12017

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBE/LAM/2016/0026**
Property	:	**Flats 1-8 Victory House, Trafalgar Street, London SE17 2TP**
Applicant	:	**Dr Nasreen Ahmed and Mr Michael Ness**
Representative	:	**Both in person**
Respondent	:	**Victory House Trafalgar Street SE17 Limited**
Representative	:	**Miss K Gray, Counsel instructed by Mills & Reeve LLP Solicitors**
Type of Application	:	**Application for costs under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Members	:	**Tribunal Judge Dutton**
Date of Decision	:	**20th February 2017**

DECISION

DECISION

The Tribunal determines that the Applicants have acted unreasonably in connection with the conduct of the proceedings for the reasons set out below. The Tribunal determines that the sum recoverable as costs under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 should be £6,000 for the reasons set out below.

BACKGROUND

1. This is an application made by the Respondents, Victory House Trafalgar Street SE17 Limited, following an application made by Dr Ahmed and Mr Ness seeking to appoint a managing agent under section 24 of the Landlord and Tenant Act 1987 (the Act).

2. On 4th November 2016 the matter came before the Tribunal and, after discussions, was compromised on the basis as set out in the order to the decision issued by the Tribunal on that day.

3. Directions were given for the question of costs under Rule 13 to be considered and this matter came before me for determination as a paper case.

4. Prior to the determination I had received a copy of the application for costs under the Rule prepared on behalf of the Respondent and a witness statement of Mr Christopher Sam Bartley from Mills & Reeve LLP Solicitors acting on behalf of the Respondent. In reply, I was provided with a response prepared by Brady Solicitors on behalf of the Applicants. I have considered all documents in reaching my determination.

5. I have also considered the Upper Tribunal case of *Willow Court Management Company 1985 Limited v Mrs Ratna Alexander and others under reference [2016]UKUT0290(LC).*

6. The application for costs made by the Respondent refers to the Willow Court case and suggests that the Applicants were vexatious in making the application which was to inconvenience and harass the current directorship of the Respondent. Various reasons are set out indicating that the application was groundless, that the Respondent had made offers to settle but the Applicants had not accepted and that the Applicants had failed to comply with directions and were adversarial and verbose in their approach to the case. It was also suggested that the proposal that Ad Interim Limited be put forward as managing agent was wholly inappropriate.

7. On considering orders that the Tribunal could make in this case, it was suggested that the conduct had increased the costs significantly and that the matter could have been resolved as early as 30th August 2016. The fact that the Applicants were not legally represented should not be given great weight for the reasons set out in the statement. Asked what the term of the order for costs should be, the Respondent, rhetorically, indicated that they should be those which were incurred by the Respondent in conducting the litigation. In a statement issued prior to the hearing, the costs that it was said the Respondent had incurred amounted to £26,634.60 inclusive of Counsel's fees and VAT. In the document dated 24th

November before me for consideration, the total had risen to £27,159 with no obvious changes in the sums involved. The difference appears to be down to simple arithmetic.

8. For the Applicants, the submission addressed the three stages set out in Willow Court and the primary position of the Applicants was that they had not acted unreasonably. The response dealt with the Applicants' motivation for making the application, the alleged failure to comply with directions and their approach to the litigation, the proposals to appoint Ad Interim Limited as manager and the allegation that the Applicants were not legally represented should not impact. The case of *Raymond Henry Stone v 54 Hogarth Road London SW5 Management Limited* was part of the Willow Court case and this was referred to at page 38 of the submission.

9. If I find that the Applicants have acted unreasonably, the question is posed what order for costs, if any, should be made. It was referred to Rule 3 and the requirement to give consideration to the anticipated costs and resources of the parties. I was reminded that the Tribunal is primarily a no cost forum. Further, it was suggested that the Respondent had not considered the application carefully but had as early as August 2016 indicated that an application under Rule 13 would be pursued. It is also pointed out that the Applicants had achieved one of their objectives, that being the appointment of a new manager.

10. As to stage 3, it was suggested that the hourly rates were too high and should be limited to those recoverable in the Birmingham area. Further, that a significant amount of work could have been carried out by a lower grade fee-earner and the time spent was excessive. It was suggested that Counsel's fees should be disallowed in their entirety.

THE LAW

11. The law applicable to this matter is set out in Rule 13 which is included at the appendix to this decision.

FINDINGS

12. I have considered the papers provided for the hearing and have noted the terms of the section 22 notice issued to support the application for the appointment of manager. The issues which appear to have caused concern were the failure, it is said, of the landlord to deal with a leak affecting Dr Ahmed's flat, that they had also failed to include the statement of rights and obligations with the service charge demands and that there have been Company Act failings. The section 22 notice gave two weeks for these matters to be resolved and was dated 21st April 2016. The application, however, was not in fact issued until 25th June 2016.

13. When the matter came before the Tribunal for hearing in November, it quickly became apparent that there was really no merit to the application. The problem with regard to the damage to Dr Ahmed's flat was an issue between herself and her neighbouring tenants. That, however, appears to have been resolved through insurance. The question of the lack of rights and obligations accompanying the service charge demands had been dealt with some time before the hearing and was

a relatively minor issue in any event. The issues relating to Companies Act matters are not ones that would ordinarily result in the appointment of a manager being made under section 24 of the Act. They are issues that fall outside the usual scope of operation for a manager and I do not consider that a Tribunal would have appointed anybody on the grounds that there had been Company Act breaches. Those were matters that should have been aired before the Companies Court.

14. I have fully borne in mind the decision of Willow Court. There are certain paragraphs which are of importance. It is noted that at paragraph 23 Counsel in the second case involving a Miss Sinclair, had argued that there should be a wider interpretation under Rule 13 (1)(b) to treat as unreasonable the conduct of a party for matters referred to therein. These submissions were rejected. At paragraph 24 the Tribunal says this *"24 ... "unreasonable" conduct includes conduct which is vexatious and designed to affect 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."*

15. The decision goes on at paragraph 25 to say *"... for a professional advocate to be unprepared may be unreasonable at worst but for a lay person unfamiliar with the substantive law or 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."*

16. The judgment went on at paragraph 27 to say as follows *"when considering the Rule 13 (1)(b) power attention should first focus on the permissive and conditional language in which it is framed: The Tribunal may make an order in respect of costs only ... if a person has acted unreasonably. We make two obvious points. First that unreasonable conduct is an essential pre-condition of the power to order costs under the Rule; secondly once the existence to the power has been established its exercise is a matter for the discretion of the Tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the Rules should be adopted."* The Tribunal then goes on at paragraphs 28 to 30 to set those three stages and I have borne those in mind when reaching my decision.

17. It is further right to note under paragraph 31 onwards of the position of unrepresented parties. At paragraph 32, the Tribunal says as follows *"In the context of Rule 13 (1)(b) we consider that the fact that a party acts without legal advice is relevant at the first stage of the inquiry. When considering objectively whether a party has acted reasonably or not, the question is whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way in which that party acted. In making that assessment, it would be wrong, we consider, to assume a greater degree of legal knowledge or familiarity with the procedures of the Tribunal and the conduct of the procedures before it, than is in fact possessed by the party whose conduct is under consideration. The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person*

who does not have legal advice. The crucial question is always whether, in the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings". I have also borne in mind that which is said by the Tribunal at paragraph 33 of the decision. Perhaps the most important wording is to be found at the end of paragraph 34 which says *"we find support in Cancino for our view that Rule 13 (1)(b) should be reserved for the clearest cases and that in every case it would be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable."*

18. The question is what do I make of the conduct of the Applicants in this matter? There is no doubt that in August 2016 a proposal to compromise was made by the Respondent which was rejected by the Applicants. That is not to say that the Applicants did not engage in attempts to reach some form of compromise. Further offers were made in September and October of 2016 with a counter offer made in October of 2016. It was only at the hearing itself that the Applicants or rather Mr Ness, as Dr Ahmed did not attend, engaged in resolving the matter by way of a compromise on the appointment of Greenwoods as the managing agents.

19. However, I do not consider that the conduct of the Applicants was so unreasonable as to justify an order for costs against them going back to August 2016. They were quite entitled not to accept an opening offer on the part of the Respondent and to consider the matter in more detail. Case management conferences followed, where the position was discussed and offers made in September and October along much the same lines, although in one case conceding in more detail to the demands made by the Applicants. There is no doubt in my mind that the reasons for appointing a new manager as put forward by the Applicants were not ones that would have persuaded a Tribunal to make such an order. However, I cannot accept that the application was made to cause harassment or to be vexatious. I accept that the Applicants considered they had reasons for making the application that they did, and indeed the Applicants are the owners of three flats in the property.

20. I do, however, consider that the Applicants could and should have stood back before the hearing to consider whether this was a matter that should be compromised along the lines suggested by the Respondent. Indeed, the settlement was not as good as some of the offers made by the Respondent in earlier correspondence. Further, it seems to me somewhat unreasonable that Dr Ahmed, who was largely the instigator of the application and the author of much, if not all of the correspondence, and the various documents produced at the Tribunal, did not attend the hearing. Ample notice had been given of the hearing date and no real explanation was given as to why she could not be there. This did leave Mr Ness in the somewhat invidious position and he was fairly quick to reach a compromise with the Respondent.

21. I do not consider that the Applicant should be required to pay the totality of the Respondent's costs. It was reasonable for them to bring the application even if it may have been somewhat misplaced, and for them to continue with the proceedings until the hearing date loomed large. At that point in time, it seems to me that they should have considered their position, not necessarily of obtained independent legal advice, but that might have been a wise step, but at least reviewed the law to see whether or not that which they were alleging gave rise to

an application under section 24 of the Act that was realistically one that they could pursue. I bear in mind they had been advised by the Respondent on a number of occasions that this was not the case.

22. Doing the best I can on the information before me I conclude that the Applicants could have withdrawn and avoided the need for a hearing. That being the case, I propose, therefore, to make an order that the costs which appear to be associated with the hearing, that is to say on the schedule of work done on documents, items 8, 9 and 11, as well as the costs of preparing for the application under rule 13 which appears at item 26 should be payable by the Applicants. I would allow further time for correspondence and attendances at Mr Bartley's rate of £230 per hour. Taking the matter in the round this gives profit costs on my assessment of £2,500. In addition also, I think it is reasonable if Counsel's fees of £2,500 plus VAT should also be payable. I, therefore, make an order that the Applicant should pay to the Respondent the sum of £6,000 in respect of costs which were incurred as a result of their unreasonable conduct in these proceedings.

Judge: Andrew Dutton

A A Dutton

Date: 20th February 2017

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 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 to 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 (ie 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.