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

Case reference : **LON/00AN/OCE/2017/0169**

Property : **163 Hammersmith Grove, London
W6 0NJ**

Applicant : **Samson and Lola Limited**

Representative : **Lawrence Stephens Solicitors**

Respondents : **The Mayor Aldermen and
Burgesses of the London Borough
of Hammersmith and Fulham**

Representative : **Unrepresented**

Type of application : **Application for costs order under
Rule 13 of the Tribunal Procedure
(First-tier Tribunal) (Property
Chamber) Rules 2013**

Tribunal members : **Mr Jeremy Donegan (Tribunal
Judge)
Mr Charles Norman FRICS (Valuer
Member)**

**Date and venue of
paper determination** : **27 February 2018
10 Alfred Place, London WC1E 7LR**

Date of decision : **05 March 2018**

DECISION

Decisions of the Tribunal

The application for a costs order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules') is refused.

The background

1. This application arises from a collective enfranchisement claim for 163 Hammersmith Grove, London W6 0NJ ('the Property') under chapter I of Part I of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act').
2. The Property contains three flats let on long leases. The respondents are the former freeholders of the Property. On 28 November 2016, the leaseholders of two of the flats served an initial notice of claim, pursuant to section 13 of the 1993 Act. That notice named the applicant as the nominee purchaser and proposed a premium of £17,150 for the specified premises and £100 for the additional freehold (the garden).
3. The respondents served a counter-notice on the applicant on 10 February 2017, on a without prejudice basis. They admitted the collective enfranchisement claim but proposed higher premiums of £21,400 for the specified premises and £20,000 for the additional freehold.
4. On 14 July 2017 the Tribunal received an application under section 24 (1) of the 1993 Act ('the Section 24 Application'). This was submitted by the applicant and sought a determination of the premium to be paid for the Property. Directions were issued on 03 August 2017, which included provision for the respondent to submit a draft transfer to the applicant by 17 August.
5. In a letter dated 29 September 2017, the Tribunal notified the parties that the Section 24 Application would be heard on 14 and 15 November 2017.
6. The applicant's solicitors wrote to the Tribunal on 09 November 2017, stating that the premium and form of transfer had been agreed. This was confirmed in a letter from the respondents of the same date. The Tribunal responded in a letter dated 10 November 2017, in which it said *"The Tribunal has closed the application as terms have been agreed and the file papers will be removed to our remote storage site."*
7. On 06 December 2017, the applicant's solicitors wrote to the Tribunal seeking a costs order against the respondents, pursuant to Rule 13 of the 2013 Rules ('the Costs Application'). Directions were issued on 18 December 2017 and the Costs Application was allocated to the paper

track, to be determined upon the basis of written representations. Neither of the parties has objected to this allocation or requested an oral hearing. The paper determination took place on 27 February 2018.

8. In accordance with the directions the applicant produced an expanded statement of its case, in the form of a letter from its solicitors dated 11 January 2018. There was no statement from the respondents, which should have been served by 26 January 2018. They wrote to the Tribunal on 28 February 2018, apologising for the delay and explaining there had been a delay in receiving Tribunal correspondence due to the relocation of some employees. They also stated, incorrectly that the applicant had failed serve or file an expanded statement. The Tribunal received the respondents' letter after the paper determination on 27 February 2018. It follows that the letter was not considered as part of the determination.
9. The relevant legal provisions are set out in the Appendix to this decision.

The applicant's submissions

10. The applicant's case was set out in the letters from its solicitors dated 06 December 2017 and 11 January 2018, the grounds of which are summarised below.
11. The applicant submits that the respondents acted unreasonably and/or negligently in:
 - 10.1 General conduct – failing to respond promptly to correspondence and failing to provide reliable means of contacting them by telephone.
 - 10.2 Failing to comply with directions, particularly in relation to the draft transfer.
 - 10.3 Appointing and dis-instructing their original valuation surveyor and seeking the Tribunal's permission to obtain further valuations.
 - 10.4 Persisting with claims that had no reasonable prospect of success, namely:
 - (a) additional compensation under paragraph 5(4) of schedule 5 to the 1993 Act for alterations to the lower ground floor flat, where consent had been obtained for the alterations; and

- (b) including costs outside the scope of section 33(1) of the 1993 Act and irrecoverable service charges in their completion statement.
12. In the letter of 06 December, the applicant's solicitors sought costs of £3,240 excluding VAT together with the Tribunal fees of £300 relating to the Section 24 Application. Their letter of 11 January was accompanied by a costs schedule on which they had highlighted the work said to be attributable to the respondent's conduct. This spanned the period from 06 March to 21 December 2017. The printout was difficult to make out, due to the small font but it appears that 3.9 hours of additional time is claimed. The work in question was undertaken by Mr Andrew Park who is a consultant solicitor and whose charging rate is £350 per hour. A further 3 hours was claimed for preparing the letter of 11 January and the costs schedule.

The law

13. The applicant seeks a costs order under Rule 13(1)(b), based on the respondent's unreasonable conduct. It does not seek an order for wasted costs under Rule 13(1)(a).
14. Rule 13(1)(b) is engaged where a party has acted "*...unreasonably in bringing, defending or conducting proceedings...*". The Tribunal's power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007, which provides:

"(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."

It follows that any Rule 13(1)(b) order must be limited to the costs of and incidental to the proceedings before this Tribunal, namely the Section 24 Application.

15. The directions on the Costs Application referred to the Upper Tribunal's decision ***Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC)***, which outlined a three-stage test for deciding Rule 13 costs applications. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order.
16. At paragraph 24 of ***Willow Court*** the UT said "*We see no reason to depart from the guidance in Ridehalgh v Horsefield at 232E, despite the slightly different context. "Unreasonable" conduct includes*

conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"

17. At paragraph 43, the UT emphasised that Rule 13(1)(b) applications "*...should not be regarded as routine...*" and "*...should not be allowed to become major disputes in their own right.*"

Reasons for the Tribunal's decision

18. The threshold for making a Rule 13(1)(b) costs order is a high one. As stated at paragraph 24 of ***Willow Court*** "*...the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level.*"
19. The Tribunal first considered whether the respondents had acted unreasonably in defending or conducting the Section 24 Application. When doing so, it only considered the period from 17 July 2017 (the date the application was received by the Tribunal) until 10 November 2017 (the date the application was closed). The respondents' conduct outside this window not relevant, as the Tribunal is only concerned with the conduct of the proceedings.
20. The applicant did not provide any specific examples of the respondents' failure to promptly respond to correspondence, so the Tribunal does not have evidence of the extent of the delays or whether they occurred before or after the Section 24 Application. Short delays would not normally amount to unreasonable conduct and longer delays might permit of a reasonable explanation, such as difficulties obtaining instructions, ill-health or other absences from the office. In the absence of specific details, the Tribunal cannot come to a finding of unreasonable conduct.
21. The respondents' failure to supply a reliable means of contacting them by telephone was not unreasonable conduct. A mobile number was provided for their in-house lawyer, Ms Antoni. The applicant's solicitors complain that she never answered their calls but did not provide specific details, such as the dates of the calls and whether voicemail messages were left. Far more information would be required before the Tribunal could consider a finding of unreasonable conduct. It is also worth pointing out there were other means of contacting Ms Antoni, namely email or letter.

22. Appointing and then dis-instructing the original surveyor permits of a reasonable explanation. The respondents may have disagreed with his/her expert opinion, in which case it was reasonable to seek a second opinion. Again, this was not unreasonable conduct.
23. A failure to comply with the Tribunal's directions can amount to unreasonable conduct. However, the applicant's solicitors have not identified the extent of the alleged breaches or disclosed any relevant correspondence. This makes it impossible for the Tribunal to conclude that this failure was unreasonable. The onus is on the applicant to establish breaches of the directions that amount to unreasonable conduct and it has failed to do so.
24. The Section 24 Application was settled before a determination by the Tribunal. There was no decision on the respondents' claim for additional compensation under paragraph 5(4) of schedule 5 to the 1993 Act and the Tribunal is unable to assess the merits of this claim. It is not satisfied that persisting with this claim amounted to unreasonable conduct.
25. The section 33 costs did not form part of the Section 24 Application. It is unclear when these costs or the irrecoverable service charges were first claimed. If this was after the application was closed, as appears to be the case then the pursuit of these claims did not amount to conduct of the proceedings. Furthermore, the applicant's solicitors have not disclosed any correspondence relating to these complaints and there is insufficient evidence to establish unreasonable conduct.
26. The applicant has not established any unreasonable conduct of the proceedings, on the part of the respondent and has not satisfied the first stage of the *Willow Court* test. This meant it was unnecessary for the Tribunal to go on and consider the second and third stages.

Name: Tribunal Judge
Donegan

Date: 05 March 2018

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.

Appendix of relevant legislation

Leasehold Reform, Housing and Urban Development Act 1993

Section 33

(1) Where a notice is given under section 13, then (subject to the provisions of this section and sections 28(6), 29(7) and 31(5) the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner or by any other relevant landlord, for the reasonable costs of and incidental to any of the following matters, namely –

- (a) any investigation reasonably undertaken –
 - (i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or
 - (ii) of any other question arising out of that notice;
- (b) deducing, evidencing and verifying the title to any such interest;
- (c) making out and furnishing such abstracts and copies as the nominee purchaser may require;
- (d) any valuation of any interest in the specified premises or other property;
- (c) any conveyance of any such interest

...

(3) Where by virtue of any provisions of this Chapter the initial notice ceases to have effect at any time, then (subject to subsection (4) the nominee purchaser's liability under this section for costs incurred by any personal shall be a liability for costs incurred by him down to that time.

The Tribunals, Courts and Enforcement Act 2007

Section 29

- (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.
- (7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

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

Rule 3

Overriding objective and parties’ obligations to co-operate with the Tribunal

- 3. -**
- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
 - (2) Dealing with a case fairly and justly includes –
 - (a) 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;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
 - (3) The Tribunal must seek to give effect to the overriding objective when it –
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
 - (4) Parties must –
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

Rule 13

Orders for costs, reimbursement of fees and interest on costs

- 13.-** (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 and land 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 to 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 Lorde Chancellor.

...