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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAG/OLR/2015/0460**
Property	:	**Flat 43 Sovereign House, 19-23 Fitzroy Street, London W1T 4BP**
Applicant	:	**Asuncion Properties Limited (1) Maribeth Asuncion (2)**
Representative	:	**Romain Coleman Solicitors**
Respondent	:	**West London & Suburban Property Investments Limited**
Representative	:	**CMC Cameron McKenna LLP**
Type of Application	:	**Rule 13 of Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the Rules)**
Tribunal Members	:	**Tribunal Judge Dutton**
Date and Venue of hearing	:	**13th October 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**13th October 2015**

DECISION

DECISION

The Tribunal makes no order for costs under rule 13 of the Rules for the reasons set out below.

BACKGROUND

1. The Applicant sought an order under the provisions of rule 13 that the Respondents had acted unreasonably in the conduct of the proceedings, in particular by seeking to include two terms within the proposed new lease. The Applicant claims £3,750 being Counsel's fees to which it would seem a sum of £750 for VAT might be added.

2. The matter came before me for a paper determination on 13th October 2015. I had before me a bundle of papers, containing the Applicant's and Respondent's submissions, both with exhibits, the Applicant's reply, the directions and a copy of the fee note of Mr Mark Loveday of Counsel. I have read these papers.

3. The Applicant's case can be summarised as set out at paragraph 5 of the application:
   - The Respondent pursued "two conspicuously unmeritorious arguments" in negotiations about the terms of the new lease.
   - The Respondent was warned that counsel's fees would be incurred, with a deadline.
   - The Respondent waited until counsel's brief fee had been incurred before conceding the points.

   It is said that this went beyond the usual "horse trading" in negotiations and amounted to unreasonable conduct under Rule 13.

4. In its conclusion the Applicants concede that there must be some leeway in negotiations but that maintaining a "hopeless" argument and conceding it late in the day when warned that costs were being incurred amount to unreasonable conduct.

5. By contrast the Respondent maintains that this was a "very ordinary lease extension" with each side putting forward its best arguments resulting in an agreement being reached 5 days before the hearing. It is said that if an order is made in this case it will "set a precedent for costs orders being made in nearly all lease extension claims and that the First Tier Tribunal would cease to be a no costs jurisdiction".

6. The Response by the Respondent sets out the chronology, which is not in dispute save that it would seem the position adopted in relation to a counter part lease was wrong. It was said on behalf of the Respondent that 25 leases had been granted in the building in which the "development covenant", one of the clauses in dispute, had been included. The response went on to set out the Respondent's views on the costs regime in the Tribunal and its conclusion. This included the

submission that the merits of the claim are not relevant, it is the behaviour that should be considered.

THE LAW

7. I have considered the provisions of rule 13, which are also set out below

FINDINGS

8. I have carefully considered the submissions made by both sides. The Applicants had the last bite at the cherry in their reply dated 7th September 2015. As a matter of record I agree the points they make at paragraphs 3 and 4.

9. I have borne in mind the overriding objectives contained at rule 13.

10. The awarding of costs under rule 13 can be made by reason of rule 13(1)(b)(iii). Originally there was a cap on the amount that could be awarded, which was set at £500. As a result of recommendations made by Mr Justice Warren this cap was removed. It does not mean however, that just because one party has been successful that costs should follow. I must consider whether the conduct of the Respondent in this case has been unreasonable. The rule provides for unreasonable behaviour in the bringing, defending or the conduct of the proceedings. I consider that this does indeed mean that the merits of a party's position can be considered. However, the behaviour must be out of the ordinary. The consideration of the liability to costs under the previous regime, the Commonhold and Leasehold Reform Act 2002, considered that the use of the word "unreasonable" should be construed in the light of the words frivolous, vexatious, abusive or disruptive also contained in paragraph10 of the 12th schedule to the Act. To my mind unreasonable is intended to describe conduct which is vexatious, designed to harass the other side and which is abusive of procedures and or disruptive. The test is whether the conduct permits of a reasonable explanation.

10. In the helpful chronology included in the Applicants application it is apparent that the draft lease was attached to the Counter notice. During April 2015 there was an exchange of correspondence with the draft travelling back and forth. On 11th June the Respondent confirmed that the premium was agreed and from then to 25th June there was further contact between the parties solicitors culminating in the Respondent accepting the Applicants position on the lease terms. It is right to record that the Respondent had been on notice that Counsel's fees would be incurred by 23rd June, although in fact delayed until the following day. The acceptance of the lease was not communicated until 25th June, the hearing being scheduled for 30th June or 1st July 2105.

11. Was this conduct one for which a reasonable explanation could be put forward? I am told that the Respondent had already granted some 25 leases which contained the development covenant. The Respondent made a conditional offer to remove the other objectionable clause

relating to subletting by email dated 19th June. This was subject to the Applicant agreeing an amended version of the development covenant, which was rejected. Arguments and counter arguments ensued during the period 19th to 25th June, not a long time, when all terms of acquisition were, on behalf of the Respondent, accepted. It appears from Counsel's fee note that the hearing was vacated on 29th June. I do not know when Counsel was actually told that the case had been settled.

12. I am afraid to say that applications under the Act and under the Leasehold Reform Act 1967 have long been used as a basis for negotiations resulting in last minute settlements and this case appears to be no different. Cases before this Tribunal are essentially a "no costs regime". I do not consider that the introduction of Rule 13 has changed this proposition. The attempt by the Respondent to include, in particular the development covenant, is one which seeks to protect the Respondent's position, this having already been included in 25 leases, and in my finding is not unreasonable given that the legislation is in terms a compulsory purchase application. The objection was withdrawn some 5 days before the hearing. I am told that the Respondent had by then incurred its own Counsel's fees. I agree with the comments of the Respondent's solicitors at paragraph 1 of the Response and as a result find that no costs should be ordered under the provisions of Rule 13 against the Respondent.

Andrew Dutton 13th October 2015

Andrew Dutton - Tribunal Judge

The Relevant Law

Orders for costs, reimbursement of fees and interest on costs

13.

—(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

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

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

(2)The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3)The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b)notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.
(7)The amount of costs to be paid under an order under this rule may be determined by—
(a)summary assessment by the Tribunal;
(b)agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.
(8) The Civil Procedure Rules 1998(**a**), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(**b**) and the County Court (Interest on Judgment Debts) Order 1991(**c**) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.