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

Case reference : **LON/00AZ/OLR/2016/1079**

Property : **101, Moremead Road, London SE6
3LS**

Applicant : **Ms Grizel Maria Jenkins**

Representative : **Ms H Holmes of Counsel instructed
by Thackray Williams LLP**

Respondent : **Mr Francis Bruton**

Representative : **Laing Law Limited**

Type of application : **Costs – rule 13(1)(b) of the Tribunal
Procedure (First-tier
Tribunal)(Property Chamber)
Rules 2013**

Tribunal members : **Judge N Hawkes
Miss M Krisko BSc(EstMan) BA
FRICS**

Venue : **10 Alfred Place, London WC1E 7LR**

**Date of paper
determination** : **26th January 2017**

DECISION

Decision of the Tribunal

The Tribunal determines that costs in the sum of £2,000 (including VAT) are payable by the respondent to the applicant pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

The background

1. This is the applicant's application for an order for costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules").
2. By a notice of claim dated 5th January 2016 under section 42 of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"), the applicant claimed a new lease of her flat at 101 Moremead Road, London SE6 3LS ("the property").
3. The applicant proposed a premium of £5,700 and that the new lease be on the existing terms save that the ground rent be reduced to a pepper corn and, of course, the extended term.
4. By a counter notice dated 14th March 2016, the respondent accepted the applicant's right to acquire a new lease but proposed a premium of £7,800. Further, as stated in Tribunal's decision dated 2nd November 2016, the applicant's proposal that the new lease should be in the existing terms was not accepted and a new draft lease was attached to the respondent's counter notice.
5. The Tribunal has been provided with copies of correspondence between the parties' solicitors following the service of the counter notice.
6. On 15th February 2016, that is between the date of the notice of claim and the date of the counter notice, the Tribunal determined an application pursuant to section 48 of the 1993 Act in which the terms of a new lease of premises at 115 Moremead Road, London SE6 were in dispute. The respondent was party to those proceedings as landlord.
7. In the decision of 15th February 2016, the Tribunal considered arguments similar to those raised by the respondent in these proceedings. The Tribunal determined that a lease in similar terms to the respondent's proposed draft lease in these proceedings was significantly different to the existing lease of 115 Moremead Road and that the respondent had not discharged the burden of proving an amendment or modification under section 57 of the 1993 Act.

8. However, the Tribunal notes that the respondent did not attend the hearing of 15th February 2016; that he was not represented at the hearing of 15th February 2016; and that it is stated in the respondent's reply to the applicant's application that the respondent has been hospitalised for an extended period.
9. Accordingly, the decision relating to 115 Moremead Road might not have come to the respondent's attention and/or its significance might not have been understood by the respondent until the applicant referred to it by a letter dated 11th April 2016 to the respondent's solicitors.
10. By their letter dated 11th April 2016, the applicant's solicitors informed the respondent's solicitors that the draft lease attached to the counter notice was not accepted; that the proposed lease did not accord with the provisions of the 1993 Act; that the same issues had been considered in relation to 115 Moremead Road; and that the Tribunal had made clear the approach which should be taken. Further, the respondent's solicitors were referred to Gordon v Church Commissioners for England LRA/110/2006. The applicant's solicitors enclosed with their letter of 11th April 2016, the draft lease which was ultimately approved by the Tribunal.
11. The respondent's solicitors replied by letter dated 4th May 2016 stating "...we feel you must not have looked at the Lease that we provided to you because that Lease was drafted with the Existing Lease being the starting point for it. We would invite you to go through the Lease in accordance with the regulations to the 1993 Act and mark in red those parts of it you would like amended. In particular, what you have referred to as 'any changes beyond those required by the Act' if indeed you believe there are any".
12. By a response dated 11th May 2016, the applicant's solicitors accepted the invitation to review the draft lease provided by the respondent against the original. The applicant's solicitors attached a document directly comparing the draft lease with the original lease, showing all of the changes which the respondent had put forward in red. They stated "You will note that the vast majority is shown red, demonstrating beyond doubt that the draft you have provided is almost entirely different from the original lease."
13. The applicant's solicitors also enclosed a copy of the original lease with their proposed amendments explaining "Essentially our only amendments have been to refer to this being under the act with necessary clauses for that purpose, to agree the prescribed clauses and title page changes you have put forward and to amend the demised to be more fitting to this situation. Those are strictly necessary under the s57 of the 1993 Act to fit modern land registry requirements"

14. The applicant's solicitors also stated, "We hope that you will now be prepared to either agree or comment on the draft we have attached, treating that as a counter amendment. The alternative would be for you to justify every change you have put forward (shown in red on the attached pdf) under s57 of the Act, which would be a lengthy and unwieldy process given that the comparison demonstrates that the vast majority of your draft is different from the original."
15. The respondent's solicitors were not willing to adopt either approach and ultimately the applicant made an application to this Tribunal which was heard on 1st November 2016. The decision records that, at the hearing, Ms Oran on behalf of the respondent conceded that there were no amendments sought that fell within the provisions of section 57 of the 1993 Act.

The law

16. In determining this application, the Tribunal has had regard to the issues identified by the Upper Tribunal in Willow Court Management Company (1985) Ltd v Mrs Ratna Aleaxander [2016] UKUT 290 (LC), which is referred to at paragraph 3 of the Directions dated 7th November 2016.
17. In that case, the Upper Tribunal set out the following sequential three-stage test:
 - (i) has the person acted unreasonably, applying an objective standard?
 - (ii) If unreasonable conduct is found, should an order for costs be made or not?
 - (iii) If so, what should the terms of the order be?
18. There is, of course, no general rule in the Tribunal that the unsuccessful party will be ordered to pay the successful party's costs. An assessment of whether behaviour was 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.
19. The reasonableness test could be expressed in different ways by asking whether a reasonable person would have conducted themselves in the manner complained of, or whether there was a reasonable explanation for the conduct complained of. 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 to manage cases before

they get to a full hearing. An objective standard is to be applied and whether or not a party acts without legal advice is relevant.

20. The Tribunal at the second and third stages has to have regard to all the circumstances. The nature, seriousness and effect of the unreasonable conduct will be important factors. Unlike in the case of wasted costs, no causal connection between the conduct and the costs incurred is required.

The Tribunal's determination

21. The respondent's draft lease differs very substantially from the existing lease. The decision dated 2nd November 2016, the Tribunal described it as a "fresh lease".

22. The respondent states that in his reply to the applicant's application:

- (i) "...negotiations in the present case were not possible";

- (ii) "...the Respondent still firmly believes that the matter could have been agreed without the need for a hearing at all if only the Applicant had been more willing to negotiate and attempt to agree the lease";

- (iii) "The issues in relation to the terms of the lease and subsequent application to the Tribunal arose because the Applicant refused to accept the draft lease attached to the Respondent's Counter Notice";

- (iv) "The significant point about the Applicant's application to the Tribunal is that neither the Applicant or her representatives made any attempt to agree the draft lease prior to doing so. They simply rejected the Respondent's draft lease altogether. The Respondent's case is that there is no means under the 1993 Act for a tenant, as the Applicant did in the present case, to reject a draft lease in its entirety and instead elect to use a draft produced by the tenant's own solicitor instead";

- (v) "The Respondent asserts that substantial parts of the draft lease could have been agreed by the usual process of amending; re-amending and agreeing by way of a travelling draft lease";

- (vi) “Had the Applicant amended and struck out parts of the Respondent’s draft lease that he knew he was not entitled to then he would have accepted it.”
23. However, by their correspondence dated 11th May 2016, the applicant’s solicitors gave the respondent’s solicitors the option of using their draft lease as the starting point for negotiations and justifying every proposed change under section 57 of the 1993 Act. The applicant’s solicitors had identified in red the changes which required justification in accordance with the legislation.
24. The Tribunal finds, applying an objective standard, that the respondent through his solicitors acted unreasonably in persisting up until the hearing with the assertion that the respondent’s new lease should be the starting point without seeking to justify each of the changes put forward under section 57 of the 1993, Act notwithstanding receipt of the applicant’s letter dated 11th April 2016.
25. The Tribunal finds that it is appropriate to exercise its discretion to make an order for costs. In reaching this finding the Tribunal takes into account the nature, seriousness and effect of the unreasonable conduct and, in particular:
- (i) The fact that the issues between the parties have essentially been issues of the law and the respondent has been legally represented throughout.
 - (ii) Whilst there may have been some difficulties in communicating with the respondent, these difficulties were not sufficiently serious to lead to the respondent’s solicitors seeking to come “off the record”.
 - (iii) The applicant’s solicitors had clearly set out the legal position by 11th April 2016.
 - (iv) By their correspondence dated 11th May 2016, the applicant’s solicitors gave the respondent’s solicitors the opportunity to use their draft lease as the starting point (they would then have had to justify each departure from the original lease under the provisions of the 1993 Act).
 - (v) As a consequence of the unreasonable conduct, the applicant has been put to expense.
26. In determining what the terms of the order should be, the Tribunal takes into account the factors set out above and also the value of the

proceedings (the premium was less than £7,000); the level of complexity the dispute which resulted in this application for costs; and the nature of the work carried out (much of which involved essentially repetition of the points initially made).

27. In all the circumstances, the Tribunal determines that costs in the sum of £2,000 (including VAT) are payable by the respondent to the applicant pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.
28. The Tribunal has been informed that the respondent is an elderly gentleman who lives alone with no known relatives who has been hospitalised for an extended period and since diagnosed with cancer. There is no evidence before the Tribunal which establishes whether or not the respondent has personally acted unreasonably.

Name: Judge N Hawkes

Date: 26th January 2016