FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**JM/LON/OOAZ/OLR/2022/0156**
Property	**:**	**Flat 1, 34 Canadian Avenue, Catford, London SE6 3AS**
Applicant	**:**	**Monica Burnett**
Representative	**:**	**Ms Burnett**
Respondent	**:**	**Enfield Management Services Limited**
Representative	**:**	**Mr Duerden**
Type of Application	**:**	**Determination of premium or other terms of Acquisition remaining in dispute**
Tribunal Members	**:**	**Judge Shepherd** **Marina Krisko FRICS**

Date and venue of Hearing : **27th September 2022 online.**

Date of Decision : 3rd October 2022

DECISION

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1. In this case the Applicant leaseholder, Monica Burnett is seeking a determination from the Tribunal in relation to a premium or other terms of acquisition remaining in dispute. The application was brought pursuant to Section 48(1)of the Leasehold Reform Housing and Urban Development Act 1993 ("The Act"). The Respondent to the application is Enfield Management Services Limited the freeholder of the premises.

2. The background to the matter is as follows: On the 22nd June 2021 the Applicant served notice pursuant to Section 42 of the Act claiming a new lease of flat 1 (ground floor), 34 Canadian Ave, Catford London SE6 3S ("the premises"). On the 26th of August 2021 the Respondent served a reply notice pursuant to section 45 of the Act. At that stage the Respondent was disputing the value of the premium (£20,000) and proposed an alternative premium of £35,000. By the day of the hearing on the 27th of September 2022 the parties had made considerable progress in resolving the issues between them. They had agreed a valuation figure of £30,685 pounds. They had agreed the terms of the lease. They had also agreed the ground rent. Issues in relation to the costs incurred by the Respondent would be negotiated and if not agreed an application made to the Tribunal.

3. At the hearing Emma Burnett appeared on behalf of the Applicant and Andy Duerden on behalf of the Respondent. Miss Burnett asked the tribunal to make a costs order against the Respondent's solicitors who she said had behaved unreasonably. She made the application under rule 13 of the tribunal rules, the relevant parts of which state the following:

13.(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—

(iii) a leasehold case;

4. The Tribunal allowed the parties to consider the leading decision of Willow Court Management Company (1985) v Sinclair Alexander and others [2016] UKUT 290 (LC) and they made further submissions once they had considered the case.

5. The basis of the application was the failure by the Respondent's solicitors to respond to correspondence from the Applicant and her solicitors in relation to the draft lease. The Applicant had drafted the lease although the Respondent had been given the responsibility for doing so pursuant to directions given by the Tribunal. Ms Burnett argued that the Respondent had failed to comply with directions and this conduct was unreasonable The letters sent by the Applicant included a letter dated 14th of September 2022 and further emails which Ms Burnett said had been ignored.

6. Mr Duerden for the Respondent gave an explanation for his firm's failure to comply with the directions. He said that the fee earner who was dealing with lease extensions Mr Hague who was a consultant solicitor had unfortunately died the week before the hearing. He had fallen ill in August but Mr Duerden had not been made aware of this until some time later. Mr Duerden said that any correspondence sent to him was sent to Mr Hague with the belief that the matter would be dealt with accordingly. Mr Haig was an experienced conveyancer who dealt with a lot of these cases. Mr Duerden had failed to notify the Applicant that he was not the first point of contact. The draft lease prepared by the Applicant contained relatively few changes and was really just an update on the previous lease. Mr Duerden said that in correspondence between him and the Applicant in March 2022 he had invited her to provide her own surveyor and solicitor. The Applicant had not replied to this and the Respondent had only found out that Ms Burnett was instructed during the previous week.

7. Ms Burnett said whilst Mr Hague's situation was unfortunate it would have been reasonable for the respondent solicitors to follow up correspondence.

The law

8. In Willow Court the Upper Tribunal found that an assessment of whether behaviour was unreasonable required 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. There was no reason to depart from the guidance on the meaning of "unreasonable" in Ridehalgh v Horsefield [1994] Ch. 205, [1994] 1 WLUK 563, applied. Unreasonable conduct included conduct that was vexatious and designed to harass the other side rather than advance the resolution of the case. It was not enough that the conduct led to an unsuccessful outcome. The test could be expressed in different ways by asking whether a reasonable person in the position of the party would have conducted themselves in the manner complained of, or whether there was a reasonable explanation for 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 in the preparatory stages of proceedings

9. The first stage of the analysis was an objective decision about whether a person had acted unreasonably. If so, a discretionary power was engaged and the tribunal had to consider whether it ought to make a costs order. If so, the third stage was the terms of the order. There was no general rule in the tribunal that the unsuccessful party would be ordered to pay the successful party's costs. The fact that a party was unrepresented was relevant at the first stage. The behaviour of a unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who did not have legal advice. It was relevant to a lesser extent at the second and third stages; the tribunal should consider mitigating circumstances, but without excessive indulgence or allowing absence of representation to become an excuse for unreasonable conduct, Cancino v Secretary of State for the Home Department [2015] UKFTT 59 (IAC), [2015] Imm. applied. The tribunal at the second and third stages had to have regard to all the circumstances. The nature, seriousness and effect of the unreasonable conduct would be important factors. Unlike wasted costs, no causal connection between the conduct and the costs incurred was required, McPherson v BNP Paribas SA (London Branch) [2004] EWCA Civ 569, [2004] 3 All E.R. 266, [2004] 5 WLUK 273 applied. Rule 13(1)(a) and (b) should be reserved for the clearest cases and it was for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct had been unreasonable, *Cancino* applied. An application should be determined summarily, preferably without the need for a further hearing, and after the parties had had the opportunity to make submissions. In a relatively modest dispute, an unwillingness to mediate by a party that considered themselves to have a strong case was not necessarily

evidence of unreasonableness. A genuine willingness to mediate, even if unreciprocated, was an example of reasonable behaviour that should be encouraged. A party should be entitled in an appropriate case to credit for such behaviour if, by reason of other aspects of their conduct, a tribunal was considering whether to make a costs order under r.13(1)(b) (paras 28-29, 32-34, 42-43, 102-103).

Determination

10. The tribunal refuses to make a costs order pursuant to rule 13 in this case. There is a mechanism for the Applicant to raise the issue of the Respondent's conduct under s 60 of the Act. Those costs have not yet been resolved. The Tribunal considers that s.60 is the appropriate means of challenging the normal assumption that the tenant bears the landlord's costs of a lease extension. In any event this case is not the sort of case where Rule 13 applies. In the Tribunal's view the case does not get beyond stage one of the test in *Willow Court*. It is not considered that the Respondent's solicitors behaved unreasonably. This was plainly a very difficult time for Mr Hague- he was dying. It is unsurprising that he was unable to carry out his normal work. The Tribunal accepts that Mr Duerden genuinely believed that Mr Hague would deal with all correspondence he had sent on. In any event even if Mr Hague had not sadly passed away the Tribunal would still be slow to find that the Respondents had behaved unreasonably. The terms of the draft lease were accepted at an early stage by the Respondent and the parties had constructively eliminated all of the other issues between them before the hearing before the tribunal. The Respondent's can also be forgiven for putting off the legal work (the drafting of the lease) until agreement had been reached. The Tribunal were told that the valuers did not meet until 21st August 2022 and agreed the premium on 20th September 2022. The Respondent's failure to provide a draft lease in accordance with the directions had no real effect on the process.

11. In summary the Tribunal rejects the application for Rule 13 costs in this case.

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

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 state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.