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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/OOAM/LSC/2017/0340
Property	:	10 Park Lea Court, 86 Durley Road, London, N16 5JT
Applicant	:	Michael Atkins and Esther Victoria Atkins
Respondent	:	Park Lea Court Limited
Type of Application	:	Costs – Rule 13(1)(b)
Tribunal Members:		Judge Robert Latham Duncan Jagger MRICS
Venue of Hearing	:	Alfred Place, London WC1E 7LR (paper determination)
Date of Decision	:	24 January 2018

DECISION

The Tribunal does not make an order for costs against the Respondent pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Background

1. On 5 September 2017, the Applicant tenants issued an application under Section 27A of the Landlord and Tenant Act 1987 seeking a determination of the service charges payable for the years 2015 to date. The application recorded that the sum in dispute was £780.81.

2. On 19 October 2017, the Judge Nicol issued Directions at a Case Management Hearing ("CMH"). The Tribunal identified the issue in dispute, namely how the service charges are apportioned between two purpose-built blocks with a total of 16 flats. This had previously been considered by a Tribunal in LON/00AM/LSC/2016/0209, a determination dated 19 July

2016. The service charge expenditure is split into two parts, Part I relates to the interior of each block and Part II to the exterior of the two blocks. The Division of the Part II expenditure was straightforward, and the contributions added up to 100%. Judge Jack determined that for Part I expenditure, Flats 1 to 10 should be treated as one building, Flats 1 to 6 paying 2/24 whilst Flats 7 to 10 should pay 2/16.

3. The outstanding issue is how the Part I interior expenditure was allocated between the two buildings. The blocks are not equal. The practice of the landlord's then managing agent was to assign expenditure to each block in accordance with how the contractor claims to have incurred it, or, if the contractor does not specify this, to allocate 2/3 to the Applicant's Block and 2/3 to the other. The Applicants disagree with this apportionment. The position at the CMH was complicated by the fact that the landlord had recently appointed new managing agents, Duncan Phillips Ltd. They had recently received several boxes of documents from the previous agents.

4. On 23 October, the tenants notified the Tribunal that they intended to withdraw their claim as "the toll of the work and costs are too expensive". On 25 October, the Tribunal agreed to the withdrawal.

5. On 22 November, the landlord applied to the Tribunal for costs against the tenants in the sum of £2,275 + VAT pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules").

6. On 24 November, the Tribunal gave Directions pursuant to which:

   (i) On 13 December, the Respondent landlord provided their Supplementary Statement. Six grounds are alleged for contending that the Applicants acted unreasonably in bringing a new application.

   (ii) On 4 January, the Applicant Tenants provided their written Submissions in Response. They describe how they withdrew their application because of the toll of work, expenses involved, their medical condition and the considerable stress which would be caused by the massive array of documents which had accrued over many years. Two medical reports were attached.

   (iii) On 12 January, the Respondent provided a response.

The Law

7. Rule 13 of the Tribunal Rules provides in so far as is relevant to this application (emphasis added):

> 13. Orders for costs, reimbursement of fees and interest on costs
>
> (1) The Tribunal may make an order in respect of costs only—

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

.....

(ii) a residential property case;

8. In *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC)), the Upper Tribunal ("UT") gave guidance on how First-tier Tribunals ("FTTs") should apply this rule. The UT consisted of the Deputy President of the UT and the President of the FTT. It is a decision to which any party seeking a penal costs order under Rule 13 must have careful regard in framing any application for costs.

9. The UT set out a three-stage test:

(i) Has the person acted unreasonable applying an objective standard?

(ii) If unreasonable conduct is found, should an order for costs be made or not?

(iii) If so, what should the terms of the order be?

10. The UT gave detailed guidance on what constitutes unreasonable behaviour (emphasis added):

22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in *Ridehalgh v Horsefield* [1994] Ch 205. We therefore restrict ourselves to mentioning *Cancino v Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). Cancino provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.

23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in Ridehalgh on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that 10 unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case

clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in Ridehalgh 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 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?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship.

11. The UT gave important guidance on the procedure to be adopted by FTTs (at [43]):

"We conclude this section of our decision by emphasising that such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become

major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. We consider that submissions are likely to be better framed in the light of the tribunal's decision, rather than in anticipation of it, and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation. A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding that it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid."

Our Determination

12. The Tribunal is satisfied that this is not a case for any award of costs under Rule 13(1)(b). The UT set out a three-stage test:

    (i) Has the person acted unreasonably applying an objective standard?

    (ii) If unreasonable conduct is found, should an order for costs be made or not?

    (iii) If so, what should the terms of the order be?

    We are satisfied that this application fails at the first hurdle. The Respondent has failed to establish unreasonable conduct by the Applicant justifying a penal award of costs. This tribunal is normally a no costs jurisdiction. A penal costs order is only justified in exceptional circumstances. The Respondent has come nowhere near to establishing such exceptional circumstances.

13. The Respondent asserts that the Applicants acted unreasonably in bringing this application. It is impossible to sustain this contention. On 19 October, Judge Nicol gave Directions. He identified a real and arguable issue in dispute, namely how specific items in the service charge accounts should be apportioned between the two blocks. Potentially, this would have been an extremely time consuming process analysing numerous items of expenditure over many years.

14. The Respondent argues that the matter should have been referred back to Judge Jack rather than by issuing a new application. Judge Jack issued his decision in July 2016. He anticipated that the matter would be referred back within weeks, rather than years later. Further, the Applicants were challenging service charge years outside those determined by Judge Jack. The Applicants were quite entitled to conclude that a fresh application would be the most proportionate manner to determine the current dispute.

15. The Respondent complains that the application was issued prematurely. However, the Applicants refer to a pre-action letter sent on 5 October 2016. In any event, there is no requirement for a pre-action protocol letter before an application is issued before this tribunal.

16. The Tribunal is satisfied that the Applicants acted reasonably in issuing their application. They were also entitled to withdraw it when confronted by the stress and expense of progressing it to trial. In *Willow Court*, the UT addressed the issue of withdrawal of claims at [35] to [37]. It is in the interests of all parties that if a party decide to discontinue a claim, they should do so at the earliest opportunity. This is what the Applicants have done. They have explained their reasons for doing so.

17. It is apparent to this Tribunal that unnecessary antagonism has built up between the parties since the tenants at Park Lea Court decided to acquire the freehold of their block in 1992. It is not necessary for this Tribunal to revisit the background to this dispute. We are quite satisfied that this is not a case for a penal costs order against either party. We would remind the parties that the tribunal offers a mediation service. Much more can be achieved by parties seeking to identify a mutually satisfactory outcome than by taking entrenched positions through litigation.

Judge Robert Latham
24 January 2018

ANNEX - 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.