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

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| **Case reference** | : | **LON/00AW/OC9/2016/0487** |
| **Property** | : | **71 St Quintin Avenue, London W10 6PB** |
| **Applicant** | : | **Peachdrive Properties Ltd ("the tenant")** |
| **Representatives** | : | **Woodfords solicitors LLP** |
| **Respondents:** | : | **Brandon Whitcher, Enrica Bellone & Serine Hamwazi ("the landlords")** |
| **Representatives** | : | **Wallace LLP** |
| **Type of application** | : | **Rule 13 Costs** |
| **Tribunal judge** | : | **Angus Andrew** |
| **Date and venue of hearing** | : | **19 July 2017**<br>**10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **9 August 2017** |

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**DECISION**

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## Decision

1. I decline to order the landlords to pay the tenant's costs pursuant to rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("Rule 13").

## The application and hearing

2. By letter dated 9 May 2017 the tenant claimed costs of £4,200 plus VAT under rule 13 and directions were issued by the tribunal on 19 May 2017.

3. At the hearing on 19 July 2017 the tenant was represented by Louisa Nye and the landlords by Simon Serota. Ms Nye is a barrister and Mr Serota is a solicitor.

## Background

4. The background to this case is set out in paragraphs 4 to 10 of the tribunal decision issued on 11 April 2017 and in accordance with the guidance given by the Upper Tribunal at paragraph 43 of the decision in Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 0290 (LC) I do not repeat it here.

5. Following agreement of the terms of acquisition the tenant sought a determination under section 33 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") of the landlords' statutory costs. Directions were issued on 5 December 2016. The relevant direction were in the following terms:-

> ***"Exchange of Documents***
>
> 1. *The landlord shall send the following documents to the tenant by* ***19 December 2016****:-*
>
>  - *A schedule of costs sufficient for a summary assessment.*
>
>  *The schedule shall identify the basis for charging legal and/or valuation costs. If costs are assessed by reference to hourly rates, detail shall be given of fee earners/case workers, time spent, hourly rates applied and disbursements. The schedule should identify and explain any unusual or complex features of the case.*
>
>  - *Copies of the invoices substantiating the claimed costs.*
>
>  - *Copies of any other documents/reports upon which reliance is placed.*

2. *The tenant shall send the following documents to the landlord by* ***2 January 2017****:-*

- *A statement of case and any legal submissions.*

  *The statement shall identify any elements of the claimed costs that are agreed and those that are disputed (with brief reasons). The statement may usefully (a) specify alternative costs that are considered to be reasonable and (b) where the tenant is represented, details of the hourly rates, or other basis for charging, applied by its solicitors, valuers or other professional advisors in the calculation of their equivalent costs.*

- *Copies or details of any comparative cost estimates or accounts upon which reliance is placed.*

- *Copies of any other documents/reports upon which reliance is placed.*

3. *The landlord may send to the tenant by* ***9 January 2017*** *a statement in response to the tenant's statement of case and any legal submissions."*

6. The directions were in standard form and concluded by providing that the application would be determined on the basis of document bundles unless either party requested a hearing.

7. On 14 December 2017 the landlords sent a cost schedule to the tenant that was at the heart of this dispute. The schedule is in the form of a 7 column, 7 page table. Each activity is dated and described: the grade of fee earner is identified as is the hourly rate and the amount claimed. The table concludes with a total of £7,617.60 (that is £6,348 plus VAT).

8. Mr Serota accepted that the schedule did not identify any unusual features and that the invoices were not at that time supplied.

9. How the valuation costs were claimed is not entirely clear but I assume that they had been claimed in previous correspondence. In any event valuation costs of £2,400 were claimed (that is £2,000 plus VAT). Thus the landlords claimed total costs of £10,017.60 (£7,617.60 plus £2,400). In open correspondence the tenant offered total costs of £4,800 (£3,000 in respect of legal costs and £1,800 in respect of valuation costs) but the offer was not accepted.

10. Although not included in the document bundle it seems that on 13 January 2017 the tenant sent a statement of case. In its statement the tenant disputed both the legal and valuation costs claimed by the landlords. On 23 January 2017 the landlords provided their submission on costs. Although I was asked to refer to this document it was again not included in the document bundle. Nevertheless it was common ground that submissions were in the form of a

witness statement from Ms Fleur Neale, who had the conduct of the case on behalf of the landlords.

11. On 26 January 2017 the tenants wrote to the tribunal complaining vociferously about the landlords' asserted failure to comply with the tribunal directions, which provoked a denial from the landlords. Faced with this correspondence a procedural judge asked if an oral hearing would be more appropriate and on 16 February 2017 the tenant requested an oral hearing as it was perfectly entitled to do. The statutory cost application was listed for 15 March 2017 and the tribunal, of which I was the chairman, issued a decision on 11 April 2017. By that decision the tribunal determined that statutory costs of £6,624 (£5,520 plus VAT) were payable by the tenant to the landlords.

12. The tenants now claim their costs incurred in connection with the tribunal hearing on 15 March 2017. Those costs comprise solicitor's costs of £1,500 plus VAT and counsel fees of £2,700 plus VAT: £4,200 plus VAT in total. On this occasion the landlords requested an oral hearing as was their right.

## Reasons for my decision

13. I am again mindful of the Upper Tribunal's guidance at paragraph 43 of the Willow Court decision. In particular that rule 13 cost applications *"should not be allowed to become major disputes in their own right"*.

14. On the basis of the Willow Court decision I must first decide whether the landlords have acted unreasonably. If I decide that the landlords have acted unreasonably I may then exercise my discretion in deciding whether to award costs. Finally, if I do decide to award costs I must then decide what order to make.

15. In deciding whether a party's behaviour is unreasonable the Upper Tribunal in Willow Court cites with approval the judgement of Sir Thomas Bingham MR in Ridehalgh v Horsefield [1994] Ch 2005. It does so at paragraph 24 of its decision in these terms:

> *""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 in the position of the party 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?".*

16. Essentially the tenant relies on three aspects of the landlords' behaviour. The first was its asserted failure to comply with the directions of 15 December 2016 and in particular it's asserted failure to provide a *"schedule of costs sufficient for summary assessment"* and *"copies of the invoices substantiating the claimed costs"*. The second was the landlords' failure to enter into meaningful negotiations in respect of the claim for statutory costs. The third was a number

of adverse comments about the landlords' claimed costs contained in the decision of 11 April 2017. I deal with each in turn.

17. The cost schedule provided by the landlords was more appropriate for a detailed cost assessment. Mr Serota acknowledged that it did not strictly comply with the directions. His explanation was that most tribunals when assessing statutory costs undertake an exercise that is more akin to a detailed assessment in that they have regard to the minutiae of the six minute units. For that reason he said that his firm always provides a cost schedule similar to that used in this case.

18. On the basis of my 15 years experience as a member of this tribunal I accept Mr Serota's explanation. Although I prefer to assess statutory costs on a summary basis I acknowledge that many colleagues adopt a different approach and Mr Serota's firm cannot in such circumstances be criticised for providing a cost schedule that is more suitable for a detailed assessment. It fair to say that in this respect Ms Neale was probably in the position of being *"damned if she did and damned if she didn't"*. There is certainly force in Mr Serota's argument that the landlords were effectively being criticised for providing more information than was required of them by the directions. Consequently I am satisfied that the failure to provide a cost schedule suitable for a summary assessment permitted of a reasonable explanation.

19. Before moving on I simply observe that it would be helpful if in future Wallace LLP provide a cost summary in addition to the detailed cost table that they have used in the past.

20. As far as the invoices were concerned the failure to provide these appears to have been an oversight: they were produced at the hearing and nothing turned on them.

21. Turning to the negotiations Mr Serota accepted that in rejecting the tenant's settlement offer the landlords made no counter offer of their own. At the hearing he said that the landlord's were not prepared *"to enter into a Dutch auction"*. Their failure to take a more proactive approach in the agreement of the statutory costs is perhaps regrettable. Nevertheless the function of this tribunal is to determine disputes about statutory costs and I do not accept that any party in proceedings of this nature is obliged to make a concession in advance of a determination.

22. In suggesting that there was such an obligation Ms Nye relied on paragraphs 100-103 of the Willow Court decision. Given the Upper Tribunal's guidance I do not consider it necessary to recite those paragraphs in full. In my view they do not assist Ms Nye. The paragraphs relied on by Ms Nye relate not to a failure to enter into a meaningful negotiations but to a failure to mediate. Even if a failure to negotiate can be regarded as analogous to a failure to mediate the Upper Tribunal said in paragraphs 102: *"in a relatively modest dispute we do not necessarily regard an unwillingness to mediate by a party which considers themselves to have a strong case as evidence of unreasonableness"*. Moreover it is apparent on reading the paragraphs relied on by Ms Nye that the Upper Tribunal considered that a failure to mediate is something that should be taken into account at the third rather than the first stage of the Willow Court decision tree.

23. Turning to the decision of 11 April 2017 it is correct that the tribunal was critical of both the time spent by the landlords' solicitor and also the landlord's valuer's claimed costs for attending an unplanned inspection. However these shortcomings fall well short of being vexatious and/or designed to harass the tenant.

24. Essentially this is a no cost jurisdiction. Rule 13 costs are the exception not the rule. As Ms Nye appeared to accept in answer to my questions the tenant's argument, if taken to its logical conclusion, would result in costs being awarded against any party failing to negotiate or for relatively minor breaches of directions. That is not what rule 13 envisages or intends.

25. The conduct complained of falls well short of the type of unreasonable behaviour identified by the Upper Tribunal in Willow Court and for each of the above reasons I decline to order the landlords to pay the tenant's costs.

26. That said the landlords should not take any comments in this decision as an encouragement to make a rule 13 cost application of their own. For the reasons alluded to at paragraph 4 of the decision of 11 April 2017 there has been a loss of perspective by both parties. Had both cost applications been determined without an oral hearing the outcomes would have been little different. For that reason alone, even if I had found that the landlords' conduct to be unreasonable I would not have exercised my discretion to award costs.

**Name: Angus Andrew** **Date: 9th August 2017**

## 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).