4413

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AE/OLR/2016/0102**
Property	:	**First Floor Flat, 10 Windcott Court, Draycott Avenue, Kenton, Harrow, Middlesex, HA3 0BX**
Applicant	:	**Finchley Investments Ltd**
Representative	:	**Nash & Co LLP, Solicitors**
Respondent	:	**Mr Emmanuel Cohen**
Representative	:	**Peter Brown & Co LLP, Solicitors**
Type of Application	:	**Rule 13(1)(b) of the Tribunal Procedure (First- Tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Members	:	**Judge I Mohabir**
Date of Decision	:	**27 February 2017**

DECISION

© CROWN COPYRIGHT

Introduction

1. This is an application made by the Respondent under Rule 13(1)(b) of the Tribunal Procedure (First- Tier Tribunal) (Property Chamber) Rules 2013 for an order that the Applicant pays the additonal costs he incurred in the substantive proceedings relating to the grant of a new lease.

2. The apportioned costs claimed by the Respondent are £25,367.74 including VAT and disbursements. The unreasonable conduct of the Applicant relied upon is set out in the Respondent's statement of case dated 7 September 2016 made in support of the application.

3. Essentially, the Respondent complains that the Applicant's valuer, Mr Shapiro sought to renege on the agreed existing leasehold value of £52,808 for the subject property as at the valuation date set out in the statement of agreed facts prepared by the respective valuers for the parties. Mr Shapiro maintained the stance that the existing leasehold value set out in the statement of agreed facts did not amount to an agreement on his part and did not bind him. At the hearing, the Tribunal ruled that he had in fact agreed the existing leasehold value and he was bound by the agreement. As a consequence, the Respondent submits that as a result of Mr Shapiro's unreasonable conduct, he incurred the additonal costs set out above and the Applicant should be liable for those costs.

4. The Applicant's statement of case in reply dated 23 September 2016 denies that Mr Shapiro acted unreasonably. It is submitted that he held an honest but mistaken belief that he had not agreed the existing leasehold value for the subject property. In addition, it is submitted that there were other substantive issues to be decided in relation to the new lease terms that required determination at the hearing. Therefore, the costs sought by the Respondent would have been incurred in any event regardless of the conduct of Mr Shapiro.

Decision

5. For any application under Rule 13(1)(b) to succeed, the 3 stage test set out in the Upper Tribunal decision of ***Willow Court Management Co Ltd v Alexander*** [2016] UKUT 0290 (LC) and conjoined appeals has to be satisfied. These are:

   (a) firstly, a Tribunal has to find that a person has acted unreasonably;

   (b) if so, secondly, a discretionary power is then engaged and a Tribunal has to go on to consider whether, in the light of the unreasonable conduct, it ought to make an order for costs or not;

   (c) if so, thirdly, what the terms of the order should be.

6. In ***Willow Court***, the Upper Tribunal concluded[1], firstly, that the fact that a party had been unsuccessful was not determinative of what amounts to unreasonable conduct. Secondly, that the threshold of what can amount to unreasonable behaviour within the meaning of Rule 13 is a high one. In other words, an order under Rule 13 is an exceptional one.

Did Mr Shapiro Act Unreasonably?

7. On balance, the Tribunal was prepared to accept the submission made by the Applicant that Mr Shapiro held the honest but mistaken belief that the existing leasehold value he had agreed only applied if it was to be used to establish the freehold value but not otherwise. By failing to qualify his agreement to the existing leasehold value in this way was perhaps a careless act on the part of Mr Shapiro.

8. The Tribunal is supported in its conclusion as to Mr Shapiro's conduct by having had the advantage of hearing evidence from him about his

---

[1] at paragraphs 61 and 62 of the judgement

undertstanding of his agreement about the existing leasehold value of the subject property. In the Tribunal's judgement, Mr Shapiro's conduct, whch could justifiably be subject to criticism, did not amount to unreasonable conduct to satisy the first stage test in ***Willow Court*** and the application for costs fails on this basis. That said, there appear to be strong arguments in favour of the Respondent about Mr Shapiro's conduct if and when the Applicant's statutory costs fall to be considered.

Should An Order For Costs be Made?

9. For the avoidance of doubt, even if the Tribunal is wrong in reaching its conclusion about the reasonableness of Mr Sharpiro's conduct, it went on to consider whether an order for costs should be made. As ***Willow Court*** makes clear there is no presumption of an entitlement to an order for costs in favour of the "successful party".

10. Even if Mr Shapiro's conduct did satisfy the first limb of the test of unreasonableness in ***Willow Court***, the Tribunal accepted the submission made by the Applicant that there were other substantive issues about the lease terms that had not been agreed by the parties. These were the buildings insurance, the provision of an express grant of right of access to the property from the adjoining public highway and the removal of a covenant on the part of the Respondent in relation to the adjoining Lower Floor Maisonette.

11. Indeed, the Tribunal's earlier decision required a determination on the last two issues set above. With the benefit of hindsight, it seems that a contested hearing was inevitable and the Respondent's submission that the additonal costs it had incurred were solely attributable to the issue of Mr Shapiro's conduct cannot be entirely correct. It is also difficult to imagine how costs of £25,367.74 could be incurred by the Respondent to establish whether or not Mr Shapiro had in fact agreed the existing leasehold value for the property. It is quite clear that the majority of

the costs claimed by the Respondent include costs incurred in relation to the issues that remained between the parties and these do not fall properly within the scope of this application.

12. Accordingly, for the reasons set out above the Tribunal was satisfied that no order for costs should be made in any event and it is, therefore, not necessary for the Tribunal to go on to consider the terms or quantum of any such order.

Judge I Mohabir
27 February 2017