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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BY/LSC/2015/0122**
Properties	:	**2 Bispham House** **Lace Street** **Liverpool** **L3 2BP**
Applicant	:	**Ms Karen Kelly**
Representative	:	**Weightmans LLP. Solicitors**
Respondent	:	**Acrophile Limited**
Representative	:	**JB Leitch, Solicitors**
Type of Application	:	**Application for costs**
Tribunal	:	**Judge J Holbrook** **Mr I James MRICS**
Date and venue of Hearing	:	**Determined without a hearing**
Date of Decision	:	**20 October 2017**

DECISION

DECISION

The Respondent is ordered to pay costs to the Applicant in the sum of £3,419.80.

REASONS

Introduction

1. This decision concerns an application for costs made by Ms Karen Kelly, the Applicant in these proceedings, against Acrophile Limited, the Respondent.

2. Ms Kelly is the leaseholder of the Property and Acrophile is her landlord. The proceedings arise out of Ms Kelly's application for a determination of her service charge liability under her lease of the Property. The Tribunal determined that application following a hearing on 22 June 2017 (its reasons being recorded in a decision of the same date).

3. At the conclusion of the hearing, Ms Kelly made an application for costs. Directions were given for the conduct of the costs application and for the matter to be decided on the papers. The parties have complied with those directions and have made no objection to the proposal for a paper determination on costs.

The application for costs

4. Ms Kelly seeks an order for costs against the Respondent in the sum of £4,200.60, arguing that it has acted unreasonably in defending or conducting the proceedings before the Tribunal.

The relevant law on costs

5. The Tribunal's powers to make orders for costs are governed by rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The general principle (set out in rule 13(1)(b)) is that the Tribunal may only make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings before the Tribunal. The application of rule 13 was considered and explained by the Upper Tribunal (Lands Chamber) in the case of *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC). The correct application of the rule requires the Tribunal to adopt the following approach when determining an application for costs:

1. Is there a reasonable explanation for the behaviour complained of?

2. If not, then, as a matter of discretion, should an order for costs be made?

3. If an order for costs should be made, what should be the terms of that order?

Discussion and conclusions

The behaviour complained of

6. Ms Kelly applied for a determination of her service charge liability following service upon her, in 2015, of a demand for payment of £32,838. That demand had been served by her landlord's solicitors on the basis that the lease of the Property unconditionally obliged Ms Kelly to pay this sum. Ms Kelly argued that any sum payable under the relevant provisions of the lease would be a service charge for the purposes of the Landlord and Tenant Act 1985 and that, by virtue of section 19 of that Act, nothing was then payable.

7. Ms Kelly's application to the Tribunal succeeded on this basis. By a preliminary decision dated 19 December 2016, the Tribunal ruled that the relevant provisions in the lease provide for the payment of a service charge, to which the statutory regime set out in the 1985 Act applies. By its decision dated 22 June 2017, the Tribunal subsequently ruled that, having regard to section 19(2), nothing was payable. At paragraph 25 of its decision, the Tribunal stated:

> "In order to demonstrate the reasonableness of the amount of an advance payment, the Respondent would have to show not only a genuine intention to carry out specific improvement works, but also a reasonably detailed (and costed) specification for the proposed works. Only then could a tenant (or the Tribunal) determine whether the amount being demanded satisfied the requirement of section 19(2). In the present case, however, the Respondent has not done either of these things: it has given no indication whatsoever of the nature, extent or anticipated cost of the works it intends to carry out, other than to refer to the seventh schedule to the lease. Given that the Respondent's statement of case asserts that it has no knowledge of previous plans for improving the building (which are understood to have been aborted in approximately 2009), it is difficult to see how the figures in the seventh schedule can have any relevance to current or future plans for the building. There has been no consultation with leaseholders about plans to carry out improvement works and we found the Respondent's assertion that it intends to carry out such works to be wholly unconvincing. It would thus be unreasonable for any advance payment to be demanded in these circumstances."

8. Ms Kelly now argues that, following the Tribunal's preliminary decision, Acrophile should have conceded that the disputed sum was not payable by her and that, by continuing to assert that the sum *was* payable, it behaved unreasonably. Ms Kelly points out that it did not until January 2017 (more than one year after these proceedings were started) that Acrophile indicated that the demand for payment related to future works, rather than to works already carried out, and that it never provided any documentary evidence of its intention to carry out those works. Ms Kelly also argues that Acrophile has been obstructive throughout the proceedings and acted unreasonably in attempting to have the application struck out.

9. In response, Acrophile denies that it has acted unreasonably or obstructively in any way. Its solicitors point out that the 2015 demand for payment was served on behalf of Acrophile's predecessor in title. Acrophile was, however, entitled to contest the meaning of the relevant provisions of the lease. But it was content for the Tribunal to make its preliminary decision on the papers: it was Ms Kelly who insisted on there being an oral hearing. As far as the case it advanced at the final hearing is concerned, Acrophile's solicitors argue:

> "... merely because particular evidence was not available does not follow that it was unreasonable to bring the proceedings or that it was unreasonably conducted or that it was improper and/or unreasonable and/or negligent."

10. We agree that Acrophile was not responsible for service of the 2015 demand for payment (in fairness, we do not think Ms Kelly has actually suggested otherwise). Nor do we think Acrophile acted unreasonably by applying to have the application struck out for want of jurisdiction (i.e., by arguing that the disputed sum was not a service charge). Acrophile was entitled, in our view, to put that argument forward and to ask the Tribunal to determine the question as a preliminary issue.

11. However, once the jurisdictional question had been determined – and it then being clear that the disputed sum *was* a service charge – it was incumbent upon Acrophile to consider whether it had reasonable grounds to persist with its assertion that it was entitled to payment of the sum. If, in the light of the preliminary decision, Acrophile no longer had reasonable grounds for its claim then, in our view, it should have withdrawn its challenge to Ms Kelly's case.

12. Acrophile did not do this. It persisted with its claim to entitlement, arguing: 1) that Ms Kelly had admitted liability to pay the disputed sum; and 2) that it intended to carry out improvement works and was therefore entitled to demand service charge contributions (the amount of which it was free to determine) prior to carrying out those works.

13. The Tribunal found these arguments to be entirely without merit. We found (at paragraph 22 of our decision) that it was "patently obvious" that the alleged admission of liability was no such thing, and we have already set out (at paragraph 7 above) the findings we made in respect of Acrophile's assertion that it was entitled to demand payment of the sum in respect of future works. We disagree with the view now expressed by Acrophile's solicitors that it was not unreasonable to continue to resist Ms Kelly's case "merely because particular evidence was not available". In the absence of any evidence to show that payment of the disputed sum would be reasonable for the purposes of section 19(2) of the 1985 Act, Accrophile's argument had no reasonable prospect of success once the Tribunal had made its preliminary decision. This should have been obvious to Acrophile – and to its solicitors – and we consider that there can be no reasonable explanation for the way in which Acrophile continued to defend the proceedings on the basis it did following the preliminary decision.

Whether an order for costs should be made

14. Given the nature and extent of the unreasonable conduct identified above, we consider it appropriate to exercise our discretion to make a costs order in this case. The effect of the conduct in question was to prolong these proceedings unnecessarily by a period of approximately six months. Not only did that cause Ms Kelly to incur additional legal costs, which otherwise could have been avoided, but it also extended the period of uncertainty during which Ms Kelly did not know whether she would ultimately have to pay a very substantial sum of money. We have no doubt that this must have been a stressful experience, and the fact that it was prolonged as a result of Acrophile's unreasonable conduct is also a factor which justifies an award of costs.

15. Acrophile argues that there are other factors which weigh against the making of a costs order. These include the fact that Acrophile was not the respondent originally named in Ms Kelly's application; that the Tribunal has previously been critical of Ms Kelly's own conduct in the proceedings concerning the original respondent; that Ms Kelly did not consent to the substantive issues being determined on the papers; and that she was late in serving her statement of case. We do not consider that any of these factors (either alone or when taken together) outweigh those mentioned in the previous paragraph or that they should cause us not to make a costs order. To the extent that those factors are relevant to the terms of the order which should now be made, however, they are discussed further below.

The terms of the order

16. Having decided to make an order for costs, we must also decide whether that order should be limited to the costs incurred by Ms Kelly as a consequence of Acrophile's unreasonable conduct – i.e., limiting it to costs incurred after the Tribunal made the preliminary decision – or whether to include additional costs incurred by her in these proceedings. Subject to what follows, we conclude that the second of these alternatives is to be preferred. The fact that Acrophile's unreasonable conduct resulted in the proceedings being prolonged unnecessarily for a significant period of time justifies that conclusion.

17. Nevertheless, we are mindful of the fact that, whilst Ms Kelly made her application to the Tribunal in December 2015, Acrophile was not joined as a party to the proceedings until 8 June 2016. Acrophile should not be required to pay any costs incurred by Ms Kelly prior to that date (including the costs of the preliminary hearing held on 8 June 2016). This also ensures that Acrophile does not have to bear any costs which Ms Kelly could have avoided had she acted differently during the early stages of the proceedings.

18. The costs in respect of which an order is now sought can be summarised as follows:

Personal attendances, letters & phone calls	£ 936.00
Attendance at hearings	£1,040.00
Work done on documents	£1,508.00
Sub-total	£3,484.00
VAT	£ 697.60
Minor disbursements	£ 19.00
TOTAL	£4,200.60

19. The work concerned was predominantly carried out by a grade A fee-earner charging £260 per hour. Small amounts of work were also undertaken by a grade B fee-earner (charging £240 per hour) and by a grade D trainee (charging £150 per hour). Acrophile contends that these charging rates are unreasonably high because they exceed the relevant guideline hourly rates (of £217, £192 and £118). Acrophile further argues that it was unreasonable for the majority of the work to have been undertaken by a grade A fee-earner. We disagree with both of these arguments. The guideline rates – as their name suggests – merely provide a guide as to solicitors' charging rates in different parts of the country. They do not amount to a cap on the permissible rates for costs purposes. Moreover, the guideline rates have not been reviewed for some time. In our view, the charging rates applied by Ms Kelly's solicitors are not out of line with rates currently being charged by the major law firms in Liverpool. Given the significant sum of money which was in issue in this case – and the consequent importance of the matter to Ms Kelly – we are also of the view that it was appropriate for the matter to be conducted by a partner at the firm personally. It is wholly

irrelevant that Acrophile was content for its own interests to be looked after by a fee-earner of a lesser grade.

20. For similar reasons, we do not consider that Ms Kelly should be criticised for requiring the issues in this case (including preliminary issues) to be determined following oral hearing rather than on the papers. Those issues were of importance to Ms Kelly and, for her, much depended upon the Tribunal's decision. She was therefore entitled to put her case at an oral hearing notwithstanding the fact that a paper determination had been offered.

21. We note Acrophile's complaint that there is a lack of particularisation in Ms Kelly's costs schedule in relation to the work done on documents. We note that some 5 hours and 6 minutes is claimed for "perusal/preparation" (by fee-earners of differing grades) and one hour 18 minutes is claimed for "drafting". It is true that these descriptions are somewhat vague. However, given the significant amount of documentation which has been generated in this case, the overall amount of time claimed for work done on documents does not appear to be excessive.

22. It follows, therefore, that the costs summarised in paragraph 18 above should be reduced only to the extent that is necessary to exclude the costs referred to in paragraph 17. Upon enquiry from the Tribunal, Ms Kelly's solicitors have stated that the necessary reduction would comprise the cost of 90 minutes preparation time plus one hour's attendance at the hearing in June 2016 (all at the rate of £260 per hour). We agree that such a reduction is appropriate, and the summary of costs can therefore be revised as follows:

Personal attendances, letters & phone calls	£ 936.00
Attendance at hearings	£ 780.00
Work done on documents	£ 1,118.00
Sub-total	£2,834.00
VAT	£ 566.80
Minor disbursements	£ 19.00
TOTAL	£3,419.80

23. Accordingly, we order that Acrophile must pay costs of this amount.