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

Case Reference : **GM/LON/OOAJ/OLR/2014/1701**

Property : **40 The Vale Court, The Vale,
London W3 7SA**

Applicant : **(1) Roger Banks
(2) Valerie Banks**

Representative : **PJH Solicitors**

Respondent : **Golden PD (1) Ltd**

Representative : **Michael Simkins LLP Solicitors**

Type of Application : **1. Assessment of costs under
section 60(1) of the Leasehold
Reform Housing and Urban
Development Act 1993
2. Costs -Rule 13 (1)(a) and (b) of
the Tribunal Procedure (First tier
Tribunal) (Property Chamber)
Rules 2013**

Tribunal members : **Judge S O'Sullivan**

Date of Decision : **7 December 2016**

DECISION

The applications

1. By a letter dated 11 May 2016 the Applicants sought an order under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Rules”). It appears that an order is sought under Rule 13(1) (b) which provides that the tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case or a leasehold case.
2. The underlying application concerned an application brought by the Applicants for the determination of the premium payable for the grant of a new lease.
3. Directions were first made in respect of the costs application on 9 June 2016. These provided for the Applicant to serve a full statement of case to include full details of the costs being sought including a schedule of the work undertaken, the time spent, the grade of fee earner/hourly rate and a copy of the terms of engagement with the Applicant. The Applicant had served a schedule dated 11 May 2016. However this was insufficient so as to enable the tribunal to identify the work undertaken and thus further directions were made.
4. In its reply to the application dated 14 July 2016 the Respondent made three separate applications for costs. First an application for the Respondent and Intermediate Landlord’s costs under section 60, secondly for an order for its costs under Rule 13(1) (a) and thirdly an order for wasted costs under Rule 13(1) (b). In the documentation a summary of the work carried out under Section 60 was been provided in relation to the Respondent’s costs only. Otherwise again the tribunal has no detailed summary of the costs said to have been incurred by the Intermediate Landlord under Section 60 or by the Respondent under Rule 13 so as to enable it to make a decision.
5. Further directions were therefore made dated 10 August 2016 which set out the further steps to be taken by the parties and in accordance with those directions bundles were lodged. The applications were considered by way of a paper determination, no request for an oral hearing having been made.

The background

6. The Applicants served notice under section 42 of the Leasehold Reform Housing and Urban Development Act 1993 (the "Act") on the Respondent's predecessors on 9 April 2014 (the "First Notice") seeking a lease extension in respect of Flat 40 Vale Court, The Vale, London W3 7SA (the "Property") The First Notice required the competent landlord to serve its counter notice by 24 June 2014. The freehold interest in the Property was then transferred to the Respondent on 7 April 2014 and registration completed on 1 May 2014 at HM Land Registry. The Applicants failed to take any steps to register the First Notice against the freehold title. On 23 June 2014 the Respondent served a counter notice to the First Notice without prejudice to its contention that it was not a valid notice.
7. On 24 June 2014 solicitors for the Respondent wrote to the Applicants' solicitors with a request that they pay their costs in relation to the First Notice.
8. The Applicants then paid a statutory deposit and served a further notice on 9 July 2014 (the "Second Notice") without prejudice to the contention that the First Notice was valid. The Respondent served a counter notice to the Second Notice on 12 September 2014.
9. The freehold interest in the Property was subsequently transferred to Launcelot Investments Ltd ("Launcelot") on 26 September 2016. The Applicants had not registered the Second Notice against the freehold title.
10. On 28 October 2014 the Applicants made an application to the First tier tribunal seeking a determination of the terms of acquisition. Directions were issued dated 23 December 2014. On 5 February 2015 the tribunal stayed the application pending the registration of Launcelot's title. On 25 June 2015 the tribunal issued its decision in which it held that it had no continuing jurisdiction to determine the terms of acquisition.

Application under section 60

11. The Respondent has applied for an assessment of both its and the intermediate landlord's costs under 60(1) of the 1993 Act.
12. The costs in issue incurred by the Respondent are itemised in a schedule and total £3,360.50 plus Vat making a total of £4,032.60. The rates range from £250 to £280 per hour. There is no description provided of the fee earners with conduct of this matter. The schedule provided is simplistic and lacking in detail. The dates upon which work was done is not included. In addition items 18-22 of the schedule appear to include

costs incurred in connection with the tribunal proceedings, such as *“considering correspondence from the tribunal re tenants’ application”*, *“draft letter to tribunal”*. *“considering order from tribunal”*.

13. A statement of costs is also provided by the intermediate landlord. Its costs under section 60(1) are calculated up to 28 October 2014, the date of the commencement of the tribunal proceedings. A grade A fee earner had conduct of the matter at a charge out rate of £238 per hour. Total costs claimed are £690.20 plus Vat making a total of £828.24. The work is detailed as including consideration of the section 42 notice, considering the failure to register the notice, consideration of correspondence and the validity of the notice, consideration of the counter notice and amended section 42 notice.

Section 60 - The applicants’ case

14. The Applicants say that as the Respondent alleges that both of the section 42 notices were void, as they were not registered, the provisions of section 60 cannot be invoked. It is said that if the Respondent reasonably believed that the non registration of the notices nullified them; costs in terms of section 60 should not have been incurred until registration. It is further said to be irrational to incur costs relating to the valuation of the flat, the grant of the lease and the tenant’s right to a new lease where a reasonable belief as to the nature of the notice is absent. It is therefore said that any costs claimed by the Respondent have not been reasonably incurred. In the alternative it is said that costs that pre date the section 42 notice should be disallowed on the basis that they were not reasonably incurred.
15. It is further said that the Respondent acknowledged the right to a lease extension by serving a counter notice and in so doing waived any right to claim any costs incurred that post-dated such notice.
16. As far as the costs themselves are concerned the costs are said to be unreasonable in value for the following reasons;
 - (a) The Respondent has claimed an hourly rate of £280 plus Vat and £250 plus Vat in respect of a Grade B fee earner. It is said that there is no justification for increasing the rate by £30 and that the Guideline Hourly Rates demonstrate that an appropriate rate for a Band B solicitor ranges from £242 for the area of London 2 in respect of the postcode WC1 being the location of dispute. Accordingly it is said that the rate should be adjusted to £242;
 - (b) The bulk of costs relate to correspondence. Given the matter was straightforward and the main issues relate to the value of the premium and costs and correspondence should be reduced substantially;
 - (c) It is submitted an unreasonable amount of time was spent overall given the matter was not complex; and

(d) Given the matter was not complex a Pay Band C solicitor would have been adequate.

17. The Applicants further say that it would be inequitable for the Applicants to be liable for the Respondent's costs incurred in circumstances where it intended to dispose of the property thereby negating the need to consider the grant of the lease, alternatively it incurred costs unnecessarily if it did not accept the notice as valid and binding and it was placed on notice of the Applicants' intention to apply for an extension of the lease and failed to convey its intention to dispose of the interest in the property when the Applicants had a legitimate interest in such information.
18. As far as the intermediate landlord's costs are concerned the Applicants accept that it is a "relevant person" for the purposes of section 60. However it is submitted that as they are not the competent landlords they should not have incurred costs save for the receipt of notices. Any costs incurred are therefore not incurred for the purposes of the matters set out in section 60. Further it is said that the intermediate landlord would not have incurred costs to the extent that it did if the Respondent had conducted itself in a reasonable manner by informing the Applicants of its intention to dispose of the property.
19. As far as the quantum of the costs is concerned the following comments are made; the matter was not complex, the time claimed is unreasonable and no specialised skill was required. If the tribunal allows the claim the Applicants have produced an annex D which sets out the costs they consider reasonable.

Section 60 - The Respondent's case

20. The Respondent set out its position in a response dated 21 September 2016. It submits that the fact that the first notice was void is irrelevant for the purposes of the recovery of costs under section 60 in circumstances where the applicants continued to assert it was valid. In such circumstances it is said the applicants should be stopped from continuing to deny liability to pay costs and reliance is placed on the decision in *Huff -v- Trustees of the Sloane Stanley Estate Unreported 1997 LTV*.
21. The Respondent also says that the Respondent's intention to dispose of the property is irrelevant to circumstances when considering costs under the Act. It is also pointed out that the Respondent's intention has no bearing on the statutory requirement to serve a counter notice under section 45.

Section 60 costs - the tribunal's decision

22. The tribunal first considered whether the Respondent and the intermediate landlord were entitled to recover their costs in principle under section 60 in these particular circumstances.
23. The Applicants argued that as both notices were said to be invalid by the Respondent the provisions of section 60 were not invoked. However this was an unattractive argument given the fact that the Applicants continued to assert that the First Notice was valid and served a valid Second Notice. The tribunal is further persuaded by the finding in *Huff -v- Trustees of the Sloane Stanley Estate Unreported 1997 LTV* relied on by the Respondent. The tribunal therefore concluded that the Respondent and intermediate landlord were in principle entitled to their costs under section 60.
24. As to what costs are recoverable the tribunal does not propose to set the legislation out in full. However costs under that section are limited to the recovery of reasonable costs of an incidental to any of the following matters, namely:-
- i. Any investigation reasonably undertaken of the tenant's right to a new lease;
 - ii. Any valuation of the tenant's flat obtained for the purpose of fixing the premium or amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56
 - iii. The grant of a new lease under that section.
25. Subsection 2 of section 60 provides *that "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"*.
26. The tribunal considers that the rate charged by the fee earners falls within the range generally adopted by the tribunal in cases of this kind given that this is a complex area of law. It does not accept the Applicants' assertion that the case was straight forward given that it concerned the service of two notices under section 42, one of which was said to be invalid and the transfer of the freehold interest on two occasions. It is also generally accepted that this area of law is complex and specialized.
27. The tribunal has been provided with copy invoices and a printed schedule from the landlord's solicitors in relation to both costs and is satisfied that the time has been incurred.

28. As far as the Respondent's time is concerned the tribunal notes that time spent in relation to the tribunal proceedings has been included. Such costs are not recoverable under section 60 and as such items 18-22 are not recoverable in any event.
29. Given the nature of this transaction the tribunal does consider that the time spent appears excessive. The tribunal had made directions in this matter which set out the detail required. However much of the detail is missing. In particular the grade of the fee earner, and the date upon which the various items of work were carried out. Without these details the tribunal had limited information in which to identify whether the costs claimed were reasonable. This matter has already been adjourned on one occasion to allow for a more detailed schedule to be provided and thus the tribunal took the view that it would have to do the best it would with the documentation available. It necessarily therefore takes a broad-brush approach. Considering the schedule and time spent as a whole and having regard to its experience and expertise the tribunal considers that the Respondent's reasonable costs under section 60 (1) (c) in this matter should be limited to four hours work at the rate of £280 plus Vat.
30. As far as the intermediate landlord's costs are concerned the tribunal agrees with the Applicants' submissions that these costs should be limited to the consideration of the notices and its title. It does not consider that the intermediate landlord would have incurred the level of costs it did had it been responsible for them. Accordingly it allows costs in the sum of £500 plus Vat.

Applications under Rule 13

Respondent's application under Rule 13

31. In the alternative the Respondent applies for an order for its costs under Rule 13 of the Rules. The application is made both pursuant to Rule 13(1) (a) for wasted costs and Rule 13 (1) (b).
32. The application for wasted costs is made on the basis that the Applicants and/or their representatives have behaved unreasonably and that they could have taken steps to avoid wasted costs of the amount claimed.
33. The Applicants submit that the respondents have failed to distinguish between the allegations that the conduct of the Applicants justifies a wasted costs order against them or whether the conduct of the legal representative justifies such order. The Applicants therefore address the application in the alternative.
34. The Applicants say that they dealt with the Respondent in an open and transparent manner and it was not anticipated that they would behave surreptitiously disposing of their interest. There was a misplaced belief

that the Respondent would deal with the matter fairly and justly. It is also submitted that the application to the tribunal was unsuccessful because of the applicants' lack of knowledge of the change of ownership. In any event it is said that an unsuccessful application does not constitute unreasonable behaviour.

35. As far as the application for wasted costs under rule 13(1) (a) is concerned the fact that other legal representatives may have acted differently is not said to meet the threshold for a wasted costs order. The main test is whether a reasonable explanation is produced. In this regard the Applicants rely on the Upper Tribunal's decision in *Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC) 20*.
36. The Applicants say that their legal representatives were entitled to believe that the Respondent's solicitors would inform them of their client's election to dispose of the interest in the property. It is acknowledged that this may seem optimistic and reflective of an experienced solicitor's judgment which is not unreasonable. It is also said that the Respondent has failed to substantiate that the Applicants and/or their legal representatives failed to act reasonably as assessed by an objective standard and failed to provide a reasonable explanation for the course of conduct adopted.
37. The Applicants rely on their annex B to set out the costs they consider reasonable if an order is to be made under Rule 13. However the Applicants say that even if unreasonable conduct is found, the tribunal ought to exercise its discretion to not make an order. It is submitted that had the Respondent acted in a transparent manner the non registration of the notices would not have had any significant consequence. It is further said that it would be unfair to impose any costs order on the Applicants or their legal representatives in circumstances where the Respondent has failed to provide an explanation for its unreasonable conduct.

The Applicants' application under Rule 13

38. The Applicants also make an application under Rule 13. They provide a costs schedule setting out the costs incurred in the total sum of £7,872.08. Copies of the invoices and client retainer are also provided.
39. The Applicants complain that the Respondent's solicitors failed to inform them of its election to dispose of its interest in the property. The application to the tribunal was said to be unsuccessful due to the Applicants' lack of knowledge of the change in ownership of the property.
40. The Respondent says that the Applicants understanding of the 1993 Act is misconstrued as they failed to acknowledge that both the First Notice

and Second Notice were void as against the Competent Landlord at the relevant times and failed to register the notices against the freehold title. The Respondent also points out that the Applicants' application was struck out. The Respondent relies on correspondence between the parties to support its contention that the Applicants totally disregarded the overriding objective.

Applications under Rule 13 – the tribunal's decision

41. The tribunal declines to make any order under Rule 13 both in respect of the Applicants' and the Respondent's applications.

Reasons for the tribunal's decision

42. The tribunal's power to award costs is contained in Rule 13 (1)(b)(ii) of the Procedure Rules which states that;

“The Tribunal may make an order in respect of costs only-

(b) If a person has acted unreasonably in bringing, defending or conducting proceedings in-

(1) a residential property case ...”

43. The power to award costs pursuant to Rule 13 is discretionary and the wording of the provision makes it clear that the tribunal may only make such an order if a person's conduct of the proceedings is unreasonable rather than his behaviour generally.
44. The tribunal had regard to the Upper Tribunal's decision in *Willow Court Management Company (1985) Limited V Alexander [2016] UKUT 0290 (LC)* in which the test to be followed is set out as follows;
- (a) Whether there has been unreasonable conduct involves a “*fact-sensitive*” enquiry;
 - (b) The key question is whether there is a reasonable explanation for the conduct complained of;
 - (c) The tribunal “*ought not to be over-zealous in detecting unreasonable conduct after the event*”;

- (d) The tribunal may only make an order if satisfied there has been unreasonable conduct and that is the first enquiry;
 - (e) Even if the tribunal is satisfied there has been unreasonable conduct it then has a discretion as to whether to award costs;
 - (f) Once the tribunal makes an order for costs it must apply the overriding objective to deal 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;
 - (g) It need not make an order in respect of all of the costs; and
 - (h) In deciding it is exercising a judicial discretion and must have regard to all relevant circumstances”.
45. The power to award costs pursuant to Rule 13 should only be exercised where a party has clearly acted unreasonably in bringing, defending or conducting the proceedings. This is because the tribunal is essentially a costs free jurisdiction where parties should not be deterred from bringing or defending proceedings for fear of having to pay substantial costs if unsuccessful. In addition there should be no expectation that a party will recover its costs if successful. The award of costs should therefore in my view be made where on an objective assessment a party has behaved so unreasonably that it is fair that the other party is compensated to some extent by having some or all of their legal costs paid.
46. As far as the Respondent’s application is concerned the fact that the Applicants were unsuccessful in the substantive application does not in itself make their or their legal adviser’s conduct unreasonable. The tribunal is satisfied that the Applicants have provided a proper explanation for their and their advisers’ conduct. The tribunal is not of the view that the Applicants’ conduct in relation to the proceedings was in any way unreasonable.
47. In any event even if the tribunal had been satisfied that there had been unreasonable conduct this is not a case in which it would have exercised its discretion to make an order given the circumstances of the case as a whole. This is because in the tribunal’s view the Respondent did not act in a transparent manner in its dealings with the Applicants.
48. As far as the Applicants’ application is concerned the tribunal is not satisfied that it acted unreasonably. It was under no duty to inform the Applicants of the intended sale of the property and it was for the

Applicants to protect their notices by registration against the title as is common practice.

49. Having considered the facts of this case overall and the test set out in *Willow* above I consider that it is not appropriate that an order is made under Rule 13 in favour of either the Applicants or the Respondent as I do not consider that the Applicants have acted unreasonably in issuing and conducting the proceedings nor has the Respondent acted unreasonably in its conduct of the proceedings.

Name: Sonya O'Sullivan

Date: 7 December 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

