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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/OOBD/LAC/2017/0016
Property	:	33a Church Road, Richmond, TW9 1UA
Applicant	:	Joe Blackman
Representative	:	In person
Respondent	:	Sinclair Gardens Investments (Kensington) Limited
Applicant	:	WH Matthews & Co
Type of Application	:	Costs – Rule 13(1)(b)
Tribunal Members:		Judge Robert Latham Duncan Jagger MRICS
Venue of Hearing	:	Alfred Place, London WC1E 7LR (paper determination)
Date of Decision	:	24 January 2018

DECISION

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(1) The Tribunal does not make an order for costs against either the Applicant or the Respondent pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(3) The Tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 Act so that none of the landlord's costs of the tribunal proceedings may be passed on the Applicant pursuant to any contractual terms in the lease.

(4) The Tribunal makes no order in respect of the reimbursement of the tribunal fees paid by the Applicant.

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Background

1. On 7 August 2017, the Applicant issued an application under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") to challenge the administration charge which the Respondent was seeking to levy in connection with the landlord's consent which he sought in order to erect a rear extension.

2. The building at 33 Church Street comprises 4 flats which are let on long leases. The Applicant is the lessee of the basement flat. On 15 August 2006, 31-33 Church Road RTM Company Limited acquired the right to manage both 31 and 33 Church Road. The Applicant is a Director of the RTM Company.

3. On 26 September, the Tribunal issued Directions at a Case Management Hearing ("CMH"). The Applicant attended. On 12 September, W H Matthews & Co (the Respondent's Solicitor) wrote to the Tribunal asserting that the application was misconceived. The Respondent suggested a Direction that the Applicant do produce a Specification, Plans and Planning Permission in respect to the works to which the Respondent would respond. The Solicitor attached a statement from Mark Kelly admitting (at [5.2]) that no administration charges were payable to the Respondent in respect of a licence for alterations as such approval (if approved by the Tribunal) would be given by the RTM Company. The Tribunal identified four issues that needed to be determined.

4. On 2 October, the Respondent confirmed that no administration charge was payable. This has led to two applications:

   (i) On 23 October, the Applicant applied to the Tribunal for costs against the Respondent pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). The Applicant further applied for (a) an order under Section 20C of the Landlord and Tenant Act 1985; (b) an application under paragraph 5A of the 2002 Act; and (c) an application for a reimbursement of the tribunal fees which they had paid.

   (ii) On 3 November, the Respondent made its own application for costs against the Applicant pursuant to Rule 13(1)(b). The Respondent contends that the Applicant acted unreasonably in issuing the application.

5. On 17 November, the Tribunal issued Directions for the determination of these applications which were revised on 24 November. Pursuant to these Directions, the parties have filed the following:

   (i) On 1 December, the Respondent filed its Statement as to Costs.

   (ii) On 28 December, the Applicant filed his Submissions on Costs.

   (iii) On 4 January 2018, the Respondent filed its Reply.

(iv) On 8 January, the Applicant filed a brief Reply.

6. This application has arisen because the Applicant erroneously believed that he needed the consent of the Respondent for the erection of the extension. In the event, the requisite consent was required from the RTM Company (see Section 98 of the 2002 Act). Before granting a Section 98 approval, the RTM Company must give the freeholder 14 days notice. If the landlord gives notice of objection, the RTM Company can only grant such approval in accordance with a determination of the First tier Tribunal. Consent from the Respondent freeholder was only required in respect of an alteration to a part of the Building which is outside the demise of the Applicant's lease. A Section 98 approval is an approval required under the lease. There is no provision in the lease entitling the Tenant to trespass onto the freeholder's property which is not demised to him with or without approval. There is an outstanding issue as to whether the proposed works is a trespass onto the landlord's property. If so, this matter would be a matter for the County Court.

The Law

7. 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—
>
> > (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
> >
> > ......
> >
> > (ii) a residential property case;

8. 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.

9. 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?
>
> (iii) If so, what should the terms of the order be?

10. 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.
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> 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?
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> 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

(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?

We are satisfied that both applications fail at the first hurdle. Neither party has established unreasonable conduct by the other justifying a penal award of costs. This tribunal is normally a no costs jurisdiction. A penal costs order is only justified in exceptional circumstances. Neither party has established such exceptional circumstances.

13. The Applicant seeks costs in the sum of £2,832.70. The Submissions are drafted by Counsel. A substantial part of this sum seems to relate to the cost of drafting these submissions. The alleged unreasonable conduct relates to the pre-action correspondence which necessitated the Applicant in bringing the proceedings as he was mislead into thinking that the landlord was entitled to demand a fee for giving consent. The Applicant relies on a letter dated 27 January 2013 (the Respondent state it was sent in 2014) in which Hurst Managements, the landlord's agent, demanded various administration charges.

14. The Respondent seeks costs in the sum of £4,276.80. The Respondent contends that the Applicant acted unreasonably in issuing this application which was without foundation. In particular, it is argued that the Applicant (i) knew that only the RTM Company could give consent; (ii) knew that the Respondent's substantive position may have changed since the without prejudice letter dated 27 January 2013; and (iii) issued the application prematurely. It is suggested that the Applicant is the author of his own misfortunes as he suggested in a letter, dated 31 July 2017, that some reasonable administration charge might be payable. The Respondent further contend that the application was issued prematurely, without giving the landlord sufficient time to responded to the letter, dated 31 July 2017.

15. The Tribunal is satisfied that the Applicant did not act unreasonably in issuing his application. He had been in communication with the landlord for some years in connection with the proposed extension. He had grounds for believing that the landlord was seeking unreasonable administration charges. This area of the law is particularly complex, particularly for litigants in person. Rule 13 is intended to punish the vexatious litigant; not the lay party who is ill informed. Rule 13 would have a chilling effect on access to justice if it were to be used to punish the lay litigant who fails to understand the complexities of this area of the law.

16. Equally, there are no grounds for contending that the Respondent acted unreasonably "in the conduct of the proceedings". The Applicant issued an application which transpired to be misconceived. Any applicant should take their own advice on the merits of their application.

17. Upon the application being issued, the Tribunal set the matter down for a CMH. This Tribunal uses its case management powers to identify the real

issues in dispute so that these can be fairly and justly determined in a proportionate manner in accordance with the overriding objectives specified in Rule 3 of the Tribunal Rules. The parties are required to cooperate to enable the tribunal to further these objectives. Had the Respondent attended the CMH, the application could have been resolved. W H Mathews & Co rather wrote to the Tribunal proposing Directions for the Applicant to produce various documents to which the Respondent would respond. As a result of the oral and written submissions made by the parties, the Tribunal was satisfied that there were four substantive issues to be determined. The Tribunal noted that the issues raised by the Respondent seemed to be outside the jurisdiction of the tribunal. Both parties must bear equal responsibility that this application was not resolved at this stage. They are advised to focus on their own shortcomings, rather than seek to project the blame on the other.

18. The Applicant makes three further applications:

(a) An order under Section 20C of the Landlord and Tenant Act 1985. The landlord does not address this in its submissions. Given the existence of the RMT Company, the Tribunal does not believe that it would be open to the landlord to pass any costs through the service charge account. However, for the avoidance of doubt, we make such an order.

(b) An application under paragraph 5A of the 2002 Act. The landlord does not address this in its submissions. Again, we suspect that this is academic. However, for the avoidance of doubt, we make such an order.

(c) An application for a reimbursement of the tribunal fees which he has paid. This application has failed. It was misconceived. We see no reason to make an order that the Applicant should be reimbursed for his costs by the Respondent.

Judge Robert Latham
24 January 2018

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.