costs (£648 surveyors costs and £1,200 legal costs) but also wanted me to pay his additional costs on top of the reasonable costs: £480 surveyors costs and £5,500 legal costs. "

32. At the commencement of the hearing we were informed that the parties had agreed the amount of the section 60 costs save for one item. We were handed a schedule dated 22 November 2016 evidently prepared by the respondent's solicitors which set out: *"Following costs recoverable under Section 60"*. There were three disbursements listed:

Land registry documents	£18.00
Surveyors fee (premium)	£540.00
Surveyors further fees	£960.00

There were then listed various legal costs which totalled £1,690.80 inclusive of VAT.

We were told that those costs were agreed save the 'Surveyors further fees £960.'.

33. In these circumstances, we adjourned for a short while so that the 'agreed' costs could be stripped out of the respondent's costs schedule and so that the resulting costs might be split out as to those relating to the penal costs claimed in respect of the Terms Application and the penal costs claimed in the Costs Application. In the absence of the presence of a representative from the respondent's solicitors it was necessary for Mr Sharples to call them to try get a breakdown. He did so to some extent and upon the hearing re-commencing he gave some form of breakdown to us. Given that we have rejected both penal costs applications, which we shall deal with below, we do not need to try and record that breakdown in this decision.

The law

35. In the schedule to this decision we have set out:
Section 60 of the Act;
Section 29 Tribunals, Courts and Enforcement Act 2007;
Rule 13; and
Extracts from *Willow Court Management Company (1985) Limited v Alexander* (and other parties) [2016] UKUT 0290 (LC)

The issues

Section 60 costs

36. We start with the disputed claim to £960 in respect of surveyor's further fees.

37. The firm instructed by the respondent was Allied Surveyors and Valuers. We were shown two invoices issued by the firm.

The first is dated 29 September 2015 in the sum of £540.00 It simply refers to the respondent, the property and *"To: Professional services rendered in respect of the above."* The common understanding was that this invoice related to the cost of a valuation report commissioned to enable the respondent to prepare his counter-notice which is dated 19 October 2015. This invoice was not in dispute.

The second invoice, said to be a proforma, is dated 9 June 2016 in the sum of £960. Again after reference to the respondent and the Property it refers: *"To: Professional services rendered in respect of the above Lease negotiations"*.

Having requested information we were told that this invoice has not yet been paid but it may be that funds have been lodged with the respondent's solicitors.

38. Having had the opportunity to take instructions Mr Sharples told us that the invoice reflected a fixed fee negotiated with the valuer for him to negotiate the premiumto be paid by the applicants. It was said that the cap on the fee was fair and reasonable. If the valuer was able to achieve an agreement promptly that was to his advantage, but if negotiations became prolonged, that was his risk.

39. Mr Sharples submitted that entitlement to these costs fell under both section 60 (1) (b) and (c). He said that negotiations were for the purpose of 'fixing the premium' as in (b) but also came within (c) because it was necessary to agree the premium in order that the new lease could be granted; doing so was part and parcel of the conveyancing process. Mr Sharples also submitted that the expression *"... costs of and incidental to any of the following matters...* which precedes sub-paragraphs (a) to (c) can embrace negotiations to agree the premium.

40. Mr Compton made rival submissions to the effect that section 60 did not embrace valuer's fees for negotiations. He submitted that the expression in (b) *"any valuation ... of the flat..."* is plainly referable to a valuation, which might be written up in a report or given verbally, but does not extend to negotiations.

41. Neither representative cited any authorities to support their rival positions.

42. We prefer the submissions made by Mr Compton and his construction of section 60(1)(b). We reject the submissions made by Mr Sharples that negotiating the premium is part and parcel of the conveyancing process. We bear in mind that where the parties are unable to agree the premium the tribunal may be called upon to determine it and section 60 (5) expressly provides that a party shall not be liable for any costs

which a party incurs in connection with proceedings before the appropriate tribunal. The scheme of the Act is that once the competent landlord has obtained his valuation, he is to be responsible for any costs which he may incur in negotiating or litigating over the premium payable.

43. Having arrived at this decision we are reinforced by it having regard to paragraph 32-24 of *Hague: Leasehold Enfranchisement* sixth edition, in which as regards (c) and the grant of the new lease the authors say:

"This has been construed as meaning 'the costs of and incidental to the drafting and execution of the new lease' and will not include the costs of arguing or negotiating the claim."

The authority for that proposition is given in footnote 106.

44. We are further reinforced in our conclusion by the remarks of Mr N J Rose FRICS sitting in the Upper Tribunal (Lands Chamber) in *Re Fitzgerald Flat 3, 49-51 Cheval Place* [2010] UKUT 37 (LC) in which at paragraph 23 he said:

"23. Thirdly, it is clear from Mr Beckett's initial account dated 10 October 2008 that the fee of £4,000 included a discussion of

"tactics in relation to a proposal by the lessee to expand his demise and make other alterations."

In my judgment such discussion does not fall within the ambit of section 60(1)(b)."

Conclusion

45. We find that the valuer's costs of £960 are not payable by the applicants to the respondent.

46. In the light of the agreement between the parties the section 60 costs payable by the applicants to the respondent are:

Land registry documents	£18.00
Surveyors fee (premium)	£540.00
Legal costs	£1,690.80

All the above are inclusive of VAT where payable.

Penal costs

What applications have been made?

47. First, we have to determine what application(s) have been made with regard to penal costs and whether they have been made in time.

48. As regards the application concerning the Terms Application, Mr Sharples relies upon the letter dated 16 June 2016 – see paragraph 21 above. The wording is not perfect. The letter bears the case reference of

the Costs Application, not the Terms Application. It refers *to 'our client's position is reserved'* and *'our client will be seeking'*. It does expressly say an application is made. Against that it does request directions be issued and directions usually follow an application having made.

Similar terminology is used in subsequent is correspondence all of which bear the Costs Application case reference.

49. With regards to paragraph (5) of the directions dated 27 September 2016 to the effect that a penal costs application in relation to the Terms Application was out of time, Mr Sharples observed that his instructing solicitors took the view it was not and proceeded to prepare one composite schedule of costs, but they do not appear to have communicated that view to the tribunal or to Comptons.

50. Mr Compton submitted that none of the letters amounted to a compliant application because none them complied with rule 26. We reject that submission. Rule 26 plainly refers to 'Starting Proceedings', that is to commencing new substantive proceedings. The rule sensibly requires detailed information about the issues and the parties so that the application can be processed as may be appropriate.

51. Penal costs applications can only ever arise in existing proceedings because they turn on alleged unreasonable conduct 'in bringing, defending or conducting proceedings'. Rule 13 (4) (a) provides that a party may make an application 'orally at a hearing' or 'send or deliver an application to the tribunal'. Rule 13 (4) (b) provides that an applicant 'may' send with the application a schedule of costs claimed, but this appears to be optional and is not a mandatory requirement.

52. In these circumstances, we are satisfied that a rule 13(1)(b) application may be made by a letter sent to the tribunal and that such an application does not have to be accompanied by a schedule of costs. It seems to us that it is sufficient compliance to send a letter intimating an intention to claim penal costs and requesting that directions be issued. In arriving at this conclusion, we bear in mind the overriding objective that the tribunal must deal with cases fairly and avoiding unnecessary formality.

53. We take a broad view of the correspondence and conclude that as early as 16 June 2016 the respondent's solicitors made reference to section 29(4) of the 2007 Act and rule 13(1)(b) and were requesting directions be issued. Whilst that letter bore the case reference for the Costs Application, at that time the Costs Application was stayed and neither party had taken any steps with regard to it. Thus, there could not have been any 'unreasonable conduct' arising in it. It is therefore reasonable to infer that the letter must have referred to 'unreasonable conduct' arising in the Terms Application. The burden of the letter was plainly informing the tribunal that terms of acquisition had been agreed, and

was information which the party was required to give to the tribunal in relation to the Terms Application.

54. Accordingly, we find that the respondent has made valid penal costs applications in both the Terms Application and the Costs Application.

The Terms Application

55. The gist of the unreasonable conduct relied upon by the respondent is;

Mr Waller

1. Raised an unjustified claim to a right to the attic space;
2. Failed to produce documentary evidence to support the claim, despite asserting that such evidence exists;
3. Failed to comply with disclosure directions in connection with the claim, despite several requests; and
4. Failed to obtain the consent of the respondent to the assignment of the lease to the applicants

The applicants

1. Failed to give prompt notice of the (unlawful) assignment of the lease;
2. Assisted in the flagrant/deliberate breach of covenant by Mr Waller with regard to the assignment;
3. Failed to get from Mr Waller confirmation that consent to assignment had been granted;
4. Failed to provide evidence concerning the attic following the request dated 29 April 2016;
5. Failed to exchange witness statements in compliance with directions or to seek and obtain an extension of time and by reason of failing to provide disclosure made it impossible for the respondent to prepare his witness statement(s) on time;
6. Withdrew a wholly unjustified claim to the inclusion of the attic in the new lease; and
7. Failed to complete the new lease having agreed terms of acquisition in June 2016.

56. In response Mr Compton submitted that:

1. Penal costs were conduct based, and stand by alleged 'unreasonable conduct'. The conduct of Mr Waller complained of is not the conduct of the applicants and there is no justification that the applicants should be penalised for it.
2. The applicants have not been substituted as applicants in the Terms Application where Mr Waller remains as the applicant. Mr Waller has not been given notice of the proceedings and the opportunity to put his case.
3. Without prejudice to the above it was not wrong or unreasonable for Mr Waller to have made a claim to be entitled to the attic space. He had been using the attic since 1996 to the knowledge of his then landlord and to the knowledge of the respondent ever since he acquired his reversionary interest.

4. Some documents to support the claim were made at an early stage but delay did occur subsequently due to Mr Waller being resident in Holland, in the circumstances that was understandable and was not unreasonable. Efforts were being made to locate the evidence to be relied upon.
5. The claim to the attic has not been abandoned. An application has been made to the county court for a vesting order and the court will determine the terms of the vesting order.
6. The conduct complained of does not begin to meet the first stage criteria set out in paragraph 28 of *Willow Court*. The test to be applied is objective, not subjective. The second and third stages of the test have not been pleaded.
7. The claims and counterclaims made in enfranchisement cases are sometimes speculative, but that is not unreasonable. For example, the respondent gave counter-notice for a premium of £35,000 but eventually agreed upon £19,000.

57. We preferred the submissions of Mr Compton on the key issues. The present applicants are not parties to the Terms application where Mr Waller remains the applicant. The present applicants are not responsible for the conduct (unreasonable or otherwise) of Mr Waller. In any event, we find that it was not unreasonable of Mr Waller to have sought rights in respect of the attic. He had been using the attic since 1996 with the knowledge of his landlords. The exact legal nature of those rights might have been unclear but it was not unreasonable to have included them. Delay in producing documentary evidence is explained by Mr Waller being in Holland.

58. If the lease was assigned to the applicant by Mr Waller in breach of covenant, that is conduct of Mr Waller, not the applicants. If there was such a breach the respondent had remedies available to him should he have wished to pursue them. The late giving of notice of assignment of the lease is not conduct in the Terms Application proceedings. Late giving of notice to assign the initial notice might be, but in context it was not unreasonable conduct and it does not appear to have caused the respondent to have incurred more costs than he would have done otherwise.

59. The failure to serve witness statements on time does not, of itself, appear to have caused the respondent to incur more costs, other than perhaps the cost of a few letters, which, in the scheme of things would be de minimis in amount.

60. As regards the alleged withdrawal of the claim to the attic and the failure to complete, Mr Compton denied that the claim had been withdrawn. He said that an application had been made to the county court for a vesting order pursuant to section 48(3). We were not shown a copy of the application to the court and we were not informed what relief was sought. Mr Compton alluded to the question of the attic being before the court.

61. In these proceedings, it is not for this tribunal to speculate what vesting order the court might make. The Act lays down a process to be followed where terms of acquisition have been agreed but, for whatever reason, the new lease is not completed within the given time frame. We reject the submission that a tenant who exercises the right to make an application to the court has acted unreasonably within the context of a penal costs application.

62. It is quite clear to us that rule 13, as explained in *Willow Court,* sets a high bar to the range of conduct to be condemned as unreasonable. The matters complained of by the respondent simply do not go anywhere near meeting that bar.

We find that the manner in which the enfranchisement process was pursued was well within the range of the cut and thrust of such processes which are before this tribunal on a regular basis.

For these reasons we refuse the penal costs application.

The section 60 costs application

63. The gist of the unreasonable conduct complained of by the respondent is:
    1. Failure to take steps to agree the costs;
    2. Failure to serve points of dispute when invited to do so;
    3. Failure to respond to letters;
    4. Purporting to accept an offer which had not been made and which was withdrawn;
    5. Informing the tribunal that the costs had been agreed when they had not;
    6. Attempting to raise the issue of settlement at the hearing to determine the amount of costs without a direction from the tribunal that they may do so;
    7. Seeking to rely on an unsigned witness statement; and
    8. Failure to pay the amount of costs or to offer security for costs.

64. Given the agreement on costs arrived at just prior to the hearing some of the above must fall away. On others, there was little supporting evidence provided, especially around whether costs had been agreed or not.

65. The gist of the case for the applicants was that the respondent had failed to comply with the directions to serve a schedule of the section 60 costs claimed plus supporting papers as set out in direction 2 of the directions dated 25 July 2016. Sometime later the respondent served a composite schedule of costs setting out all of the costs claimed. There was a dispute as to when this was served, the respondent says it was during August, Mr Compton said it was later. What was not in dispute was that it was a composite schedule and did not expressly identify the section 60 costs claimed. The updated composite schedule included in the hearing papers put before us also did not expressly identify the section 60 costs claimed.

66. We find as a fact that the respondent's solicitors did not produce a schedule of the section 60 costs claimed until 22 November 2016, the day before the hearing. Once that was provided Mr Compton was able to agree the costs, save as to the disputed £960 surveyor's costs concerning premium negotiations.

67. We also find as a fact that on Friday 10 June 2016 Mr Loughran told Mr Smith that the respondents lease extension costs amounted to £648 surveyor's costs and £1,200 legal costs that Mr Smith offered £19,000 premium plus payment of those costs and that that offer was rejected and Mr Loughran made a counter-proposal of those sums plus an additional £480 surveyor's costs and £5,500 legal costs, which offer was not accepted by Mr Smith such that after a reasonable time it lapsed.

68. We also bear in mind, for completeness that it was Mr Waller who originally made an application for the amount of the section 60 costs to be determined and that it was the applicants' solicitors who wrote to the tribunal on 15 June 2016 reporting the agreement on the terms of acquisition and asking that directions be given for the determination of the section 60 costs.

69. Again, in broad terms we prefer the submissions made by Mr Compton. It may well have been that in some correspondence some bad or poor or misunderstood points were made as to whether or not the costs had been agreed but taken overall in context we hold that that conduct does not get anywhere near the criteria to warrant a penal costs order being made.

70. The respondent failed to comply with directions, he failed to provide a clear schedule of the section 60 costs claimed until the day before the hearing. The composite schedule of costs served was not in conformity with directions and failed to identify the costs claimed under the various applications.

71. For these reasons we refuse the penal costs application.

Judge John Hewitt
12 December 2016

The Schedule

Leasehold Reform, Housing and Urban Development Act 1993

60.— Costs incurred in connection with new lease to be paid by tenant.
(1) Where a notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely—

(a) any investigation reasonably undertaken of the tenant's right to a new lease;
(b) any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56;
(c) the grant of a new lease under that section;

but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

(2) For the purposes of subsection (1) any costs incurred by a relevant person in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) Where by virtue of any provision of this Chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then (subject to subsection (4)) the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

(4) A tenant shall not be liable for any costs under this section if the tenant's notice ceases to have effect by virtue of section 47(1) or 55(2).
(5) A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before the appropriate tribunal incurs in connection with the proceedings.

(6) In this section "relevant person", in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter, any other landlord (as defined by section 40(4)) or any third party to the tenant's lease.

Tribunals, Courts and Enforcement Act 2007

29. Costs or expenses
(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal, and
(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

The Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013

13. Orders for costs, reimbursement of fees and interest on costs

(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 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 the person (the "paying person") without first giving that person an opportunity to make representations.

(7) – (8) [Assessment and interest on costs]

(9) The Tribunal may order an amount to be paid on account before the costs of expenses are assessed.

Willow Court Management Company (1985) Limited v Alexander (and other parties) [2016] UKUT 0290 (LC)

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.*
>
> *The term "negligent" was the most controversial of the three ... We are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession*
>
> *We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."*

The element of discretion in rule 13(1)(b)

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only ... if a person has acted unreasonably...." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28. 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. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. 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.

29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.

39. Ridehalgh highlights (at page 237E) that in the wasted costs jurisdiction it is essential to demonstrate a causal link between the improper, unreasonable or negligent conduct complained of and the costs said to have been wasted. In the tribunal context the need for such a link is apparent from the definition of "wasted costs" in section 29(5) of the 2007 Act i.e. that there are costs incurred by a party "as a result of" the relevant act or omission of the representative.

40. No such explicit causal connection is apparent in the language of rule 13(1)(b). Unreasonable conduct is a condition of the FTT's power to order the

payment of costs by a party, but once that condition has been satisfied the exercise of the power is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned.

41. In this respect rule 13(1)(b) more closely resembles rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 which permit the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably. Our attention was drawn once again to the decision of the Court of Appeal in McPherson in which the exercise of the rule 14 power was considered. At paragraph 40 Mummery LJ considered the submission that only costs attributable to the unreasonable aspects of the applicant's conduct could be ordered under rule 14:

> *"In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred."*

Mummery LJ then accepted, at paragraph 41, that the wasted costs jurisdiction was not designed to punish unreasonable conduct, but explained that:

> *"It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a pre-condition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order."*

42. We consider the observations of Mummery LJ in McPherson to be equally applicable to rule 13(1)(b). At this stage the unreasonable conduct, its nature, extent and consequences are relevant factors to be taken into account in deciding whether to make an order for costs and the form of the order

95. The first ground did not relate to the conduct of the proceedings at all. The FTT was entitled to be critical of Ms Sinclair's failure to pay her service charges unless and until she was required to do so in order to participate in the enfranchisement and to obtain her new lease, but it was not entitled to rely on that conduct as supporting the charge that she had "acted unreasonably in bringing, defending or conducting proceedings." Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis. We qualify that statement in two respects. We do not intend to draw this limitation too strictly (it may, for example, sometimes be relevant to consider a party's motive in bringing proceedings, and not just their conduct after the commencement of the proceedings) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct. Secondly, once unreasonable conduct has been established, and the threshold condition for making an order has been satisfied, we consider that it will be relevant in an appropriate case to consider the wider conduct of the respondent, including a course of conduct prior to the proceedings, when the tribunal considers how to exercise the discretion vested in it.

In this case, however, the FTT inadvertently but impermissibly elided the different stages of the analysis.

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.