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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/OOAP/ORL/2016/0850
Property	:	117 Fortis Green Road, London N10 3HP
Applicant	:	Deborah Gisele Dwek and Robert Benjamin Hyde
Representative	:	Mr John Blank, Abrahamsons Solicitors
Respondent	:	Whetstone Properties Averbrian Investment
Representative	:	No appearance
Type of Application	:	Leasehold extension
Tribunal Members:		Judge Robert Latham Mr Duncan Jagger MRICS
Date and venue of Hearing	: :	20 September 2016 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	23 September 2016

DECISION

(i) Upon the Respondent landlord having notified the Tribunal that it no longer opposes the application, the Tribunal determines that the new lease should be granted on the terms proposed by the Applicant.

(ii) 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 November 2015, the Applicant served a Notice of Claim pursuant to Section 42 of the of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") seeking an extension of their lease in respect of the Third Floor Flat at 117 Fortis Green Road, London N10 3HP. A premium of £51,100 was proposed. The Applicant proposed that the terms of the new lease should be as set out in the Act.

2. On 30 November, the Respondent landlord served its Counter-Notice. The Respondent admitted that the tenant had a right to a new lease. The landlord proposed a premium of £68,200. The extended lease should be in the terms of the draft served with the notice.

3. On 23 May 2016, the Applicant issued their current application. The premium had been agreed. The Applicant asked the Tribunal to determine the terms of the new lease. The Applicant proposed that the terms of the new lease should be those of the draft lease submitted by the Respondent, but subject to the amendments proposed by the Applicant. The Applicant asserted that the Respondent had refused to accept any amendments to their standard form of lease. The Applicant stated that whilst they were entitled to a new lease in the form of their existing lease, they were willing to accept the standard form of lease proposed to the extent that it served to modernise the existing lease. They were not willing to accept the new obligations that the Respondent sought to impose which were not in the existing lease. The Applicant stated that they were content for the matter to be determined on the papers.

4. On 9 June 2016, the Tribunal issued Directions which were premised on there being an oral determination. On 12 September, the parties agreed a Statement of issues in Dispute. Three terms in the proposed new lease were stated to be in dispute. The significant issue seemed to be the desire of the landlord to include a clause prohibiting the tenant from subletting the premises without the consent of the landlord and the RTM Company, such consent not to be unreasonably withheld. On 14 September, the Applicant filed the requisite Bundles with the Tribunal for a hearing fixed for today.

5. At 16.41 on 19 September, Male and Wagland ("M&W"), the landlord's Solicitor, e-mailed Abrahamsons and Associates ("Abrahamsons"), the tenant's solicitors, in these terms: "Thank you for your e-mail sent this morning. We consider that the expense of a hearing is disproportionate to the issues involved and that although they are of the view that it is misconceived our clients are in the circumstances prepared to concede your client's application". The Tribunal were notified accordingly.

6. At 16.53 on 19 September, Abrahamson's e-mailed M&W: "This should have been clear to you at the outset. You cannot withdraw at the last minute without consequences and we intend to attend the tribunal tomorrow and ask for an order that your client pay our clients' costs of this application. If these are agreed the hearing won't be necessary". A Schedule of Costs was attached in the sum of £8,159.76. This included the costs of the proceedings

from the drafting of the application to the appearance before us today. Costs of £1,500 were claimed for today's hearing, based on a five hour hearing at £300 per hour. Travelling time was also claimed at £300. In the event, the hearing lasted for 45 minutes.

7. Mr John Blank, a Solicitor with Abrahamsons, appeared on behalf of the Applicant. He provided a Skeleton Argument in support of his application for costs under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). This had not been sent to the Respondent. This was the first intimation that the Applicant would be seeking a penal costs order under Rule 13(1)(b). The Respondent did not appear. M&W wrote to the Tribunal stating that they did not propose to attend and that each party should bear their own costs.

The Law

8. 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
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> (1) The Tribunal may make an order in respect of costs only—
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> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
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> .....
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> (iii) a leasehold case;
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> .....
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> (4) A person making an application for an order for costs—
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> (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
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> (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.
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> (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—
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> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
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> (b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
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> (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.

9. 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.

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

> (i) Has the person acted unreasonable applying an objective standard?
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> (ii) If unreasonable conduct is found, should an order for costs be made or not?
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> (iii) If so, what should the terms of the order be?

11. 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.
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> 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.

12. The UT also considered the situation relating to the late withdrawal of claims. The principles apply equally to a respondent who makes a late concession to concede a claim. Again, we add our emphasis:

> 35. In one of the appeals with which we are now concerned (Stone), costs were awarded under rule 13(1)(b) on the grounds that the applicant had delayed in withdrawing proceedings until after a time when it should have been clear to him that he had achieved as much by concession from the management company as he could realistically expect to obtain from the FTT by proceeding to a hearing. It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make

sensible concessions and to abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs.

36. In this regard our attention was drawn to the decision of the Court of Appeal in *McPherson v BNP Paribas* [2004] EWCA Civ 569, which concerned rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (permitting the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably). Having noted that in civil litigation under the CPR the discontinuance of claims was treated as a concession of defeat or likely defeat, Mummery LJ went on, at paragraph 28: "In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for Employment Tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss MacAtherty appearing for the Applicant, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the Tribunal should not adopt a practice on costs which would deter applicants from making sensible litigation decisions."

37. The views of the tribunal in Cancino were to similar effect, at paragraph 25(i): 14 "Concessions are an important part of contemporary litigation, particularly in the overburdened realm of immigration and asylum appeals.... Occasionally a concession may extend to abandoning an appeal (by the appellant) or withdrawing the impugned decision (by the respondent). We consider that applications for costs against the representative or party should not be routine in these circumstances. Rule 9 cannot be invoked without good reason. To do otherwise would be to abuse this new provision."

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"142..... As the Court of Appeal made clear in *McPherson v BNP Paribas*, in tribunal proceedings there is no imputation that a claim which is discontinued was doomed to fail or ought never to have been commenced. Such an imputation is only required where it is necessary to identify a successful party so that liability for the costs which it has incurred may be shifted on to the unsuccessful party. Where, as in tribunal proceedings, there is no general rule that the winner will be entitled to an order for the payment of their costs by the loser, the withdrawal of a claim should not be stigmatised as an admission of defeat or as unreasonable. To allow such a stigma to be attached to withdrawal creates an unhelpful obstacle to the making of sensible concessions."

13. 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."

The Applicant's Case

14. Mr Blank pursued his application on the following grounds:

(i) The Respondent had acted unreasonably in defending the application. The Respondent should have recognised that it had no reasonable prospect of persuading a Tribunal that the terms sought fell within the limited scope of Section 57 of the Act.

(ii) The Respondent had acted unreasonably in the conduct of the proceedings. Mr Blank relied on the following matters:

(a) The Applicant had sought a paper determination. The Respondent had not indicated whether or not it would agree to this.

(b) The requirement for consent to sub-letting would have imposed an unreasonable and conditional burden on the Applicant who was an investor and who would seek the freedom to sub-let without restriction. The landlord had abused its position by seeking to impose this burden on the tenant. The decision to withdraw at the last moment had been a tactical ploy.

(c) The Respondent had unreasonably sought to insist that 27 leases be included in the Bundle prepared for the Tribunal. In the event, the Applicant had not agreed to this. Mr Blank explained that the Respondent had insisted on this as 27 other lessees had agreed to extensions with the terms proposed by the Respondent.

(d) The late stage at which the Respondent's Solicitor had conceded the claim. It was suggested that this was an exercise in brinkmanship, imposing the maximum pressure on the tenant to agree to the terms unreasonably demanded by the landlord.

The Tribunal's Determination

15. The Tribunal is satisfied that this is not a case for any award of costs under Rule 13(1)(b). The Applicant has come nowhere near to satisfying the high threshold set by the UT in *Willow Court*.

16. It is not appropriate for this Tribunal to determine what decision we would have reached had we been required to determine the substantive dispute between the parties. We remind ourselves of the observations of the editors of Hague "Leasehold Enfranchisement" (6th Edition 2014). A claim for a new lease under the Act "presents a golden opportunity to substitute a wholly new lease for an out-of-date or unsatisfactory one" ([32.06]). If agreement cannot be reached, the scope for this tribunal to modify the terms of the existing lease is limited.

17. It is apparent that both parties in the current case agreed that a new modern lease was desirable. The dispute was to the terms of that new lease. It is apparent that prior to the issue of the current application, the Respondent gave the Applicant a stark choice (see e-mail of 12 May 2016 at p.66):

> (i) to take a new lease in the terms proposed by the landlord. This had been agreed both by the RTM Company and some 27 other tenants who had been granted new leases. The Tribunal notes that the interests of the tenants who occupied their flats may have been different from those of investors such as the Applicant. They would have had a greater concern as to whom any neighbouring flat had been sub-let. They may have been concerned about the new market in "Airbnb". The letting market has changed significantly since the lease was granted in 1973. Many lessees no longer reside in their flats.
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> (ii) to take a new lease in the terms of the expired lease.

18. As a result of this application, the new lease is now to be granted on new terms, albeit that it will not include the three terms sought by the Respondent landlord.

19. Mr Blank's real concern seems to be the late stage at which the Respondent conceded the application. In the Bundle prepared for the hearing, there is no suggestion that the Applicant would seek an Order under Rule 13(1)(b) on the ground that the application should not have been defended. Had this Tribunal been required to determine this application, in the absence of any agreement by the Respondent, we may have had no option but to grant a lease on the terms of the expired lease. This would not have suited either party.

20. We are also concerned at the procedure adopted by the Applicant. Whilst the Applicant had notified the Respondent at 16.53 on the eve of the hearing, that it would be seeking costs, the Applicant did not specify that costs would be sought under Rule 13(1)(b) or the grounds of the alleged unreasonable conduct. Had we been satisfied that there was a case for the Respondent to answer, procedural fairness would have required us to give the Respondent

an adequate opportunity to make representations under Rule 13(6). We were therefore reluctant to permit Mr Blank to submit new documents to the Tribunal which the parties had not included in the Bundle.

21. We refuse this application on the following grounds:

(i) We are satisfied that the Respondent was entitled to defend this application. There was a real dispute as to the terms of the new lease that needed to be agreed by the parties or determined by this Tribunal. The decision to defend the claim cannot be categorised as "unreasonable".

(ii) The Tribunal had given directions for this matter to be determined at an oral hearing. Had this application not been conceded, we are satisfied that it raised difficult points of law that would have required oral representations. It is not unreasonable for the landlord to seek a new modern lease that applies to all lessees.

(iii) There is no material before us in the Application Bundle to indicate that the Respondent has conducted these proceedings in an unreasonable manner.

(iv) Whilst it would have been open to the Respondent to concede the claim at an earlier stage, it was preferable for the Respondent to concede it on the eve of the hearing, rather than argue a case that it no longer considered it proportionate to advance. We endorse the approach adopted by the UT *Willow Court* in respect of late concessions. In Tribunal proceedings, there is no imputation that a claim (or defence) which is discontinued was doomed to fail or should never have been brought. It is better that such concessions are made late, than not all.

22. The Tribunal refuses this application at Stage 1 of the three Stage test formulated by the UT (see [10] above). It is not necessary for us to consider Stage 2 or 3.

23. This is normally a no costs jurisdiction. This Tribunal would discourage parties from pursuing penal costs orders save in the exceptional case. Where such an application is appropriate, the grounds of the application must be fully particularised having regard to the guidance given by the UT in *Willow Court*. The other party must be afforded the opportunity to make representations in accordance with Rule 13(6).

Judge Robert Latham
23 September 2016

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.