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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00BA/LUS/2014/0004
Property	:	14 Robinson Road, Colliers Wood, London SW17 9DW
Applicant	:	South London Ground Rents Limited
Representative	:	Pier Management
Respondent	:	14 Robinson Road RTM Co Ltd
Representative	:	Harmens Management
Type of Application	:	Costs – Rule Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
Tribunal Members	:	Judge Robert Latham
Date and venue of Determination	:	24 March 2015 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	27 March 2015

DECISION

The Tribunal determines not to make an order that the Respondent pays the Applicant costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Introduction

1. On 14 August 2014, 14 Robinson Road RTM Co Ltd ("the RTM Company") issued the substantive application under Section 94(3) of the Commonhold and Leasehold Reform Act 2002 in respect of accrued uncommitted service charges. On 26 November 2014, the Tribunal struck out this application. The Respondent to this application is South London Ground Rents Limited, the landlord. It has been represented by Pier Management Limited, its managing agents.

2. On 23 December 2014, the landlord made the current application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). The application is framed as follows (emphasis added): "the Respondent seeks an order for Wasted Costs occasioned by the Applicant unreasonably bringing, defending and conducting these proceedings".

3. The landlord seeks to recover costs in the sum of £1,500, inclusive of VAT for the period 18 August to 22 December 2014. The time of Ms C, an in-house Solicitor with Pier Management Limited, is charged out at £220 per hour. The most significant claim is £540, namely the costs of Mr H, its Portfolio Manager, travelling from Southend to attend the tribunal hearing on 26 November 2014. A more modest sum of £120 is claimed in respect of the tribunal hearing itself.

4. In both the substantive application and in the current application for costs, Ms M, of Harmens Management ("Harmens"), has acted for the RTM Company in her capacity as its managing agent. She states that she is a sole trader.

5. On 19 January 2015, the Tribunal gave Directions treating this as an application pursuant to Regulation 13(1)(b) of the Tribunal Rules. The landlord is now the "Applicant"; the RTM Company the "Respondent".

6. By 2 February, the Respondent was directed to send their Statement of Case to the Applicant setting out why it disputed the landlord's claim for costs together with a statement as to the reasonableness or otherwise of those fees. On 2 February, Harmens Management e-mailed the Tribunal attaching a document headed "Applicant's Reply to Strike out Application".

7. On 16 February, the Applicant provided the Tribunal with the required Bundle. This did not include either the Respondent's Statement of Case or a number of documents which the Respondent had apparently asked the Applicant to include. The Bundle was merely marked "To follow from Respondent".

8. On 6 March, the Tribunal issued further directions. By 13 March, each party was directed to provide the Tribunal and the opposing party with copies of any additional document on which they sought to rely. The parties have provided the following:

(i) On 10 March the Applicant wrote to the Tribunal describing the difficulties that they had faced in trying to agree a Bundle of Documents with the Respondent. It also made submissions in response to the Respondent's "Reply to Strike out Applications".

(ii) On 16 March, the Respondent sent a number of e-mails relating to the preparation of the Bundle.

Rule 13 of the Tribunal Rules

9. Rule 13 of the Tribunal Procedure Rules provide (emphasis added):

> "(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 of applying for such costs;
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in ...(ii) a leasehold case ...."

10. The Tribunal Procedural Rules have applied since 1 July 2013 and make two significant changes to Rule 13(1)(b) to those that were previously to be found in Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002:

> (i) The 2002 Act referred to the conduct of a party who had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably" in connection with the proceedings.
>
> (ii) The limit of £500 has been removed. This gives effect to the recommendation made at [105] in the report "Costs in Tribunals" by the Costs Review Group chaired by Sir Nicholas Warren. The Committee suggested that the means of the parties may be a relevant factor in assessing the size of any order.

Rule 13(1)(a)

11. The Section 29(5) of the Tribunal, Courts and Enforcement Act 2007 defines "wasted costs" as being any costs incurred by a party as a result of any "improper, unreasonable or negligent act or omission" by another party's legal or other representative. In *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal put "improper" on a par with "conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty." The term

"unreasonable" described "conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case" and "negligence" was conduct "which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do".

12. The making of a wasted costs order against a legal or a lay representative is a serious matter that must not be taken lightly, involving as it does a finding of improper, unreasonable or negligent behaviour on the part of that representative.

Rule 13(1)(b)

13. The Tribunal has regard to the guidance provided by HHJ Huckinson in *Halliard Property Co Ltd v Belmont Hall and Elm Court RTM Company Limited* LRX/130/2007; LRA/85/2008 in respect of the 2002 Act at [36]:

> "So far as concerns the meaning of the words "otherwise unreasonably", I conclude that they should be construed *ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10 behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively or disruptively. I respectfully adopt the analysis of Sir Thomas Bingham MR (as he then was) in *Ridehalgh v Horsefield [1994] 3 All ER 848* as to the meaning of "unreasonable" (see paragraph 13 above) which I consider equally applicable to the expression "otherwise unreasonably" in paragraph 10 of schedule 12 to the 2002 Act. Thus the acid test is whether the behaviour permits of a reasonable explanation."

14. In *Ridehalgh v Horsefield,* Sir Thomas Bingham dealt with the word "unreasonable" in the context of a wasted costs order in the following terms:

> "'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simple because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

15. The Tribunal is satisfied that an order for costs should only be made under Rule 13(1)(b) if on an objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid.

The Background

16. On 14 August 2014, Harmens issued the substantive application on behalf of the RTM company in respect of accrued uncommitted service charges. On 2 September, the Judge Dickie gave Directions at a Case Management Conference ("CMC"). Ms M, of Harmens, appeared on behalf of the RTM Company; Mr H, of Pier Management Ltd for the Applicant.

17. The Tribunal noted that the Respondent had acquired the right to manage on 12 February 2014. Ms M stated that until the previous week, no service charge information, accounts or money had been received from the Applicant landlord. Service charge accounts had now been provided and the parties were intending to engage in discussions to seek to resolve the application. The Tribunal noted that there were currently no particulars of the sums in dispute and that these must be clearly stated in the Respondent's Statement of Case.

18. The Tribunal gave the Respondent until 10 October to send their Statement of Case. This gave the parties the time in which to seek to settle the issues in dispute. The Tribunal alerted the parties to the decision of the Upper Tribunal in *OM Ltd v New River Head TRM Co. Ltd.* [2010] UKUT 394 as to the meaning of "accrued uncommitted service charge". The Directions warned the parties of the consequences of failing to comply with the Directions. This included the powers to strike out a claim and make an adverse costs order.

19. On 16 September, the Respondent requested details of insurance claim details. On 24 September, the Applicant provided these. It also made an unsuccessful attempt to make an electronic payment of the accrued uncommitted service charges. On 22 October, the Applicant finally sent these to the Respondent.

20. The Respondent did not file its Statement of Case as directed by the Tribunal. On 17 October, the landlord informed Harmens of their non-compliance with the Direction. On 24 October, the landlord wrote to the Tribunal inviting it to strike out the claim. On 28 October, the Tribunal wrote to the Respondent asking for an explanation for its failure to comply with the Directions.

21. On 3 November, Harmens responded. Ms M described how the balance of the handover documents had only been received on 4 October. She identified three items in dispute, namely (i) various loans totalling some

£6,700; (ii) a sum of £3,675 charged to the service charge account as building insurance; and (iii) a bill for works of £3,746.96 which appeared not to have been carried out. She added that various other items might become apparent on closer scrutiny of the accounts. She suggested that the best way forward was an external audit of the management accounts.

22. On 5 November, Judge Andrew issued further Directions informing the parties that the Tribunal was minded to strike out the Respondent's claim. The Tribunal noted that none of the three items in dispute constituted "accrued uncommitted service charges" having regard to *OM Ltd v New River Head TRM Co. Ltd.* It added that the suggestion of an external audit of the management accounts reinforced the perception that the application was premature. It also indicated that the applicant's service charge dispute was with the service charges themselves and thus outwith the current application. The Respondent had failed to explain what action it proposed to take to remedy its breach. The parties were invited to attend a hearing on 26 November at which the strike out application would be determined.

23. At the hearing on 26 November, Mr H appeared for the landlord. No one attended on behalf of the Respondent, whether Harmens or the RTM Company. The Tribunal, consisting of Judge Pittaway and Mr Jarero, struck out the application on the ground that the Respondent had made no attempt to address what constitutes "accrued uncommitted service charges" and had persisted with the application despite the suggestion from the Tribunal that it was premature. There was no evidence that the Respondent had questioned the sum forwarded to it in respect of accrued uncommitted service charges.

The Submissions of the Parties

24. The Applicant relies upon the following as constituting unreasonable conduct in bringing or conducting the proceedings:

(i) Bringing the application prematurely before considering the accounts and documentation and identifying the accrued uncommitted service charges in dispute.

(ii) Attending late at the Case Management Conference on 2 September 2014;

(iii) Failing to comply with the Directions;

(iv) Failing to attend the Strike Out hearing on 26 November 2014;

(v) The attempted payments of the accrued uncommitted service charges which bounced;

(vi) The Respondent's failure to withdraw their claim, despite a number of suggestions from the Applicant that it should do so.

The Applicant complains that due to the Respondent's behaviour, it had to make further applications and attend an additional hearing of the Tribunal.

25. It is difficult to identify the substance of the Respondent's Case from the document e-mailed to the tribunal by Harmens on 2 February 2015 which is headed "Applicant's Reply to Strike Out Application". The Respondent states that it had no option but to issue the application because of the Applicant's failure to provide relevant information about the accrued uncommitted service charges. Complaint is made of the cost of a roof repair and as to what insurance claim papers might reveal. Harmens make imputation against the integrity of the landlord company and an alleged director. The imputations seem to be unfounded. More importantly, they are irrelevant to the current application for costs.

26. However, paragraph 5 reads as follows:

> "The Applicant's representative (which is a sole trader) was diagnosed with cancer in late October 2014 and had two operations in November 2014. She is receiving on-going treatment. There has been slippage on her part. It was not intentional or out of any disrespect to the court".

This seems to relate to ill health suffered by Ms M.

27. On 10 March, the Applicant wrote a letter in response. It noted that most of the issues that had been raised were irrelevant, including the Respondent's statement that it had no option but to issue the application because of the Applicant's failure to provide relevant information about the accrued uncommitted service charges. In response to the ill health suffered by Ms M, the Applicant states: "We are sorry to learn of the RMT Company's representative's illness".

The Tribunal's Determination

28. The Tribunal declines to make a wasted cost's order under Rule 13. The Applicant has not satisfied the Tribunal that the conduct of the Respondent is so unreasonable as to merit a penal costs order.

29. Since the current Tribunal Rules were introduced, there have been an increasing number of applications for penal costs. This Tribunal would stress that this is normally a "no costs" jurisdiction. A penal costs order should only be made in an exceptional case. The current case does not fall within this category.

30. In service charge disputes, most parties are unrepresented. Most managing agents are not legally qualified. The law in this area is notoriously complex. The issue of accrued uncommitted service charges has not proved straight forward. Right to Manage applications are normally made where the relationship between landlord and tenant has broken down. Litigation can lead parties to take entrenched positions, the party in the stronger position seeking to take tactical advantage.

31. The role of the Tribunal is to ensure that both landlord and tenant should have access to justice and to enable both parties to participate fully in the proceedings. The Tribunal gives Directions to assist the parties to identify the substantive issues in dispute between them to enable those issues to be determined in a proportionate manner, having regard to the resources of the parties.

32. The Tribunal encourages best practice. It expects higher standards from those who are legally represented that from those who are not. It is important that all parties should comply with directions given by the tribunal. All parties are warned of the potential penalties should they fail to comply. However, were the Tribunal to adopt an unduly punitive approach to any breach, it could have a chilling effect upon access to justice. Parties with good claims could be deterred from bringing them before the tribunal.

33. The Tribunal is not impressed by the manner in which Harmens have conducted this case on behalf of the RTM Company. The Tribunal understands that Ms M is not legally qualified and is a sole practitioner. She has also suffered ill health. It seems that she did not bring her ill health to the attention of either the Tribunal or the Applicant. It is unclear whether it was brought to the attention of the RMT Company so they could secure alternative representation. She was under a clear obligation to do so, if she was unable to provide a professional service to her client. However, the Applicant does not seek a wasted costs order against Ms M under Rule 13(1)(a).

34. The Applicant complains that the Respondent brought these proceedings prematurely and should be penalised for this. The Tribunal does not accept this. The RTM Company acquired the right to manage on 12 February 2014. By August 2014, the Applicant had still not transferred the accrued uncommitted service charges. It is apparent that this application secured a successful outcome for the Respondent and the funds were finally transferred on 22 October 2014.

35. Secondly, the Applicant complains that Ms M was late for the CMC on 2 September 2014. Had the Tribunal considered that her conduct merited a penal order, it would have imposed one there and then.

36. Thirdly, the Applicant complains of the Respondent's failure to comply with the Directions which were given at the CMC. A CMC is an opportunity for the Tribunal to help the parties to identify the substantive issues in dispute. The Tribunal alerted the Respondent to the weaknesses to its case. Service charge accounts had now been provided. The Tribunal gave the parties five weeks to try and settle the dispute. The Respondent was told exactly what it had to do, by no later than 10 October, if it wanted to proceed with its case. It had to particularise its case. It was given a clear steer as to what constituted accrued uncommitted service charges.

37. The Tribunal takes a dim view of the Respondent's failure to comply with the Directions and provide a Statement of Case which had due regard to the case law to which it had been alerted. Anyone bringing a claim before the Tribunal must identify the issues that it is asking the Tribunal to determine. When the Tribunal has alerted a party to a potential legal difficulty to its claim, that party must heed that advice.

38. However, there are a number of points to note. First, the Directions did secure a successful outcome for the Respondent in that the accrued uncommitted service charges were transferred on 22 October. Secondly, Harmens wrote to the Tribunal on 3 November 2014 suggesting that there were three outstanding issues in dispute. Thirdly, the Tribunal must have regard to the health problems that Ms M faced at this time. Rule 13(1)(b) refers to unreasonable conduct. The problem in this case is Harmens failure to act in the manner required. Taking all matters into account, the Tribunal is not satisfied that this omission justifies a penal costs order against the Respondent.

39. Fourthly, the Applicant complains of the Respondent's failure to attend the Strike Out hearing on 26 November 2014. It is to be noted that Judge Andrew could have struck out the application without directing a further hearing. He rather set down the matter for an oral hearing, presumably with the intention of ascertaining whether there was any real issue to be determined which fell within the jurisdiction of the Tribunal. Thus he was not satisfied that the application was hopeless and ill founded. Had he been so satisfied, he would have used his case management powers to strike out the case.

40. Thus the hearing did not result directly from the conduct of the Respondent, but rather from the case management decision taken by Judge Andrew. The Tribunal is not satisfied that the failure of a party to attend a hearing fixed by the Tribunal constitutes "conduct" justifying a penal costs order. Neither does the mere fact that a claim is struck out justify one. The Tribunal is accustomed to dealing with lay parties who do not fully understand the complexities of the law. It uses its case management powers accordingly, having regard to the Overriding Objective in Rule 3 of the Tribunal Rules to ensure that cases are dealt

with fairly and justly. In any event, regard must also be had to the two operations for cancer which Ms M underwent at this time.

41. Fifthly, the Applicant relies upon its attempted payments of the accrued uncommitted service charges which bounced. The Applicant accepts that this, of itself, would not justify a penal costs order. The Tribunal agrees.

42. Finally, the Applicant complains of the Respondent's failure to withdraw its claim, despite a number of suggestions from the Applicant that it should do so. The Tribunal does not have the relevant correspondence. However, this of itself is insufficient to justify a penal costs order.

43. Although the Tribunal has considered the Applicant's complaints individually, it has also considered whether taken together they demonstrate a course of conduct in connection with these proceedings that is so unreasonable as to justify a penal costs order. The Tribunal is satisfied that they do not. The Tribunal accepts that the conduct of the Respondent and, more particularly, their representative has been less than satisfactory. However, this falls far short of the threshold that must be met before a penal costs order should be made. The Tribunal asks itself whether the Respondent's behaviour merits criticism akin to acting frivolously, vexatiously, abusively, or disruptively. The answer must be "no". The simple fact is that the Respondent's application secured a successful outcome, namely the transfer of the accrued uncommitted service charges.

Robert Latham,
Tribunal Judge

27 March 2015