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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LAM/2015/0018**
Property	:	**Steep Hill, Croydon, Surrey CR0 5QS**
Applicant	:	**Ms A Iriate**
Representative	:	**Mr M Folwell**
Respondents	:	**(1) Steep Hill Freeholders Limited ("SHFL"), (2) Steep Hill Residents Association Limited ("SHRA") and (3) those leaseholders of the Property who have successfully applied to the Tribunal to join the proceedings**
Representative	:	**Mr A Kerr, director of SHFL and SHRA**
Type of Application	:	**Application for the appointment of a manager**
Tribunal Members	:	**Judge P Korn (Chairman)** **Mr A Lewicki FRICS**
Date and venue of Hearing	:	**1st February 2016 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**24th February 2016**

DECISION OF THE TRIBUNAL ON (A) THE STRIKING OUT OF AN APPLICATION UNDER RULE 9 OF THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (PROPERTY CHAMBER) RULES 2013 AND (B) AN APPLICATION FOR COSTS BY THE RESPONDENTS

Decisions of the Tribunal

(1) The Applicant's application for the appointment of a manager was struck out at an oral hearing on 1st February 2016 pursuant to Rule 9(3)(b) and Rule 9(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**").

(2) The Tribunal orders the Applicant to pay to the Respondents the sum of £500.00 pursuant to the Respondents' cost application under Rule 13(1)(b) of the Tribunal Rules.

(3) No wasted costs order is made.

The application for the appointment of a manager

1. On 20th August 2015 the Tribunal received an application from the Applicant for the appointment of a manager over the Property under section 24 of the Landlord and Tenant Act 1987.

2. The Applicant is the leaseholder of Flat 9. The Property comprises 97 flats within a development of 4 blocks. The proposed manager as at the date of the application was Mr Richard Woods BSc (Est Man) FRICS.

The background and events since the date of the abovementioned application

3. A previous application in similar terms was made by the Applicant on 13th February 2014. That application was struck out by the Tribunal on 28th April 2014 by reason of the Applicant's failure at that time to comply with directions.

4. A case management conference ("CMC") took place on 10th September 2015 in connection with the current application for the appointment of a manager. As at the date of the CMC leaseholders of some 31 of the 97 flats had applied to join the application as co-respondents (i.e. opposing the application) and none had applied to be joined as co-applicants.

5. At the CMC Mr Kerr for the Respondents applied for the current application to be struck out as well, on grounds that included (i) the Applicant's failure to pay the costs that she had been ordered to pay in connection with the previous application, (ii) the lack of support that the Applicant had received from fellow leaseholders for the previous and the current application and (iii) the Respondents' belief that the current application had no foundation. The Procedural Judge declined to strike out the application at the CMC stage but issued a series of

directions and warned that the issue of strike-out would be revisited if there was non-compliance with those directions.

6. On 15th December 2015 the Tribunal served a notice on the parties that it was minded to strike out the application. It had given very clear guidelines and deadlines to the Applicant in its directions and she had failed to comply with those directions. Both parties were invited to make written representations on the question of whether the application should be struck out on the basis that the Tribunal would then re-consider the matter in the light of any representations received. Written representations were subsequently received by the Tribunal from both parties. Those representations were considered by a procedural judge who decided that the hearing originally scheduled for 1st February 2016 should still go ahead and that at that hearing the Tribunal would decide whether to strike out the application or – if not – whether to proceed with the hearing of the application for the appointment of a manager or whether to issue further directions.

The Applicant's position

7. The Applicant was not present at the hearing on 1st February 2016 but was represented by Mr Folwell, her sub-tenant at Flat 9. At the hearing Mr Folwell told the Tribunal for the first time that the Applicant no longer wished to appoint the manager referred to in her application but instead wished to appoint a different manager.

8. Mr Folwell acknowledged that the Applicant had not complied with certain key directions but said that the reasons were in parts that he had recently been out of the country and that the parties had been encouraged to try to reach an understanding between them.

9. Mr Folwell said that he was now able to provide written submissions in compliance with the directions and he produced a substantial lever arch file of documents on which he sought to rely.

The Respondents' position and discussion generally at the hearing

10. The Respondents were represented at the hearing by Mr Kerr. His fellow directors Ms Reynolds and Mr Anton were also present. Mr Kerr said that the Respondents still felt that the application should be struck out. As regards the file of documents produced by Mr Folwell at the hearing, he said that it would be unreasonable to expect the Respondents to absorb and respond to them, especially as they might well need to take advice on many of the points. Mr Folwell conceded that it would take the Respondents many hours fully to absorb the contents of the file.

11. The Tribunal appreciated the Respondents' position but wanted to explore whether there was a feasible basis on which to proceed with the hearing relating to the application for the appointment of a manager. To that end, the Tribunal gave the Respondents an hour to have a quick read through the Applicant's file of documents in order to take a view on whether it would be reasonable for any of those documents to be accepted in evidence. An adjournment accordingly took place, after which Mr Kerr for the Respondents said that the Respondents were not comfortable that they were in a position properly to respond to any of the documents at the hearing. The documents could not be neatly sub-divided into simpler and more difficult documents, there were no separate headings and no index and therefore they were simply not in a position to make that judgment. Mr Folwell did not argue on that point.

12. The Tribunal floated the question of whether the case could proceed without the Applicant relying on these documents, but Mr Folwell said that without reliance on these documents the Applicant would simply not be able to make her case.

The Tribunal's decision

13. Part of the context of the current application is that a previous application by the Applicant was struck out in 2014 for lack of compliance with directions. No real evidence has been advanced by or on behalf of the Applicant to show that the current case is any different from the previous case.

14. The Applicant has offered various reasons at different stages for her failure to comply with directions but in our view none of these has been compelling. She was already on notice, as a result of the previous application being struck out, that she needed to take the Tribunal's directions seriously and yet it appears that she has continued not to do so. She has had many weeks within which to serve a statement of case on the Respondents and yet has failed to do so. Instead her representative has simply turned up to the hearing with a file of documents in the hope that these would be treated as admissible. However, especially in view of the length, nature and lack of structure of those documents it would be wholly unreasonable for the Applicant to have been allowed to rely on them as the Respondents would patently not have had an opportunity to consider them properly, and still less to take advice as necessary and to respond to them.

15. We do not consider that it is appropriate to allow an adjournment of this case to another date. The Applicant has been warned very explicitly that a failure to comply with directions could lead to strike out, as it has already done previously, and we see no evidence that this warning has been taken seriously or that she has made much of an effort to comply with those directions until (to some extent) at the very

last minute when it was already too late. We have received some excuses for non-compliance, and there is a very small amount of merit in certain of those excuses, but we have to consider how fair it would be to the Respondents to order an adjournment, how likely it is that an adjournment would actually achieve anything and also the effect on the Tribunal's limited resources of agreeing to adjourn and thereby directing those resources away from the speedy determination of a case with potentially more merit. We have still seen no substantive case, and the application is actively opposed by many leaseholders and supported by none of them.

16. Under Rule 9(3) of the Tribunal Rules the Tribunal may strike out the whole or a part of the proceedings or case if (inter alia) *"(b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly"* and *"(d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal"*. We are satisfied that both (b) and (d) apply in this case. As required by Rule 9(4) the Applicant has been given an opportunity to make representations in relation to the proposed striking out. Accordingly the Applicant's application for the appointment of a manager is struck out.

Cost applications

17. The Respondents have applied for an order under Rule 13(1)(b) of the Tribunal Rules that the Applicant reimburse their costs incurred in connection with these proceedings. Such an order can only be made if the Applicant *"has acted unreasonably in bringing ... or conducting proceedings"*. The Applicant has made written representations opposing the Respondents' application. Both parties' representations have been taken into account by the Tribunal.

18. The Respondents submit that costs have been incurred by them as a result of the Applicant's or her representative's unreasonable conduct. In support of their position they have referred the Tribunal to the Applicant's repeated failures to comply with directions, her late notification of change in the identity of the proposed manager, her failure to amplify her case, her failure to attend the hearing and her failure to arrange for the proposed manager to attend. They also note that she was familiar with Tribunal procedure, having previously made a similar application and made similar errors.

19. The Respondents have also applied for a wasted costs order against both the Applicant and her representative Mr Folwell under section 29(4) of the Tribunals, Courts and Enforcement Act 2007. The Respondents argue that the Applicant or her representative has caused

wasted costs by behaving unreasonably or conducting proceedings improperly and not complying with directions.

20. We deal first with the application under Rule 13(1)(b) that the Applicant reimburse the Respondents' costs incurred in connection with these proceedings on the basis that the Applicant has acted unreasonably in bringing or conducting proceedings. In the case of *Ridehalgh v Horsfield (1994) 3 All ER 848* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct admits of a reasonable explanation. This formulation was adopted by the Upper Tribunal (Lands Chamber) in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007.* Costs are therefore not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings.

21. The Applicant's conduct has been referred to at length above and it has led to her application being struck out. For the reasons given by the Respondents and also for the reasons set out above in giving the background to the striking out of the application for the appointment of a manager, we are satisfied that the Applicant's conduct has been sufficiently unreasonable to pass the test in *Ridehalgh v Horsfield.*

22. Any cost award under Rule 13(1)(b) is limited to those costs which arise from the unreasonable conduct. Turning to the schedule of specific costs submitted by the Respondents, these costs amount in total to £1,590.00 and represent the time charges (plus disbursements) of a Mr Brian Cudby who is described as someone who, though not a solicitor, has worked with several solicitors' offices having conduct of numerous matters since 1975, mainly relating to leasehold property. It is assumed that his hourly rate of £50 reflects the fact that he is not a qualified solicitor. We accept, on the basis of the information supplied, that the Respondents have incurred these costs and that it was reasonable for them to do so. We also accept that the costs and disbursements are reasonable.

23. The ability to claim costs is limited to those incurred as a result of the Applicant unreasonably bringing or conducting proceedings, and therefore the 3 hours 15 minutes spent dealing with allegations raised prior to the Applicant applying to the Tribunal cannot in our view be recovered under Rule 13(1)(b). The remainder of the costs do arise in connection with the bringing and/or conducting of proceedings, but the Respondents have not provided sufficient detail to make it clear which of those costs arose out of the Applicant's unreasonable conduct. For example, costs are stated to have been incurred by Mr Cudby in receiving a copy of the Applicant's application and advising the Respondents on the Case Management Conference, but the Respondents have not shown that the Applicant was necessarily acting

unreasonably at that particular stage. Similarly, time was spent by Mr Cudby receiving the Respondents' report on their meeting with the Applicant and Mr Folwell and then advising on issues raised by Mr Folwell, but again it does not follow that these issues were being raised unreasonably.

24. However, we are satisfied that the Applicant's conduct has been unreasonable on a number of occasions during this process, particularly during the latter stages, and therefore it would be harsh on the Respondents to refuse to make any penalty cost award. In addition, we appreciate that it is not that easy in practice to identify precisely which elements of Mr Cudby's work arose specifically out of the Applicant's unreasonable conduct. Therefore, it seems to us that the most appropriate approach in this case is to make a cost award which in our view is fair and proportionate, taking into account the total costs incurred and the extent of the Applicant's unreasonable conduct.

25. Taking the above approach, we consider that a reasonable cost award would be £500.00. This would equate to 10 hours of Mr Cudby's time, and we are satisfied on going through the narrative in his schedule of costs that at least 10 hours of his time would have been spent in advising and assisting the Respondents as a result of the Applicant's unreasonable conduct.

26. Therefore the Applicant is ordered to pay to the Respondents the sum of £500.00 pursuant to Rule 13(1)(b), these being the costs incurred by the Respondents as a result of the Applicant acting unreasonably in bringing and/or conducting proceedings.

27. Turning now to wasted costs, it appears from the cost application that the Respondents may simply be applying in the alternative – in relation to the same set of charges – either for costs under Rule 13(1)(b) or for wasted costs. However, as the wasted costs application has been made it needs to be dealt with. Under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 the Tribunal may disallow or order a legal or other representative to meet the whole or part of any wasted costs. "Wasted costs" is defined as 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.

28. We note the points made by the Respondents in relation to wasted costs, namely that Mr Folwell was the Applicant's "representative" for the purposes of the definition of wasted costs and that in their view he acted improperly or unreasonably, but on the latter point we disagree with their assessment. Whilst ultimately Mr Folwell did not manage to avoid the case being struck out, there is no real evidence before us that

Mr Folwell was doing anything other than acting on the Applicant's instructions and trying to put the best gloss on the Applicant's repeated failure to comply with directions and her failure to assemble a proper case. Therefore, the wasted costs application is refused.

29. Finally, in addition to claiming the sums charged by Mr Cudby the Respondents have also asked the Tribunal to make an award of such additional costs as it thinks fit to Steep Hill Freeholders Limited (one of the Respondents) in compensation for the expenses incurred by that company incidental to defending the application. The Respondents have not quantified these costs nor provided any detailed narrative, and nor have they clarified the basis on which they are considered to be recoverable or whether the application is under Rule 13(1)(b) or an application for wasted costs or otherwise. In the circumstances, this request for additional costs is also refused.

Name: Judge P. Korn **Date:** 24th February 2016