12033

FIRST-TIER TRIBUNAL
PROPERTYCHAMBER
(RESIDENTIAL PROPERTY)

Property	:	19 Fermain Court West, De Beauvoir Estate London N1
Case Number	:	LON/00AM/LVL/2016/0010
Applicant	:	London Borough of Hackney
Representative	:	In House Legal Services
Respondents	:	Mr Roy Derek Fox and Mrs Carol Ann Fox
Representative	:	In person
Type of Application	:	Application for costs under rule 13 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
Tribunal Member	:	(1) Judge Amran Vance (2) Mr M Taylor, FRICS
Date of Decision	:	4 January 2017

DECISION

Decision of the Tribunal

1. The respondents' application for an order for costs is refused.

Introduction

2. At the hearing on 27 October 2016 the respondents sought an order for costs against the applicant under the provisions of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

3. This was an application for variation of the lease of 19 Fermain Court West, De Beauvoir Road, London N1 entered into between the parties and dated 24 July 1989 ("the Lease"). The application is dated 6 July 2016 and in it the applicant sought a variation to the definition of the Block in the second schedule to the Lease. The variation sought was to replace the definition of the Block as "13-26 Fermain Court" with "1-126 Fermain Court". The remainder of the information set out in this section is taken primarily from the background and reasons for the tribunal's refusal of the applicant's request to adjourn the hearing of 27 October.

4. In its statement of case the applicant had contended that the Lease was defective as it meant that the respondents were only liable for costs incurred in respect of the first two floors of the two building which comprise 13-26 Fermain Court as opposed to 1-126 Fermain Court. The applicant requested a variation in accordance with the provisions of s.25(2)(f) Landlord & Tenant Act 1987 ("the 1987 Act") on the basis that this definition affected the computation of the service charge payable to it by the respondents. No witness evidence was adduced by the applicant in support of its application.

5. At the start of the hearing on 27 October 2016 the tribunal was presented with a skeleton argument from counsel representing the applicant, Mr Kilcoyne in which he requested that the application be amended to enable the authority to rely upon s.35(2)(b) of the 1987 Act so as to make satisfactory provision for insurance of all the buildings on Fermain Court because it was considered that at present the applicant was only entitled to recover the insurance premium in respect of 13 – 26 Fermain Court from the respondents.

6. A second amendment was also sought to enable the authority to rely upon section 35(2)(e) of the 1987 Act on the basis the Lease did not satisfactorily provide for sums spent by the applicants on behalf of the respondents to include provision for the applicants to recover the cost of insurance from the respondents.

7. At the start of the hearing the tribunal expressed its concern about the extremely late stage at which requests to amend the application had been made and the lack of any evidence to support the applicant's position that the lease failed to make satisfactory provision in respect of the computation of service charges payable to the applicant. It also expressed concern that nowhere in the hearing bundle was there

any reference to the relevant lease provisions in respect of other long lessees in Fermain Court and this information appeared important in order for the tribunal to be satisfied that the requirements of s.35(4) of the 1987 Act were met so that the tribunal could be satisfied that the aggregate of service charge contributions to be paid by long lessees was either greater or less than the total expenditure to the applicant.

8. Mr Kilcoyne explained that there are 46 long lessees across Fermain Court out of 126 flats. Of those, 14 had leases that defined "the Block" as 1–126 Fermain Court. 32 had leases that had a more limited definition of what constituted the Block and three out of the 32 had similar definitions to the respondents' lease. He conceded that the evidence before the tribunal might not deal with how the requirements of s.35(4) of the 1987 Act were met and requested that the tribunal adjourn the application on directions.

9. After hearing the parties representations in respect of the adjournment the tribunal refused that request for the following reasons:

(i) It appeared to the tribunal that the amendments to the application being requested were so substantive that if the applicant did not want to proceed with its application today a new, properly drafted, application should be made rather than the tribunal issuing directions concerning an amended application when no such amended application or amended lease was before the tribunal. The applicant was now seeking to rely on three additional statutory provisions namely ss.35(2)(a), (b) and (e) in support of its application and sought to make further variations, which Mr Kilcoyne described as minor variations, to the Lease in addition to the variation specified in the application. In the absence of a properly drafted amended application and amended Lease the tribunal did not consider it was in a position to agree to the adjournment request and that do so would not be in accordance with the overriding objective to deal with cases justly and proportionately.

(ii) Paragraph 8 of the tribunal's Practice Direction dated 9 September 2013 requires the applicant, when starting proceedings, under Part 4 of the 1987 Act to ensure that it is accompanied by the documents set out in schedule 8 to that practice direction namely the names and addresses of any person the applicant knows or has reason to believe is likely to be affected by any variation specified in the application together with a draft of the variation sought ad a copy of the lease. In the tribunal's view the interests of other lessees in Fermain Court are likely to be engaged by this application so that it is necessary to give such notice to at least the 32 lessees who have leases with the more limited definition of what constituted "the Block". We say that because we consider there is the potential for this tribunal's decision being of precedent value in respect of future applications to this tribunal for variation of leases or in respect of

applications under s.27A Landlord and Tenant Act 1985 challenging the payability of service charge costs. In addition, if Mr Kilcoyne is correct and the provisions of the respondents lease is inadequate in respect of insurance of the buildings then the same must be true of the other lessees whose leases share the same wording.

(iii) The need for such notice to be given supports our view that rather than adjourning this application the applicant should start afresh if it did not want to proceed with its application today. It seems to us that what the applicant needs to do is to identify a coherent approach to remedy what it sees as defects in a large number of leases in Fermain Court and what impact, if any, modification of these leases, will have on the computation of service charge. A further application can, of course, be made to this tribunal following such consideration and consultation with lessees if agreement to proposed changes is not forthcoming.

10. The tribunal issued directions in respect of the Rule 13 costs application on 27 October 2016. These required the respondents to send to the applicant a statement of case setting out:

(a) The reasons why it is said that the applicant has acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule, dealing with the issues identified in the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC), with particular reference to the three stages that the tribunal will need to go through, before making an order under rule 13 (a copy of the decision accompanied the directions)

(b) Any further legal submissions;

(c) Full details of the costs being sought, including:

- Supporting invoices for solicitor's fees and disbursements;
- Counsel's fee notes (if any)
- If not provided in the solicitor's invoice a schedule of the work undertaken; details of the time spent; and the grade of fee earner and his/her hourly rate;

11. Directions were also given for the applicant to send the respondents a statement in response and for the respondents to be able to provide a short reply. The tribunal indicated that it would determine the matter on the basis of the written representations received unless either party requested an oral hearing. No request for an oral hearing was received and the tribunal therefore determined the application on the papers on 4 January 2017.

The Respondents' Case

12. Although the respondents have submitted a short handwritten statement of case they have not complied with the tribunal's direction to set out details as to why the applicant acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule in the *Willow Court* decision.

13. Their primary contention appears to be that the council acted unreasonably in that it was compelled to withdraw its application at the last minute due to inadequate paper-work. They seek an order for costs in the sum of £850 being the sum they paid to solicitors for legal advice regarding the application. They have provided copy receipts for the payments made to their solicitors, Paradigm solicitors, and a copy of an invoice from the solicitors which simply states that the sum of £708.33 had been charged to them for *"consultation, advice and preparation of witness statement"*.

The Applicant's Case

14. The Applicant's position is that the respondents have failed to provide any reasons as to why it had acted in an unreasonable manner and had failed to address the three-stage test as required by the tribunal. It also asserts that inadequate information has been provided regarding the costs being sought given that no breakdown of the time spent, grade of fee earner or hourly rates is stated on Paradigm Solicitors' invoice. It contends that there is a legitimate dispute between the parties regarding the need for a variation of the existing lease and that it acted in good faith throughout the proceedings

The Law

15. Rule 13 of the 2013 Rules provides as follows:

> *(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.*

16. Rule 13(1)(a) is not relevant to this application as it concerns costs incurred by legal representatives. We need to determine if an order for costs should be made under Rule 13(1)(b). Clarification as to how this tribunal should approach a Rule 13(1)(b) costs application has been provided in the detailed decision of the Upper Tribunal in *Willow Court.* At paragraph 24 of its decision, it approved the guidance given in *Ridehalgh v Horsefeld [1994] Ch 205* which described "unreasonable" conduct as including conduct that is "vexatious, and designed to harass the other side rather than advance the resolution of the case". It was not enough that the conduct led, in the event, to an unsuccessful outcome.

17. It then went on to set out a three stage test for Rule 13 costs orders. The first stage is whether a person has acted unreasonably. This is an essential pre-condition of the power to award costs under the rule. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable. This requires the application of an objective standard of conduct to the facts of the case. The second and third stages involve the exercise of discretion on the part of the tribunal. At the second stage the tribunal must consider whether or not, in the light of the unreasonable conduct identified, it ought to make an order for costs. The third stage is what the terms of the order should be.

Decision and Reasons

18. In the tribunal's view this application fails at the first stage of the test in *Willow Court* as we do not agree that by withdrawing its application the applicant acted unreasonably for the purposes of Rule 13(1)(b). We accept that there is a genuine and substantial dispute of importance between the parties and that it was reasonable for the applicant to issue its application.

19. We do not consider that it was unreasonable for it to withdraw its application. We recognise that the withdrawal was only made on the day of the hearing but we respectfully agree, and follow, the decision of the Upper Tribunal at paragraph 143 of the *Willow Court* decision in which it stated that

> *It is legally erroneous to take the view that it is unreasonable conduct for claimants in the Property Chamber to withdraw claims or that, if they do, they should be made liable to pay the costs of the proceedings. Claimants ought not to be deterred from dropping claims by the prospect of an order for costs on withdrawal, when such an order might well not be made against them if they fight on to a full hearing and fail.*

20. It is our view that the applicant was poorly prepared for the hearing on 27 October 2016. This is evident from the late requests for amendment of the application and the last minute application for an adjournment. It is also clear, from reviewing the tribunal's notes of the hearing, that it was the tribunal's refusal to grant the adjournment that led to the application to withdraw. Whilst we consider that the applicant can be criticised for seeking an adjournment at the last minute we stop short of determining this to amount to unreasonable conduct for the purposes of

this application. This was not, in our view, conduct which was unreasonable in the sense that to was "vexatious, designed to harass the other side rather than advance the resolution of the case" as was referred to in *Ridehalgh v Horsefield.*

21. Even if we had been satisfied that the applicant had acted unreasonably we would not have made an order for costs given the lack of information provided regarding time spent, grade of fee earner and hourly rates..

22. As the Upper Tribunal said at paragraph 62 of its decision in *Willow Court* the residential property division of the First-tier Tribunal is a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs. That is the case with this application.

Amran Vance

Date: 4 January 2017

ANNEX 1 - 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.