3018

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AC/OC9/2014/0119
Property	:	27 Hendon Hall Court, Parson Street, Hendon, London NW4 1QY
Applicant	:	Calabar Estates Limited
Representative	:	Wallace LLP
Respondent	:	Benjamin Hakham
Representative	:	Koster Hanan Herskovic
Type of Application	:	Costs – Rule 13(1)(b) Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
Tribunal Members	:	Judge Robert Latham
Date and venue of Determination	:	24 February 2015 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	26 February 2015

DECISION

The Tribunal makes an order that the Applicant pays the Respondent costs of £2,796 pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Introduction

1. The substantive application is one under section 91 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). On 1 September 2014, the Applicant freeholder issued an application for the determination of the costs payable by the Respondent tenants under section 60(1) of the Act. The Applicant requested an oral hearing, albeit that this Tribunal would normally have dealt with such applications on the papers.

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2. On 29 October 2014, this application was listed for hearing. The Applicant freeholder did not appear. The Respondent was represented by Mr David Herskovic, a partner of Koster Hanan Herskovic, Solicitors. On 26 November, the Tribunal issued its decision. The Tribunal noted that it would normally have dealt with such an application on the papers. This was the proportionate manner to determine such applications. It added that it is always open to a party to request an oral hearing, if satisfied that this is the only fair means of determining an application. What was not acceptable was for a party to insist on an oral hearing and then fail to attend without providing any explanation for their absence.

3. On 23 December 2014, the Respondent made the current application for his costs in attending under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). The Respondent claims:

(i) £1,100 + VAT for the cots of Mr Herskovic attending the oral hearing. His time is charged at £220 per hour. He claims 3 hours preparation for the oral hearing; 1.5 hours attending the hearing and 1 hours travel (at 50% of the hourly rate). The total claimed is £1,320 (inclusive of VAT).

(ii) £1,210 + VAT for preparing and making this application (5.5 hours work) and £20 + VAT for filing it. The total claimed is £1,476 (inclusive of VAT).

4. On 6 January 2015, the Tribunal gave Directions pursuant to which:

(i) On 23 January 2015, the Respondent filed their Statement of Case;

(ii) On 10 February, the Applicant filed their Statement of Case;

(iii) On 17 February, the Respondent filed their Case in Reply.

(iv) On 19 February, the Respondent filed a Bundle of Documents.

Both parties have been content for the Tribunal to determine this application on the papers.

Rule 13 of the Tribunal Rules

5. Rule 13(1)(b) of the Tribunal Procedure Rules provide:

> "(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 .."

6. The Tribunal Procedural Rules have applied since 1 July 2013. They make two significant changes to those previously to be found in Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

(i) The 2002 Act referred to the conduct of a party who had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably" in connection with the proceedings.

(ii) The limit of £500 has been removed. This gives effect to the recommendation made at [105] in the report "Costs in Tribunals" by the Costs Review Group chaired by Sir Nicholas Warren. The Committee suggested that the means of the parties may be a relevant factor in assessing the size of any order. It also noted (at [104]) that the enfranchisement jurisdiction deals with part and party disputes where it may be appropriate for the normal costs-shifting rules to apply. This suggestion has not been implemented.

7. The Tribunal has regard to the guidance provided by HHJ Huckinson in *Halliard Property Co Ltd v Belmont Hall and Elm Court RTM Company Limited* LRX/130/2007; LRA/85/2008 at [36]:

> "So far as concerns the meaning of the words "otherwise unreasonably" I conclude that they should be construed *ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10 behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively or disruptively. I respectfully adopt the analysis of Sir Thomas Bingham MR (as he then was) in *Ridehalgh v Horsefield [1994] 3 All ER 848* as to the meaning of "unreasonable" (see paragraph 13 above) which I consider equally applicable to the expression "otherwise unreasonably" in paragraph 10 of schedule 12 to the 2002 Act. Thus the acid test is whether the behaviour permits of a reasonable explanation."

8. The Tribunal is satisfied that an order for costs should only be made under Rule 13 if on an objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid.

The Background

9. On 1 September 2014, the Applicant freeholder issued their original application for the determination of the costs payable by the Respondent tenants under section 60(1) of the Act. As noted, the Tribunal would normally have dealt with such an application on the papers. The Applicant ticked the box stating that it required an oral hearing. The Applicant explains that it indicated a request for an oral hearing as it was not clear whether written submissions would suffice. It states that if a written determination had been indicated, it would have been held to this election unless it had requested an oral hearing within 14 days of the issue of directions.

10. Wallace LLP states that it is their practice to request an oral hearing in the application where it considers that this may be necessary due to the nature of a

particular case. In this case, there were three superior landlord title interests and the issues may have been complex.

11. Wallace LLP subsequently decided that their presence at an oral hearing would not be necessary. They do not state when this decision was reached. On 28 October, they wrote to the Tribunal indicating that they no longer considered that further oral submissions were necessary. They stated that the documents filed by the parties were both detailed and comprehensive. This letter was faxed to the Tribunal and was received at 16.23.

12. Wallace LLP accepts that a copy of this letter was not faxed to the Respondent. It was rather sent by DX and was received after Mr Herskovic on his return from the Tribunal hearing. They state that this was a secretarial error. The first that Mr Herskovic learnt of this letter was when he was informed of it by the Tribunal. The Respondent notes that most of the correspondence in the matter had been sent by e-mail. This was a notable exception.

13. At about 17.00 on 28 October, Mr Herskovic spoke to Mr Shamin Kashem who had partial conduct of this file on behalf of Wallace LLP. The reason for this call was that the Tribunal had requested an electronic version of the Scott Schedule. Mr Kashem did not inform Mr Herskovic that Wallace LLP no longer intended to attend the hearing.

14. The Respondent contends that the unavoidable conclusion is that this was a deliberate tactic by the Applicant and its advisers intended to cause the Respondent to incur the costs of preparing and attending the hearing, the costs of which would substantially wipe out or substantially reduce any reduction in costs achieved through opposing the application.

15. Wallace LLP denies that their conduct was a deliberate ploy or tactic. They refer to a number of cases where they have requested an oral hearing and have attended.

The Tribunal's Determination

16. Any party appearing before this Tribunal must have regard to the overriding objectives. Any claim for costs must be determined in a proportionate manner. In the current case, the Applicant was seeking legal costs of £2,400 + VAT; disbursements of some £280 and valuer's fees of £850 + VAT. The Applicant was also seeking a determination of the costs payable to an intermediate landlord.

17. The Tribunal is satisfied that such applications for costs should normally be determined on the papers. Each party should be able to set out their case clearly and concisely in their written submissions. The Directions given by the Tribunal are intended to facilitate this. The Tribunal is further satisfied that there was nothing particular in this case that would have required an oral determination.

18. The Tribunal accepts that it is always open to a party to request an oral hearing. However, a party requesting such a hearing must satisfy itself that there

are good grounds for requesting such a hearing, having regard to the overriding objectives in Rule 3 of the Tribunal Rules.

19. What concerns the Tribunal in this case are two factors: (i) the late stage at which the Applicant notified the Tribunal that an oral hearing was no longer required and (ii) their failure to notify the Respondent of their decision. The Tribunal is satisfied that this behaviour is so unreasonable that it is only fair and reasonable to compensate the Respondent for their legal costs occasioned thereby.

20. On 8 October 2014, the Applicant filed their Statement in Reply. At this stage, Wallace LLP should have been in a position to make an informed decision as to whether there was still a need for an oral hearing. On 15 October, Wallace LLP sent the required hearing bundles to the Tribunal. Fewer bundles would have been required, were the matter to have been determined on the papers. This is the latest date by which Wallace LLP should have reviewed whether on oral hearing was required. Having concluded that an oral hearing was no longer required, Wallace LLP should have promptly informed both the Tribunal and the Respondent.

21. If one party has requested an oral hearing, the other party is almost bound to attend. We accept Mr Herskovic's evidence that he would not have attended had he been alerted in due time. Because he was not so alerted, he had to prepare for an oral hearing and attend the Tribunal.

22. We do not accept the Applicant's argument that there was no obligation on them to notify the Respondent that they would not be attending. It was the Applicant who had initially requested an oral hearing. In these circumstances, Wallace LLP must have known that Mr Herskovic was likely to attend unless notified that they would not have been attending. Rule 3 place a positive duty on the parties to help the Tribunal to further the overriding objectives and co-operate with the Tribunal generally. This involves avoiding unnecessary expense both to the parties and to the Tribunal. The Tribunal must be able to determine disputes in the most cost effective manner. This is particularly important given current financial restraints.

23. Neither does the Tribunal accept the Applicant's argument that their non-attendance was actually to the benefit of the Respondent. The Tribunal notes that Wallace LLP has not addressed Mr Kashem's failure to inform Mr Herskovic of their decision not to attend during the telephone conversation at 17.00 on 28 October.

24. It is not necessary for the Tribunal to make a finding on whether Wallace LLP's initial request for an oral hearing was motivated by a desire to secure a tactical negotiating advantage. The evidence before us is insufficient to justify such a finding.

25. The Respondent is claiming £1,100 (4.5 hours + travel) for preparing and attending the hearing. The Applicant does not dispute the hourly rate of £220. The Tribunal does not accept the Applicant's argument that three hours preparation would have been required in any event had the matter been determined on the papers. By 15 October, the application bundles had been sent to the Tribunal.

Additional preparation was required for the oral hearing, particularly given the size of the bundle and the 8 previous tribunal decisions that had been included by the Applicant.

26. The Respondent is also claiming the additional sum of £1,210 for preparing and making this application. The Respondent argues that any decision to refuse this would make a Rule 13 application almost academic since the size of the award would be substantially reduced, if not negated altogether, by the cost of the application. The Tribunal agrees. Rule 13(6) provides that a Tribunal may not make an order for costs without first giving the paying person the opportunity to make representations. The Tribunal is satisfied that this application has been made in a proportionate manner and that these costs flow from the unreasonable conduct of the Applicant in failing to notify the Respondent of their decision that an oral hearing was no longer required to the original claim.

Judge Robert Latham,

26 February 2014