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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/OLR/2016/1831**
Property	:	**4 Bourne House, St Vincent Street, London W1U 4DB**
Applicant	:	**Michael Paul Loosemore and Donna Gellatly-Loosemore**
Representative	:	**John May Law**
Respondent	:	**Howard de Walden Estates Limited**
Representative	:	**Charles Russell Speechlys**
Type of application	:	**Costs - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member	:	**Judge Timothy Powell** **Ian Holdsworth FRICS**
Date and venue of hearing	:	**5 July 2017 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**14 July 2017**

DECISION

Background

1. This was an application for costs made by the lessees of 4 Bourne House, St Vincent Street, London W1U 4DB ("the Property"), under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. It relates to the alleged unreasonable conduct of the respondent landlord, Howard de Walden Estates Limited, in dealing with the lessees' claim for a lease extension in respect of the

Property, pursuant to the Leasehold Reform, Housing and Urban Development Act 1993.

2. That claim for a lease extension was initiated by the service of a notice of claim dated 13 July 2016. The landlord served a counter notice on 21 September 2016; and then applied to the tribunal for a determination of the terms of the new lease and the premium, at the first opportunity, on 21 November 2016, being two months from service of the counter notice.

3. Following negotiations between the parties' valuers, the premium and statutory costs were agreed on 11 February 2017. Thereafter, the terms of the new lease were agreed by the parties' solicitors on 7 April 2017, so that the hearing fixed for the substantive application, on 11 April, was no longer necessary.

4. On 3 May 2017, the lessees then made an application under rule 13 for an order for costs against the landlord.

The hearing

5. The hearing of the costs application took place on 5 July 2017. At that hearing, the applicant lessees were represented by Mr John May of John May Law and the respondent landlord by Mr Anthony Radevsky, of counsel, instructed by Charles Russell Speechlys.

6. Mr Law sought to demonstrate within the terms of rule 13 how the landlord had acted unreasonably in bringing or conducting the proceedings, such that an order for costs in the sum of £5,772, including VAT, should be made in the lessees' favour. Those costs represented some 18.5 hours' additional time spent by John May Law due to the alleged unreasonable conduct of the landlord, i.e. 8.5 hours additional time spent in relation to the substantive application and 10 hours in relation to the subsequent rule 13 costs application.

7. The tribunal had the benefit of a substantial bundle of documents containing the lessees' statement of case and documents in support, including correspondence between the parties' solicitors; the landlord's statement in response; the lessees' response to that; and various other documents.

The lessees' submissions

8. In opening, Mr May complained that there had been "a multitude of small iniquities" on the part of the landlord. None in itself caused concern, he said, but together they formed "collective conduct" on the part of the landlord that was unreasonable and that was designed to apply unreasonable pressure on the lessees.

9. By reference to the existing lease, the landlord's proposed new lease (which had been attached to the counter notice), the travelling draft lease with amendments (which had passed between the parties' solicitors) and the final, agreed lease, Mr Law sought to show that the negotiations and hence the proceedings had been conducted in an unreasonable manner. He clarified this by saying that the landlord had sought changes to the existing lease that it was not entitled to, nor were justified under the 1993 Act; and the delay and cost of fighting all of the landlord's proposed changes had caused worry and distress to the lessees. Mr May did not object to fact that the landlord had attached its proposed new lease to the counter notice, but he did object to what he considered to be the unreasonable conduct of the negotiations and the proceedings, thereafter.

10. In the lessees' statement of case, it was claimed that the landlord "was following a determined policy of unreasonable behaviour to seek to defeat the Applicants' proper rights" (para.12). The landlord was said to have "displayed conduct which is vexatious, designed to harass the other side rather than to advance the resolution of the case and which does not permit of a reasonable explanation" (para.18); and that was "with a view to bullying them into submitting to terms that were neither lawfully nor reasonably required" (para.39).

11. Mr May referred the tribunal to various items of correspondence, starting with a letter of 12 December 2016, which he said set the tone of all subsequent correspondence. He also complained that the landlord had refused to provide a breakdown of its statutory costs, after these had been agreed (as part of a global sum, together with premium) by the parties' respective valuers.

The landlord's submissions

12. On behalf of the landlord, Mr Radevsky objected to the attack which he said had been made on the character of the landlord's employee involved in the negotiations and on the landlord's solicitors. He said that he was at a loss to understand the basis of the costs application, or the allegations of unreasonable conduct on the landlord's part. Whether the allegations were aimed at the negotiations as to the terms of the new lease, or at the actual conduct of the proceedings, in his submission there was nothing at all that could constitute unreasonable conduct, within the meaning of rule 13.

The tribunal's determination and reasons

13. The tribunal agrees with Mr Radevsky. In accordance with the decision in *Willow Court Management Company Ltd v Mrs Ratna Alexander and Others* [2016] UKUT 0290 (LC), there is a three-stage test before an order of costs under rule 13(1)(b) may be made by the tribunal. At the first stage, the question is whether a person acted unreasonably,

which requires the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour would properly be judged to be unreasonable, and the threshold for the making of an order would have been crossed: see paragraph 28 of the judgment.

14. In this case, the landlord made an application to the tribunal, as it was entitled to do, to determine the premium for and the terms of the new lease. Nothing turns on the fact that the landlord made such an application on first available date, two months after having served a counter notice. Neither does anything turn on the fact that the landlord attached to its counter notice a draft of the new lease that it would wish to see granted.

15. There is nothing unusual in parties negotiating and/or agreeing terms of a lease extension, which are substantially different from those that may be acquired under the 1993 Act. Indeed, the Act contemplates that there will be such negotiations, because, by section 48, it is only where "any of the terms of acquisition remain in dispute" that application may be made to the tribunal. Both firms of solicitors in this case are extremely experienced in enfranchisement matters under 1993 Act; and it is very difficult to understand how either one of them could bully or feel bullied by the other.

16. Even in a situation where one party did feel bullied, the solution is very simple indeed: that party may simply refuse to negotiate further and insist upon the grant of a new lease on existing terms, subject to the usual statutory modifications set out in the 1993 Act and/or such modification or correction of defects, as may be allowed: see sections 56 and 57 of the Act.

17. However, in the present case, there is nothing in the correspondence seen by the tribunal that remotely supported the allegation of bullying, harassment or vexatious conduct. The landlord's solicitors may have adopted a forthright negotiating stance, for example by saying that negotiations would cease if there had been no agreement three weeks before the tribunal hearing; but there was nothing, so far as the tribunal could see, that amounted to unreasonable conduct.

18. It is correct that that there were differences of opinion as to the appropriate clauses to be inserted into the new lease. The tribunal's attention was drawn, in particular, to the provisions relating to alienation, alterations and insurance. However, as the travelling draft lease makes clear, with each re-amendment by the landlord's solicitors, there was an explanation seeking to justify the proposed changes.

19. In the event, the parties were able to agree the terms of the new lease, late on Friday, 7 April 2017, in advance of a hearing on Tuesday, 11 April. While it is always preferable for there to be early, rather than late

settlement, the fact is that last-minute settlements are commonplace; and the tribunal does not agree with the description of the nature and timing of this settlement as being "mischievous and unreasonable".

20. Given that the parties' valuers had agreed a global settlement figure that included the premium and all of the statutory costs including VAT, there appears to be nothing unreasonable in the landlord's solicitors later declining to provide a further breakdown of that element of the global figure allocated to those statutory costs.

21. Mr Radevsky referred the tribunal to the recent decision in *Primeview Developments Limited v Mr R Ahmed and Others* [2017] UKUT 0057 (LC). This was a service charge case where a landlord was alleged to have pressurised lessees into signing an agreement. While the landlord was said to have persistently adopted an "unattractive hectoring" tone when dealing with the lessees, and although its approach was "blunt and uncompromising", the Upper Tribunal did not consider that this was capable of providing grounds for the making of an order under rule 13(1)(b), in that case. The conduct complained of could not fairly be described as "vexatious and designed to harass the leaseholders rather than advance resolution of the case".

22. Even without the benefit of the decision in *Primeview*, this tribunal would still have reached its conclusion that, in the present case, there was no unreasonable conduct on the landlord's part. However, bearing in mind the very much worse conduct described in *Primeview*, the tribunal is reinforced in its view that this is not an appropriate case for an order for costs to be made under rule 13(1)(b).

23. Finally, the tribunal can see no justification for awarding a party the costs incurred in *making* an application under rule 13(1)(b), save where there had been some unreasonable conduct in the rule 13 proceedings themselves. This is because the tribunal is a no-cost jurisdiction and the position in rule 13(1)(b) contrasts with rule 13(1)(a) (wasted costs), where express provision is made for an applicant to recover the costs of making the application itself.

Name: Timothy Powell **Date:** 14 July 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).