



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : LON/00BK/LLC/2015/0001

Property : Flat 1B Lauderdale Road Maida Vale
London W9 1LT

Applicant : Ms Rokhsareh Kianouri

Representative : Ms Zietler - Counsel

Respondent : 1 Lauderdale Road Limited

Representative : Mr Denehan -Counsel

Type of application : Costs under Rule 13 Tribunal Procedure
(First –tier tribunal) (Property Chamber)
Rules 2013

Tribunal member(s) : Judge Haria

Date and venue of hearing : 10 Alfred Place, London WC1E 7LR

Date of decision : 21 September 2015

DECISION

Decisions of the tribunal

- (1) The Tribunal make no order for costs.

The application

1. The applicant by a letter dated 31 May 2015 seeks an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Rules”). Rule 13(1)(b) provides that the Tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case or a leasehold case.
1. Directions were issued on 22 June 2015 further to which the parties lodged submissions and the Applicant produced an agreed bundle of documents for the hearing. Neither party requested an oral hearing, accordingly the application was listed for a paper determination.
2. The costs in issue are those said to be incurred by the Applicant in defending an application to the tribunal in relation to alleged breaches of covenants under case reference LON/00BK/LBC/2014/0046 (the “Substantive Application”). The costs being claimed by the Applicant amount to 80% of the total costs incurred by the Applicant in the sum of £27,794.10 inclusive of VAT.
3. The relevant provisions of the Rules are set out in the Appendix attached to this decision.

The background

4. The Substantive Application related to an application by the Respondent for a determination pursuant to subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 in relation to alleged breaches of covenants of a lease.

The Applicants’ Case

5. The Applicant relies on her application of the 31 May 2015, the submissions made by Ms Zietler dated 7 July 2015, the Statement in Reply dated 4 August 2015 and the Applicant’s supporting documents.
6. The Applicant contends that the decision in the Substantive Application warrants an order for costs under Rule 13. It is submitted that the Tribunal’s determination in the Substantive Application shows that the Respondent acted unreasonably in:

- (i) bringing the proceedings in the Substantive Application, and
 - (ii) in conducting the proceedings by not withdrawing its allegations in relation to the Applicant's disabled daughter despite being encouraged by the Tribunal not to pursue this part of the Respondent's claim against the Applicant.
7. The Applicant has produced copies of invoices as well as a breakdown of the work undertaken.

The Respondent's Case

8. The Respondent relies on the response to the application dated 12 June 2015, the Respondent's Statement of Case dated 28 July 2015 and the Respondent's supporting documents.
9. The Respondent states that as the relevant covenantee only the Respondent as freeholder who could bring the proceedings under section 168. It is submitted that the Respondent required a determination under section 168 in order to serve a section 146 notice. The Respondent submits that the fact that the Tribunal took the view that a witness in the proceedings has given evidence which is exaggerated and/or driven by irrelevant or even unreasonable considerations does not impact on the decision of the Respondent to bring the proceedings.
10. The Respondent submits that it acted entirely reasonably in bringing the Substantive Application. This is made good by the fact that:
- (i) The Respondent partly succeeded in the Substantive Application, and
 - (ii) The Respondent's failure in respect of the Nuisance Covenant turned on a detailed assessment of the oral evidence given by Mrs Giladi (one of the witnesses) at the hearing by the Tribunal, it having been tested under cross examination, a benefit that was not available to the Respondent before the Substantive Application was brought.

The Tribunal's decision

11. The Tribunal make no order for costs under Rule 13.

Reasons for the Tribunal's decision

12. In dealing with any application for costs the Tribunal must seek to give effect to the overriding objective under Rule 3 of the Rules.
13. The Tribunal considered the bringing of the Application, the manner in which the Application was conducted and the merits of the application. In order for the Respondent's conduct to be unreasonable, it must be conduct, which is out of the ordinary or incapable of any reasonable explanation.
14. The Tribunal notes the Respondent engaged fully in the mediation process.
15. The Court of Appeal in **Ridehalgh v Horsefield [1994] Ch 205, CA** laid down guidelines to assist courts exercising a very similar jurisdiction and considered the meaning of 'Unreasonable' and stated that it ".....describes conduct which was vexatious, designed to harass the other side rather than advance the resolution of the case: it made no real difference that the conduct was the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply 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 judgement, but it is not unreasonable.....".
16. In addition even where "unreasonable" conduct was shown, a costs order does not necessarily follow as this remains within the Tribunal's discretion.
17. The Tribunal rejects the Respondent's assertion that the costs rules under the Civil Procedure Rules provide a useful measure of the limited jurisdiction under rule 13, the costs powers of the Tribunal is much more limited than those under the Civil Procedure Rules. A more useful guide as to the extent of the Tribunal's power can be found in a decision of the Immigration and Asylum Tribunal in **Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC)** where the tribunal considered the powers under Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014(the "FtTIAC procedure Rules"), the wording of Rule 9(2)(b) of the FtTIAC procedure Rules being almost identical to that under Rule 13(1)(b).
18. This Tribunal is essentially a costs-free jurisdiction where an applicant should not be deterred from bringing an application for fear of having to pay the other party's costs in the event that their application is unsuccessful. There should be no expectation that a party that is successful will recover its costs. The award of costs under Rule 13(1)(b) should be reserved for cases where on any objective assessment a party

has behaved so unreasonably that it warrants an order for costs as it is only fair and reasonable that the other party is compensated by having their legal costs paid.

19. An order for costs under Rule 13(1)(b) can clearly embrace the whole of the “*proceedings*”. Potentially it is capable of bringing under scrutiny conduct from when the Substantive Application comes into existence and ends when that application is finally determined in the Tribunal.
20. The Tribunal does not accept the Respondent acted unreasonably in bringing the Substantive Application. The Respondent considered it had an arguable case and was of the view that there was a reasonable prospect of success. The submissions made by both parties in relation to the Substantive Application show that there was an arguable case.
21. Although the Tribunal did encourage the Respondent to withdraw its reliance on the Applicant’s daughter’s behaviour in support of the breach of the Nuisance Covenant, it is a matter for a party to decide how best to present its case and the evidence it wishes to rely upon. The Applicant admitted the conduct of her daughter was a nuisance as it caused a disturbance and the Tribunal’s finding that the incidents of such disturbance were not sufficiently frequent to amount to a nuisance in law does not mean that the bringing of the proceedings partly in reliance on the behaviour of the Applicant’s daughter was unreasonable.
22. The Respondent took the advice of its managing agent and legal advisors acted on their professional advice. The fact that the Respondent was only partly unsuccessful in the Substantive Application does not inevitably mean that it acted unreasonably in bringing the Application.
23. The subject property is a flat on the first floor of a building comprising of four flats. In relation to the alleged breaches of the Nuisance Covenant, the Respondent relied upon the witness statements of:
 - (i) current leaseholder and occupier Dr Paul Giladi of the ground floor flat, and
 - (ii) the occupier of the ground floor flat Mrs Mona Giladi supported by extensive diary entries for the period from 18 August 2012 to 30 June 2014, and
 - (iii) the current leaseholder and occupier of the second floor flat Ms Laurel Green, and

(iv) the previous occupier and leaseholder of the ground floor flat for the period from 12 August 2005 to end of May 2012 Ms Caron Sandhu.

24. The Applicant submits that prior to bringing the proceedings the Respondent should have investigated whether the allegations made by Mrs Giladi could be independently corroborated or borne out by any of the other directors of the Respondent.
25. The Respondent freeholder is a limited company and acts through its directors. There are three directors of the Respondent. Mrs Giladi and Ms Green, two out of the three directors played an active role in the proceedings. The Respondent accepts that as a director Mrs Giladi has an influential role in the Respondent. The fact that the Respondent's case relied heavily on the witness statement of one of its directors does not make the decision to bring the proceeding unreasonable, as is clear from the list at paragraph 22 above the Respondent did not rely solely on the evidence of Mrs Giladi.
26. The Applicant is correct in that it was open to the Respondent to investigate the allegations of noise nuisance by other means such as the installation of noise measuring equipment or the involvement of the services of the local authority's environmental protection department. The Respondent has provided a perfectly reasonable explanation as to why it decided not to use noise measuring equipment. There is no requirement for independent corroboration of the claimed nuisance and inevitably there is a subjective element to the impact of noise nuisance in a residential context. The fact that the Respondent chose not to arrange for the noise to be measured and did not involve the services of the local authority does not render the decision to bring the proceeding unreasonable.
27. In this case the Respondent's conduct in bringing the Substantive Application may be considered to have been optimistic but it certainly falls short of conduct that is unreasonable. Accordingly, the Tribunal makes no order to costs under Rule 13.

Name: Judge N Haria

Date: 21 September 2015

Appendix

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3: Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Rule 13: Orders for costs, reimbursement of fees and interest on costs

(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.

