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

Case Reference : BIR/47UD/OAF/2014/0014

Property : 48 Hollyberry Close, Winyates Green, Redditch,
Worcestershire, B98 0QT

Applicant : Mrs Sonya Mary Foreman

Representative : Mr K. Waller

Respondent : Clarise Properties Ltd.

Representative : Mr N. Plotnek LL.B.

Type of Application : Application to determine the landlord's reasonable costs pursuant to s.9(4) of the Leasehold Reform Act 1967 and counter application for wasted costs incurred by the Respondent under rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Tribunal Members : I.D. Humphries B.Sc.(Est.Man.) FRICS
P.J. Hawksworth (Lawyer)

Date and Venue of Hearing : 14th May 2014 at the First-tier Tribunal Office, 35 Bull St.
Birmingham

Date of Decision : **30 SEP 2014**

FINAL DECISION

REASONS

Introduction

- 1 By its Interim Decision issued 19th June 2014, the Tribunal determined the landlord's reasonable valuation fee under section 9(4) of the Leasehold Reform Act 1967 at £450.00 (Four Hundred and Fifty Pounds) plus VAT if applicable.
- 2 At the hearing on 14th May 2014 the Respondent's representative applied for an order for wasted costs against the Applicant.
- 3 The Tribunal issued further Directions in its Interim Decision, following which the parties made further written submissions. The Directions invited the parties to make their submissions and comment on a case relevant to wasted costs, *Ridehalgh v Horsefield* (1994) 3 All ER 848. The Tribunal has considered these representations and finds as follows.

The Law

- 4 Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states:
 - (1) The Tribunal may make an order in respect of costs only-
 - (a) under section 29(4) of the 2007 Act⁽¹⁾ (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.

⁽¹⁾The Tribunals, Courts and Enforcement Act 2007

The Parties' Submissions

- 5 The Applicant's representative Mr Waller
At the hearing, Mr Waller denied that the Respondent was entitled to a valuation fee as the Respondent's Surveyor Mr Plotnek had not provided him with a copy of the valuation. He accepted that Mr Plotnek had visited the property but expected him to provide the valuation as a basis for negotiation.
- 6 However, in light of the further representations received following the counter application for wasted costs this was found to be incorrect, as Mr Waller had in fact offered a sum for valuation fees that had not been accepted. This is evidenced by two sources:
 - 1) A representation sent by Mr Waller to the Tribunal dated 23rd June 2014 in which he states at paragraph 4, line 10:

'I did not refuse to pay a fee as I actually offer to pay half of his fee as there was never any dispute that he had visited the property'

and

2) A copy of an open email submitted by Mr Plotnek with his counter application, sent by his client's Solicitor Carmen Dowd of S E Law to Mr Waller dated 2nd May 2014 stating:

'The costs of £225 plus VAT in respect of valuations costs are not agreed as they are not considered to be reasonable in the circumstances.'

- 7 He had therefore made an offer albeit not the amount requested by the Respondent.
- 8 Mr Waller's main point reiterated several times in his representation is that he had not seen Mr Plotnek's valuation and contested the fee on that ground.
- 9 He also made the point that a decision in another cost case determined by the leasehold valuation tribunal (although not binding on it) relating to 9 Poole Crescent, Brownhills, Walsall, WS8 7LY, case reference BIR/OOCU/OAF/2011/0101, was only submitted to the Tribunal by Mr Plotnek at the hearing and he had not been given advance notice of its use in evidence.
- 10 The Respondent's representative Mr Plotnek
Mr Plotnek submitted in oral evidence on 14th May 2014 that the hearing had only been convened because Mr Waller had refused to agree his fee. In his written submission he claimed £999.90 plus VAT for wasted costs which were itemised in a schedule of time spent preparing the case and attending the hearing, travelling and preparation of his claim for wasted costs.
- 11 He submitted that Mr Waller's conduct had been improper, unreasonable and that his case was 'doomed to fail' as 'it was patently obvious, both from the correspondence and his statements at the Tribunal that he just wanted a forum to air the grievances he holds against my client'.
- 12 He supported this by enclosing a copy of an open letter sent to him by Mr Waller dated 25th April 2014 in which Mr Waller said he was continuing to challenge the fees and continue with the Tribunal case and secondly, by attaching the copy email from his client's Solicitor referred to at paragraph 6 above.
- 13 Mr Plotnek referred to the case of *Ridehalgh v Horsefield* and the meaning ascribed to the word 'improper' in connection with wasted costs, a term he had charged against Mr Waller.
- 14 In summary, he asked for an order based on the evidence and authority quoted.

Determination

- 15 In order to weigh the evidence the Tribunal must first decide whether the Applicant's conduct had been 'unreasonable' in the terms of rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The use of the term 'unreasonable' in this context was examined by the Court of Appeal in *Ridehalgh v Horsefield* where it was held:
- 16 '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'.

- 17 The Tribunal finds that while Mr Waller's offer prior to the hearing of £225 plus VAT had been 'optimistic', it had not been unreasonable. He had not, as stated at the hearing, contested the entire fee, he had simply offered insufficient to cover the Respondent's fee which was itself found to be reasonable by the Tribunal. He was entitled to bring the case to the Tribunal for determination and had exercised his right. Had he been presented with the Tribunal decision in respect of 9 Poole Crescent Brownhills referred to by Mr Plotnek before the hearing, he may have altered his submission or reached a different conclusion.
- 18 So far as the allegation of 'improper' conduct is concerned, again guidance is obtained by referring to *Ridehalgh v Horsefield* where it was stated as follows:

'improper means what it had 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 penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgement limited to that. Conduct which 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'.

Again having regard to Mr Waller's conduct, it was not, in the Tribunal's view 'improper' within the context of the above to contest a valuation fee.

- 19 The Tribunal are also mindful of the fact that its Directions required both parties to disclose any evidence they wished to bring no less than 14 days before the hearing and Mr Plotnek's late presentation of evidence at the hearing contravened Direction No.1.
- 20 For all the above reasons the Tribunal dismisses the Respondent's counter application for wasted costs. The conduct of Mr Waller fell considerably short of the substantial hurdle necessary to support a wasted costs order.

I.D. Humphries B.Sc.(Est.Man.) FRICS
Chairman

Date **30 SEP 2014**