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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BJ/OLR/2014/0970**
Property	:	**Flat 2F, 90 Ritherdon Road, London SW17 8QG**
Applicant	:	**Mr Simon Bradley**
Representative	:	**Mr I J Ailes BSc FRICS**
Respondent	:	**Rangecourt Limited**
Representative	:	**None**
Type of Application	:	**To determine the terms of acquisition of a new lease which had not been agreed section 48 Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	:	**Judge John Hewitt Chairman** **Mr Patrick Casey MRICS**
Date and venue of Hearing	:	**Tuesday 14 October 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15 October 2014**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

   1.1 the premium payable by the applicant to the respondent on the grant of the new lease is £21,414; and

   1.2 the applicant's application for costs shall be and is hereby dismissed

2. The reasons for our decisions are set out below.

Procedural background

3. The applicant served on the respondent a notice pursuant to section 42 Leasehold Reform, Housing and Urban Development Act 1993 (the Act) seeking to exercise the right to a new lease. The applicant proposed a premium of £16,000. The notice is dated 18 February 2013.

4. By a counter-notice dated 12 February 2014 the respondent admitted that on the relevant date the applicant had the right to acquire a new lease. The respondent counter-proposed a premium of £26,300.

5. By an application dated 19 June 2014 the applicant made an application to the tribunal to determine the terms of acquisition which had then not been agreed. The application stated that the only term of acquisition in dispute was the premium payable for the new lease.

6. Directions were duly issued.

7. On 2 September 2014 the parties' respective valuers, Mr I J Ailes FRICS for the applicant and Mr M Lee MRICS for the respondent, signed a document headed Statement of Agreed Facts which contained a statement of matters which had been agreed and some which had been not agreed. Material for present purposes the only matter not agreed was the value of the extended lease and hence the premium payable. Mr Ailes stated he considered the premium payable to be £19,965 and Mr Lee stated he considered the premium payable to be £21,414.

8. On 10 October 2014 the applicant made an application for costs pursuant to rule 13 and filed a submission by Mr Ailes in support. In that submission Mr Ailes asked that:

   8.1 The premium be determined at £21,414; and

   8.2 The respondent pay to the applicant costs in the sum of £2,820.

9. On 13 October 2014 the tribunal received an email from Mr Ahron Ebert on behalf of the respondent which set out a number of submissions including that the first open offer from the applicant to pay a premium of £21,414 was contained in the application for costs and that the application for costs should be refused.

10. The application came on for hearing before us on 14 October 2014. The applicant was present and he was represented by Mr Ailes. The respondent was neither present nor represented.

The premium

11. The tribunal considered that Mr Ebert's submissions amounted to a clear statement that the respondent was willing to agree the premium at £21,414 unconditionally.

12. Mr Ailes stated to the tribunal that the applicant was willing to agree to pay a premium of £21,414 unconditionally.

13. In the absence of a representative from the respondent and for the avoidance of doubt and despite the apparent agreement as to the amount of the premium to be paid we have determined that the premium payable is £21,414.

The costs application

14. The costs application was made on 10 October 2014. The applicant seeks to recover costs of £2,820 incurred over the period 1 July 2014 to date, to include the costs of making and presenting the costs application. Most of the application related to the time spent by Mr Ailes but there was included a claim of £400 + VAT for solicitors costs but the information about those costs set out in an email to Mr Ailes dated 10 October 2014 was scant and did not state over what period the costs were incurred or what work had been carried out. We infer that the amount claimed related to all of the work carried out to include making the application in June 2014 and subsequent routine file management.

15. The respondent received the application and made written submissions opposing it.

16. The costs application was made pursuant to rule 13. The written application did not make it clear whether it was an application for wasted costs under rule 13(1)(a) or an application for costs under rule 13(1)(b). At the hearing it was clarified that the application was made pursuant to rule 13(1)(b) which provides that in a leasehold case, the tribunal can only make a costs order if a person: *"has acted unreasonably in bringing, defending, or conducting proceedings"*.

17. The statutory provisions are set out in the Schedule to this decision.

18. The gist of the case for the applicant was that the respondent had acted unreasonably in the conduct of without prejudice negotiations. In support of the application Mr Ailes summarised the negotiations and took us through the limited documentation provided. Mr Ailes asserted that during the course of the negotiations in the summer the respondent's position was that any agreement on premium was conditional upon completion being deferred until the next tax year beginning 6 April 2015 to be documented by way of some form of

option agreement, but nothing in the documents provided to us make clear that any offers made were subject to such a condition.

19. The documents provided to us show:

26 June 2014	A without prejudice offer by the applicant to pay a premium of £21,414 and a request for the respondent's solicitors to provide a draft new lease;
2 September 2014	Joint signed Statement of Agreed Facts in which Mr Ailes considered the premium payable to be £19,965 and Mr Lee considered the premium payable to be £21,414;
11 September 2014	A letter sent 'Without Prejudice (Save as to Costs)' sent by Mr Ailes to Mr Ebert proposing a premium of £21,414 plus statutory costs and making clear that the applicant was not obliged to enter into an option agreement by which completion of the new lease would be deferred;
7 October 2014	An email from Mr Ebert to Mr Ailes in which Mr Ebert states that all matters have been agreed save for the market value and suggesting that this be determined by the tribunal by written submissions so as to avoid an oral hearing. The email indicated that 'the option route is still available'. We do not know what reply, if any, was sent by Mr Ailes.

20. The gist of the submissions made by Mr Ailes was that deferring completion, or the option route, was outside the scheme of the Act and that it was unreasonable of the respondent to seek to impose this condition, which, Mr Ailes submitted was only withdrawn at the very last moment. Mr Ailes submitted that it was unreasonable for the respondent not to have accepted the without prejudice offer made in his letter of 11 September 2014 such that all costs incurred by the applicant after that date should be paid by the respondent.

21. The gist of the written submissions made by Mr Ebert were that as late as 2 September 2014 the applicant's open position on premium was the sum of £19,965 and the applicant's first open offer to agree to pay £21,414 was not made until set out in the submissions document dated 10 October 2014. He also submitted that the applicant could have avoided the costs of a hearing if the applicant had accepted that figure prior to the hearing.

Discussion

22. The starting point is whether the tribunal should exercise its discretion and make a costs order in favour of the applicant. If the tribunal were to do so the tribunal would then need to determine the amount of costs to be paid.

23. Having regards to the powers of the tribunal (and its predecessor, the leasehold valuation tribunal) to make awards of costs in leasehold enfranchisement cases we conclude that rule 13 should be reserved for those cases where, on any objective assessment, a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having some of their costs paid. Thus any order of costs would be penal in nature.

24. The question then arises as to what amounts to unreasonable conduct in the context of rule 13. At present there is no binding authority or guidance from the Upper Tribunal as to the approach which we should take on an application under rule 13(1)(b). We can however draw on guidance from superior courts which have considered similar provisions. For example the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 concluded that the term 'unreasonable' in the context of wasted costs described *"conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case'.*

25. In the context of the present case Mr Ailes submitted it was unreasonable for the respondent to have made an offer to agree the premium at £21,414 conditional upon completion being deferred. There was no evidence before us that that was the respondent's position. We note that the Statement of Agreed Facts dated 2 September 2014 signed by Mr Lee stated that the respondent considered the premium payable to be £21,414. That was an unconditional position binding on the respondent.

26. We have not had put before us full accounts of the manner in which the negotiations proceeded. Clearly some negotiations proceeded, quite rightly, on a without prejudice basis. From what little we have seen both parties were trying to obtain an outcome which was most favourable to them overall as they saw it. Naturally as negotiations progress a party might modify its position and might make a concession but that is the cut and thrust of the negotiating process. Save in exceptional cases can it be said that a party is acting unreasonably in not putting its final position forward at an earlier stage.

27. As at 2 September 2014 the applicant's formal position in the Agreed Statement of Facts as signed off by Mr Ailes was that the premium payable was to be £19,965 even though in earlier without correspondence an offer to pay £21,414 had been made on his behalf. If, in the Statement of Agreed Facts, both valuers had stated that the premium to be paid was £21,414 that would have amounted to a term of acquisition which had been agreed and thus binding on both parties. If all other terms of acquisition had by then been agreed the parties would have been obliged to complete and if the respondent had failed to do so for some (unacceptable) reason it would have been open to the applicant to make an application to the court for appropriate relief.

28. We have considered carefully Mr Ailes complaint that in seeking, as part of the negotiating process, a deferment of the date for completion the respondent was acting unreasonably because that was not something to which it was entitled under the Act. We reject that complaint. As part of a package it was something which the respondent was entitled to propose and something which the applicant was entitled to reject.

29. Taken overall and bearing in mind the limited evidence before us as the manner in which the negotiations were conducted in this case the applicant has failed to persuade us that the conduct of the respondent was so unreasonable that we should exercise our jurisdiction and make a penal costs order.

30. Had we been minded to make a costs order it would have been limited to those costs directly referable to the unreasonable conduct as found by us. The starting point in this tribunal is that it is a no costs jurisdiction and that each party shall bear its own costs. Only costs over and above those which a party will have incurred in any event might be the subject of a penal costs order in appropriate circumstances.

31. Thus in the circumstances of the present case those costs would have been limited to one telephone call and one email sent on 7 October 2014 and a modest and proportionate sum preparing and presenting an application for costs. For the reasons set out in paragraph 14 above we would not have allowed any of the legal costs claimed.

Judge John Hewitt

15 October 2014

Schedule

The statutory provisions are as follows:

Tribunals, Courts and Enforcement Act 2007

Section 29 Costs or expenses

(1) The costs of and incidental to–

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party–

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

Rule 13

Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in— (i) an agricultural land and drainage case, (ii) a residential property case, or (iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) 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; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc.) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.