FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LBC/2015/0002**
Property	:	**Unit 6, 2 Archie Street, London SE1 3JT**
Applicant	:	**AHGR Limited**
Representative	:	**George Ide LLP Solicitors**
Respondent	:	**Craig Derrick Hamer**
Representative	:	**Child & Child Solicitors**
Type of Application	:	**Application for costs under Rule 13 of the Tribunal Procedure Rules**
Tribunal Judge	:	**Mr L Rahman**
Date and venue of Hearing	:	**21/1/16 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15/2/16**

DECISION

Decision of the tribunal

(1) The tribunal determines the respondents application be struck out under Rule 9(2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Procedure Rules").

The application

1. The respondent seeks a determination pursuant to Rule 13 of the 2013 Procedure Rules for costs against the applicant.

Background

2. The costs arise out of an unsuccessful application by the applicant for a determination of a breach under s.168 of the Commonhold and Leasehold Reform Act 2002, refused by the tribunal in a decision sent to the parties on 16th April 2015.

3. The applicant sought permission to appeal the tribunal's substantive decision in an application sent to the respondent and the tribunal on 11th May 2015. The Upper Tribunal refused permission on 19th October 2015 and the decision was received by the parties on 21st October 2015.

4. The respondent made his application for costs against the applicant on 6th November 2015 (received by the tribunal on 9th November 2015). The claim is in the sum of £24,271.01 (costs at the First-tier Tribunal in the sum of £20,857.01 and costs at the Upper Tribunal in the sum of £3,414.00 (the parties have previously been advised by the tribunal that it has no jurisdiction over costs before the Upper Tribunal)). The respondent submitted that the application had been made within time but in the alternative, if he was out of time, he sought permission for an extension of time under Rule 6(3) of the 2013 Procedure Rules.

5. The applicant objected to the respondents costs application on the grounds that the respondent was out of time and that the tribunal should decline the respondents request for an extension of time and to dismiss the respondents claim.

6. The tribunal issued directions on 23rd November 2015 informing the parties that as the tribunal's jurisdiction to consider the Rule 13 costs application had been challenged, the extent of that jurisdiction would be determined as a preliminary issue. If jurisdiction was rejected, the proceedings would be struck out under rule 9(2) of the 2013 Procedure Rules. If jurisdiction was accepted, the tribunal would issue further directions to bring the substantive costs application to a hearing.

7. The parties were informed that the preliminary issue would be determined by consideration of the documents alone and without an oral hearing. The parties were given the opportunity to request an oral hearing and directions were made for written representations from both the parties. Neither party requested an oral hearing and both parties provided written representations.

The respondents case

8. Rule 13(5) provides for a costs application to be made within 28 days after the date when the tribunal sends a decision notice recording the decision which finally disposes of all issues in the proceedings. Whilst the decision was sent on 16/4/15, the proceedings were kept alive by the applicant by reason of their application for permission to appeal, which were not finally disposed of by the Upper Tribunal until 19/10/15 and received by the respondent on 21/10/15.

9. The Rule refers not just to the sending of the decision but the sending of the decision which *finally disposes* of all issues in the proceedings. Given the appellate procedure from the tribunal to the Upper Tribunal, the matter cannot have been *finally disposed* of until either (i) the normal times for appealing have elapsed and have not been exercised (cf s64 of the Landlord and Tenant Act 1954 which provides for termination of a business lease three months after the application has been finally disposed of which '*shall be construed as a reference to the earliest date by which proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired*' or (ii) the appeal process has been engaged and has come to an end.

10. In this case, the applicant was challenging the jurisdiction of the tribunal to deal with the application at all. In those circumstances, the question of whether or not the decision was of any effect was put into question and until determined (against the applicant) by the Upper Tribunal, there was no decision which finally disposed of the issues.

11. In the alternative, the respondent seeks an extension of time under Rule 6(3) as it had only recently received notification from the Upper Tribunal that the applicants application for permission to appeal had been refused. Until determination of that application by the Upper Tribunal, the respondent considered it would have been premature to have made a costs application which would most likely have been stayed pending the outcome of the permission application. If an appeal had been successful, then any costs application would have been redundant.

12. Reference should be had to the questions set out in **Data Select Ltd -v- HMRC [2012] UKUT 187 (TCC)** as endorsed in **Leeds CC -v- HMRC [2014] UKUT 0350 (TCC)**, namely, (a) What is the purpose

of the time limit; (b) How long was the delay; (c) Is there a good explanation for the delay; (d) What will be the consequences for the parties of an extension of time; and (e) What will be the consequences for the parties of a refusal to extend time?

13. With respect to question (a), the purpose was to bring finality to litigation. However, in the context of this matter, it was not the case that nothing else was proceeding between the date of the tribunals decision and the costs application. The applicant had been trying unsuccessfully to seek permission to appeal the tribunals decision. The respondent had been required to put in submissions to the Upper Tribunal. The respondent was notified that that process was at an end on 21st October 2015 after receiving notice of the dismissal of the applicants application.

14. With respect to question (b), whilst the delay was over 5 months, it should be considered in the context that it was made within 28 days of the Upper Tribunals decision, the Upper Tribunal had taken months to make its determination, and had any application for costs been made during that period it would only have been stayed pending the outcome of the appeal process.

15. With respect to question (c), the delay was caused by the respondent awaiting the outcome of the appeal process.

16. With respect to question (d), there would be no prejudicial consequences caused by the extension given that had the application been made within 28 days of the tribunals decision it would have been stayed pending the outcome of the appeal process. Therefore, the parties would have been in exactly the same position as they are now.

17. With respect to question (e), if the extension is not granted the respondent would be prejudiced in that he would have lost the opportunity to claim costs in respect of a premature and unreasonable application brought by the applicant against him. The tribunal had noted that the application was premature, making the respondents costs application strong and the merits of which should be taken into account when considering whether to grant an extension under Rule 6(3).

The applicants case

18. Rule 13(5) provides in clear and mandatory terms that an application for costs must be made within 28 days after the date on which the tribunal sends a decision notice recording the decision which finally disposes of all issues in the proceedings. The Rule does not go on to state "*or, if later, the date on which any appeal against that decision is finally disposed of*" or words to that effect.

19. The Rule states that time runs from the date on which "the tribunal sends a decision notice recording the decision which finally disposes of all issues in the proceedings". "The tribunal" is defined in Rule 1(3) as "the First-tier Tribunal". Accordingly, it is the decision notice containing the First-tier Tribunals final determination that starts time running (and not any later decision notice from the Upper Tribunal).

20. The terms of s.64 of the 1954 Act are of little assistance when construing the differently worded provisions of Rule 13(5). If anything, s.64 supports the applicants case as s.64 extends the meaning of "finally disposed of" so as to include the appeal process. Rule 13(5) has no such provision. Moreover, in contradiction to s.64 of the 1954 Act, the express terms of Rule 13(5) make it clear that it is the final decision of the First-tier Tribunal in the substantive proceedings, not any decision by the Upper Tribunal or any higher appellate Court on appeal, from which time starts running.

21. The fact that one of the grounds upon which the applicant had sought permission to appeal was on the basis that the tribunal had exceeded its jurisdiction, did not mean that the provisions of Rule 13(5) ceased to apply or were suspended until such time as the Upper Tribunal had dealt with the issue of jurisdiction. Rule 13(5) did not state that and the time period is expressed as applying in all cases. The respondents argument that time starts running upon receipt of a decision notice from the Upper Tribunal is contrary to the statutory language which is to the opposite effect.

22. The applicant objects to any extension of time under Rule 6(3). The delay was not minor but substantial as the application was made not merely a few days or weeks out of time but nearly 6 months after the expiry of the statutory deadline. No good reason had been provided for the delay. The respondent did not state that there had been any intervening event that made it impossible or difficult to make the application in time. The respondent was not suggesting that he and his legal advisers were genuinely under any misapprehension that the clock started to run from receipt of the Upper Tribunals decision. Instead, the respondent chose not to make the application in time simply because the respondent and his legal advisers took the view that it would be better to defer submissions on costs until after the appeal process had concluded. A decision made by a party, freely and with eyes open, not to comply with the time limit imposed under Rule 13(5) was not a reason, let alone a good reason, for extending time under Rule 6(3). The respondents failure to apply in time had little to do with the applicants application to the Upper Tribunal as the applicants application to the tribunal for permission to appeal was sent to the tribunal and the respondent on 11th May 2015, therefore received on 12th May 2015, just two days before the expiry of the 28 day time limit. If it were sufficient for the respondent to state that he considered it would make better sense to make his costs application after the conclusion of the appeal process rather than within the prescribed 28 days, and for the tribunal

to then grant an extension of time, then the same could be applied for any other litigant taking the same course for the same reasons, resulting in a more relaxed timetable than imposed by the legislature.

23. The applicant also referred to the questions set out in **Data Select Ltd** and made the following points.

24. With respect to question (a), the purpose of the time limit in Rule 13(5) was to ensure that any costs applications were made within a deliberately short time period so that they could be dealt with whilst the parties and the tribunal had a fresh recollection of the case. Rule 13(5) was specifically designed to prevent parties at the First-tier Tribunal from holding fire for months and then instituting a costs application.

25. With respect to question (b), the delay in question was nearly 6 months and therefore a considerable delay.

26. With respect to question (c), the respondent entirely fell on this limb. The respondent conspicuously did not take issue with the applicants suggestion that the respondent was not genuinely labouring under a misapprehension as to the meaning and effect of Rule 13(5) at the relevant time. It followed that either the respondent took a deliberate decision not to comply with the Rule 13(5) time limit or alternatively the respondent was slapdash about it. In either case, the respondent had failed to surpass the "good reason" requirement.

27. With respect to question (d), the consequences for the applicant would be that the applicant would have to spend time and money in dealing with a costs application that was now time-barred. The time and costs of doing so would be greater now that the detail was no longer at the applicants' lawyers' finger tips. There would also be wider consequences in that if the respondent is allowed to ignore time limits and apply for costs after the conclusion of any appeal, the same could be available to other litigants.

28. With respect to question (e), it is correct that if time is not extended the respondent will not be able to advance his costs application. But that would be so in every case where a party invites the First-tier Tribunal to extend under Rule 6(3). Having chosen not to apply in time, the respondent or his lawyers are the authors of the respondents misfortune.

Findings and reasons

Did the respondent make his costs application in time for the purposes of Rule 13(5)?

29. The relevant part of Rule 13(5) states "*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...*"

30. According to Rule 1(3), "Tribunal" means the First-tier Tribunal.

31. I find that the wording used in Rule 13(5) is clear and mandatory, namely, that an application 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 decision notice recording the decision which finally disposes of all issues in the proceedings.

32. The legislature can be presumed to have been aware of the appellate procedure from the tribunal to the Upper Tribunal. Had the legislature intended that the 28 day period was to start running from the date on which the Upper Tribunal had dealt with any appeals to it, the relevant Rule could have included words to that effect, as demonstrated by s.64 of the 1954 Act, which extends the meaning of "finally disposed of" so as to include the appeal process. On the contrary, Rule 13(5) specifically avoids using any words to that effect and clearly states that the 28 days starts running from the date the "tribunal", defined as the First-tier Tribunal, sends its decision notice.

33. The fact that one of the applicants grounds of appeal to the Upper Tribunal was on the basis that the tribunal had exceeded its jurisdiction, does not mean that the tribunal had not finally disposed of all the issues in the proceedings. I have not been provided with a copy of the tribunals decision, the applicants grounds seeking permission to appeal, or the Upper Tribunals decision refusing permission to appeal. However, I assume that so far as the tribunal was concerned, it was not of the view that it had exceeded its jurisdiction and accordingly, so far as the tribunal was concerned, it had finally disposed of all the issues in the proceedings. I have no evidence before me to show that the tribunal had left an issue unresolved or undecided because it felt it had no jurisdiction or until its jurisdiction was confirmed by the Upper Tribunal.

34. I find that the 28 days started to run from the date on which the First-tier Tribunal sent its decision notice to the parties, namely, 16th April 2015. Therefore, the respondents application for costs made on 6th November 2015 was out of time.

Should the tribunal extend time under Rule 6(3)?

35. The relevant part of Rule 6(3) states "*...the Tribunal may- (a) extend...the time for complying with any rule, practice direction or*

direction, even if the application for an extension is not made until after the time limit has expired..."

36. In considering the exercise of case management powers under Rule 6, I remind myself of the overriding objective under Rule 3, namely, to deal with cases fairly and justly, which includes amongst other things, dealing with cases in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs, the resources of the parties and of the tribunal, avoiding unnecessary formality and seeking flexibility in the proceedings, and avoiding delay so far as compatible with a proper consideration of the issues.

37. In answering the questions set out in **Data Select Ltd**, I make the following findings;

(a) The purpose of the time limit is a deliberate effort by the legislature to ensure that any costs application is made promptly within a relatively short period. This is consistent with what is essentially a 'cost-free' jurisdiction where costs orders should be the exception rather than the norm.

(b) The delay was over 5 months and can only be described as a significant period bearing in mind the 28 day time limit.

(c) I do not find the respondents explanation, that the delay was caused by the respondent awaiting the outcome of the appeal process, a good explanation. The respondent and his legal advisers knew or ought to have known the 28 day time limit started from the date the tribunal sent its decision and not after the conclusion of the appeal process. I agree with the applicant that it appears that the respondent made a deliberate decision not to comply with the time limit despite the clear and mandatory requirement.

(d) I do not agree with the respondents argument that there would be no prejudicial consequences caused by the extension. The respondents argument is based upon the premise that had the application been made within 28 days of the tribunals decision, it would have been stayed pending the outcome of the appeal process in any event. However, this misses the point raised by the applicant, which I find to be practical and reasonable, that costs applications were to be made within a deliberately short time period so that they could be dealt with whilst the parties and the tribunal had a fresh recollection of the case, given that costs in this "cost-free" jurisdiction were to be the exception rather than the norm. As the respondent had made his costs application over 5 months late, the time and expense of dealing with the costs application would now be greater than it otherwise would have been had the application been made earlier and within the 28 day time limit. The applicant was entitled to assume, given that the respondent had not made any costs application within the 28 day period and not until

over 5 months later, that it would not have to contend with such an application.

(e) I agree that if the extension is not granted the respondent would be prejudiced in that he would have lost the opportunity to claim costs in what he believes to have been a premature and unreasonable application brought by the applicant against him. However, I agree with the applicant that that would be so in every case where a party invites the First-tier Tribunal to extend under Rule 6(3). I find that that reason alone cannot be enough to grant an extension. The respondent suggests that the merits of his costs application are strong (other than the fact that the application is made late), as the tribunal had noted that the applicants application was premature. Based upon the limited information before me, I am not satisfied that the merits of the respondents costs application can be described as strong. The word "unreasonable" is not defined but it was held in **Ridehalgh v Horsefield [1994] 3 All ER 848** *"...The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case... 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 practitioners judgment, but it is not unreasonable."* An application described as "premature" does not in my view satisfy the very high threshold necessary to establish unreasonable behaviour. In any event, regardless of whether the respondent had a strong case or not, the respondent and his legal advisers chose not to make the costs application in time and have brought the prejudice upon themselves.

38. For the reasons given, the respondents application for an extension of time under Rule 6(3) is refused.

39. As stated in the tribunals directions dated 23rd November 2015, the tribunal having declined jurisdiction, the proceedings are struck out under Rule 9(2) of the 2013 Procedure Rules.

Name: Mr L Rahman **Date:** 15/2/16