12589

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AN/LSC/2017/0161**
Property	:	**270 Wandsworth Bridge Road, London SW6 2UA**
Applicant	:	**Mr Jonathan Goater**
Representative	:	**Linda Myers, Solicitors**
Respondent	:	**Amek Investments Limited**
Representative	:	
Type of application	:	**Costs - Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member(s)	:	**P M J Casey, MRICS**
Date of decision	:	**24 January 2018**

DECISION

Decision of the Tribunal

The tribunal determines that under the provisions of Rule 13(2) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, "the Rules", the respondent shall pay to the applicant the sum of £300 within 28 days of the date of this decision but the tribunal declines to make any order under Rule 13(1)(b).

The Application

1. The applicant seeks a determination under Rule 13 of the Rules that the respondent does pay him costs as a consequence of the respondent's having, allegedly, "acted unreasonably in bringing defending or conducting proceedings in – (i) ... (ii) ... (iii) a leasehold case" namely the application referred to at 2 below.

2. This application, dated 9 October 2017, follows on from one made by the applicant under S27(A) of the Landlord and Tenant Act 1985, "the Act", in respect of service charges demanded by him from the respondent.

3. Directions for the conduct of the Rule 13 application were given on 16 October 2017. These provided for the matter to be dealt with on the papers the parties were required to provide unless either or both sought an oral hearing; neither have. The sums sought as costs in the application are as follows: application fee £100, hearing fee £200, Counsel's fee £3,000 including VAT for representation at the S27(A) hearing and £540 including VAT solicitor's fee for advice and the application under Rule 13. However in the hearing bundle provided by the applicant in response the solicitor's fees are said to amount to £2,033.28 including VAT as set out in a statement of costs. The directions required reasons to be given as to why it is said the respondent has acted unreasonably, etc and to deal with the issues for invoking the Rule as identified by the Upper Tribunal decision in Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander [2016]UKUT(LC). Accordingly the tribunal have considered the application on the basis of the joint bundle of documents provided by the applicant which included his statement of case and details of the costs claimed together with the respondent's statement in reply, and the applicant's response to that.

4. The application under S27(A) Landlord and Tenant Act 1985 was made on 14 April 2017 and shortly after this, on 11 May 2017 the respondent sent a cheque for £1,943.94 which sum had been demanded on 14 March 2017. This payment cleared all outstanding service charge demands in respect of 2015/16 and 2016/17 but left at issue for the tribunal's determination the first quarter payment on account of service charges for 2017/18 together with an administration charge within the meaning of Schedule II to the Commonhold and Leasehold Reform Act 2002 of £1,875 which had been invoiced on 13 April 2017. The tribunal decided in its decision of 11 September 2017 that the service charge for the first quarter 2017/18 was reasonable and payable save for a small sum in respect of a reserve fund

contribution but limited the amount payable as an administration charge to £1,275 including VAT.

5. The respondent took no part in the proceedings whilst the applicant was represented at the hearing by Counsel.

6. This non-involvement by the respondent forms the basis of the applicant's Rule 13 claim.

7. In particular it is claimed that failure by the respondent to notify the applicant and/or the tribunal that it did not intend to contest the application resulted in the tribunal setting the application down for an oral hearing when the applicant's preference had been for a paper determination. Moreover failure to acknowledge that at least some of the sums claimed were not disputed meant there was no narrowing of the issues with the result that all such items required proof by the applicant. It also led to the applicant, a lay person with no experience of tribunals taking the decision to be legally represented at the hearing.

8. For its part the respondent sought to explain the difficulties which had led to a history of late payment on its position as head leaseholder encountering difficulties with being put in funds by the sub-lessee, the occupier and ultimate beneficiary of the services. It had no issue with the service charge amounts and decided not to incur costs in opposing the application. With hindsight it appreciated this position should have been made clear to the applicant and the tribunal to both of whom it apologized.

Decision

9. The claim encompasses three separate aspects of Rule 13. An order is sought under Rule 13(2) for the reimbursement by the respondent of application and hearing fees paid by the applicant. The application was a result of the respondent's failure to pay service charges demanded in accordance with its lease. The difficulties arising from payment issues arising with the sub-lessee do not excuse this failure. The hearing appears to be a direct consequence of the respondent failing to contact the tribunal to advise that it did not intend opposing the application. In these circumstances the tribunal is of the view that it is appropriate to order the respondent to reimburse to the applicant the £100 application fee and the £200 hearing fee within 28 days of the date of this decision.

10. The element of the claim relating to solicitor's fees in advising on and making and progressing the application, originally £465 subsequently expanded to £2,033,28 (both inclusive of VAT) would only be capable of consideration if this were a claim for wasted costs against a legal or other representative under S29(4) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) and Rule 13(1)(a) as it is only in such cases that the tribunal can award the costs of applying for such costs. But it is clearly not intended as such not least because the respondent had no legal or other representation. The tribunal has no similar power under Rule 13(1)(b) to order a person to pay the costs of making the claim for costs because it is

said that person "acted unreasonably" etc. This element of the claim is not allowed by the tribunal.

11. The rest of the claim for costs relates to Counsel's fee in respect of the hearing of the original S27(A) application. However as the Upper Tribunal makes clear in its decision in Willow Court the tribunals powers to make cost orders at its discretion given by S29 of the 2007 Act is constrained by Rule 13 so that in a leasehold case, as here, before any order for costs can be made against any person the tribunal would have to find that that "person has acted unreasonably in bringing, defending or conducting proceedings ... in a leasehold case ...". The respondent did not bring or defend the proceedings so the question becomes: did the respondent's decision to take no part in the proceedings and moreover the failure to advise the applicant and the tribunal of this decision constitute acting unreasonably?

12. Rule 3 of the Rules sets out their overriding objective and party's obligation to co-operate with the tribunal. Rule 3(4) requires parties to help the tribunal further the overriding objective and co-operate with the tribunal generally. The respondent did not do this but as an unrepresented party probably had little if any knowledge of the tribunal's procedural rules. Does this amount to "acted unreasonably"? One can see that a party who does not engage with the proceedings who is in possession of information or evidence which would if disclosed considerably advance the overriding purpose or which puts other parties to disproportionate cost to obtain might be regarded as having so acted but a party who does not dispute the claimed sums but claims not to be in a position to pay and does not wish to incur further costs by taking advice or obtaining representation can it truly be said has acted unreasonably? The Upper Tribunal in Willow Court approved a definition of unreasonable conduct to include conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case and also adopted the "acid test": is there a reasonable explanation of the conduct complained of. Not wishing to incur further expense in relation to a claim that is not opposed is a reasonable explanation and no part of the respondent's non behaviour can be said to have been vexatious or designed to harass. It simply left the applicant with an open goal. In the tribunal's opinion the respondent cannot be said to have acted unreasonably in taking no part in the proceedings and accordingly no costs order will be made.

13. If however this conclusion is wrong Willow Court directs that a tribunal which finds a party to have acted unreasonably then needs to take two further steps in the exercise of its discretion namely to decide if in all the circumstances an order should be made and then to decide what form the order should take.

14. At the hearing of the S27(A) application the applicant elected to be represented by counsel and the fee for that is the remaining part of the claim. It was however a simple and straightforward case made easier by no case presented by the respondent. A significant number of such cases come to the tribunal with litigants in person presenting their own case with little difficulty. If the respondent had acted unreasonably that cannot in the tribunal's opinion have caused the applicant to require legal representation;

that was entirely his choice and again the tribunal will not make any costs order.

Name: PATRICK M J CASEY **Date: 24 January 2018**

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).