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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2014/0112/0113/ 0114/0115**
Property	:	**Flats 2 & 3, 1 Palace Gate, London W8 5LS**
Applicant	:	**Winchester Park Limited**
Representative	:	**Pemberton Greenish LLP**
Respondent	:	**Wayland Investment Inc. Flat 2** **Mr Raymond Sehayek &** **Mrs Daphina Sehayek Flat 3**
Representative	:	**Collyer Bristow LLP**
Type of Application	:	**Application for Costs**
Tribunal	:	**Judge Dickie** **I Thompson, FRICS** **A Ring**
Date of Costs Hearing	:	**2 October 2015**
Date of Decision	:	**13 November 2015**

DECISION

Summary of Decision

The application for costs is out of time. The application to extend time to bring the application is dismissed.

The tribunal will issue an Order consenting to the withdrawal of the Applicant's application for costs on condition that the Applicant pay the Respondents costs on that application, to be summarily assessed.

Introduction

1. Following the issue of the tribunal's decision on the substantive applications on 4 March 2015, the tribunal received an application on behalf of the Respondents on 9 June 2015 for an order under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 "the 2013 Rules" for costs to be payable by the Applicant.

2. The tribunal then received an application dated 31 August 2015 from Mr Mahpud as Director of Number 1 International on behalf of the Applicant for an order for costs to be payable by the Respondents.

3. Prior to the costs hearing that took place on 2 October 2015 the Applicant appointed solicitors Pemberton Greenish LLP, who by a letter dated 28 September 2015, gave notice of their intention to withdraw the application for costs. By a letter dated 1 October 2015 the Respondents' solicitors expressed their consent to that withdrawal, subject to the Applicant paying the Respondents' costs incurred in respect of the Applicant's costs application. A costs schedule was produced with that letter by Respondents' solicitors Collyer Bristow for a total of £2,655.00 inclusive of VAT.

4. At the costs hearing the Applicant was represented by Mr Howard Lederman of counsel and the Respondents by Mr Daniel Dovar of counsel. At the same hearing the tribunal also considered an application by the landlord under s.20ZA for dispensation from statutory consultation. Its decision on that application is to be issued separately.

5. The Respondents did not produce for the costs hearing a Summary of Costs in the s.27A proceedings, or specify the amount of costs in respect of which an order was sought. Mr Dovar sought an order for costs to be subject to detailed assessment. After the hearing, the tribunal issued directions requiring the Respondents to file and serve a summary of costs, and for the Applicant to make written submissions thereon. The parties complied with these directions, though the Respondents' solicitors objected that the Applicant's submissions went beyond those permitted, and went to the issues in the application.

The Law

6. So far as is relevant, Rule 13 provides:

> Orders for costs, reimbursement of fees and interest on costs
>
> (1) The Tribunal may make an order in respect of costs only—
>
> (a) ...
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
>
> (i) ...

(ii) a residential property case, or

(iii) ...

...

(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.

The Preliminary Issue

7. Shortly before the costs hearing, the Applicants raised a point concerning the Tribunal's jurisdiction to make an order for costs under Rule 13.

8. At the hearing of the substantive application under s27A and in subsequent written submissions, the parties reserved their positions with regard to costs and fees (as the tribunal recorded in paragraph 49 of its decision), but it was not in dispute that no application for costs

was made during the course of that hearing and the tribunal has no record of such an application having been made orally or in writing. Pursuant to Rule 13(5), therefore, an application for costs must be made within 28 days after the date when the tribunal sends the decision notice which finally disposes of all issues in the proceedings.

9. The Respondents' application for costs was made by letter of 8 June 2015, received considerably more than 28 days after the date of the decision of 3 March 2015 (which was sent to the parties under cover of a letter dated 4 March 2015).

10. Mr Lederman for the Applicant therefore submitted that the tribunal had no jurisdiction to consider the application for costs at it had been made out of time. Mr Dovar made an oral application at the hearing for the tribunal to extend time for bringing that application for costs, pursuant to its powers under Rule 6(3)(a). Having considered that application to extend time, the tribunal has decided to refuse it. It accepts Mr Lederman's submission that the application for costs is out of time and dismisses it. The tribunal's reasons are as follows.

11. Mr Dovar was unable to advance a good reason for the Respondents having failed to comply with the 28 day deadline. It appears to have been an oversight. The parties became locked in dealings arising from the Applicant's interpretation of the tribunal decision (though no questions concerning its interpretation could coherently be conveyed on behalf of the Applicant to the tribunal at the hearing).

12. The tribunal considered the procedural history of the matter after its decision of 3 March 2015 was issued. The tribunal granted an application by Mr Mahpud to extend the Applicant's time in which to seek permission to appeal. Notwithstanding this extension, the Applicant did not bring an application for permission to appeal, and time expired for doing so on 24 April 2015.

13. In its letter of 8 June 2015 making an application for costs, the Respondents' solicitors also sought clarification and correction of the decision as a credit of £3,323.06 referred to in paragraph 42(c) of the decision has not been included in the Schedules to it. The tribunal notified the parties on 14 July 2015 that there was no error in the decision and declined to issue a correction certificate under Rule 50.

14. The tribunal does not consider that these circumstances mitigate the Respondents' delay in applying for costs, and in any event, its application came more than 28 days after the deadline for the Applicant to seek permission to appeal had expired, and the litigation could thus no longer have been considered live.

15. Mr Dovar argued that the proceedings were still extant, since they were commenced in the County Court with claims for service charges, costs and interest, and some for ground rent, and transferred by virtue of an order of the County Court dated 24 February 2014 that "Case numbers

.... are transferred to the First Tier Tribunal – Property Chamber for determination."

16. The tribunal does not accept this argument, however, since "all issues in the proceedings" in Rule 13(5)(a) must mean all issues in the proceedings in relation to which the First Tier Tribunal has jurisdiction. As Mr Lederman observed, "the proceedings" in Rule 13(5)(b), and its jurisdiction in relation to these transferred applications was in relation to the determination of service charges. The tribunal reached a decision on all service charge items in dispute. No issues for the tribunal remain. The directions on the substantive applications identified the issues for the tribunal which have been determined in the decision of 3 March 2015. It was common ground that the application for costs and interest would be considered in the County Court upon transfer back of the proceedings. There had been no application under s.20C of the Act.

17. Mr Dovar argued, alternatively, that the Applicant was estopped by convention from asserting that the tribunal had no power to hear the costs application as it was out of time. The Applicant had made full written submissions in response to the application for costs and in accordance with directions, but had not raised the time point. It only did so just before the hearing.

18. The tribunal does not accept that the Respondent has been prejudiced by virtue of the Applicant having been late in raising the time issue. The hearing would have taken place in any event (since doubtless the Respondents would have made an application to extend time). The tribunal accordingly does not accept that any estoppel can have arisen by virtue of the Respondent having altered its position. In any event, the lateness of the application is a matter affecting the tribunal's jurisdiction, and an order for costs and the extension of time are matters for its discretion. These matters cannot be restricted by such conduct of the parties.

19. Mr Lederman submitted that the tribunal should not exercise its power to extend time in this case. The overriding objective required the tribunal to act proportionately and avoid delay. The Respondents had not produced a Summary of Costs and therefore additional tribunal resources would be required in conducting a detailed assessment, in relation to which it is likely that a further hearing would be required. Thereafter, only once the totality of the costs claimed was identified, could the tribunal properly exercise its discretion as to whether and in what amount to order costs. The additional costs in following this course to its conclusion ought not to be forced upon the Applicant in the circumstances.

20. Mr Lederman invited the tribunal to consider the principles applying when the court considers a sanction for breach of a deadline in the Civil Procedural Rules (*Denton v TH White* [2014] 1 W.L.R.). However, the tribunal observed that the question of sanctions for late compliance in

the Upper Tribunal had been considered in *Leeds CC v HMRC* [2014] UKUT 0350. The Upper Tribunal was found that the *Denton* principles were not applicable since the overriding objective in its procedural rules was materially dissimilar to Rule 3.9 of the Civil Procedure Rules, and that the alternative (and prior) approach in *Data Select v HMRC* [2012] UKUT 187 should apply, in that the tribunal should consider all of the circumstances of the case including the overriding objective. The overriding objective of this tribunal, as set out in Rule 3 of the 2013 Rules, is for all material purposes identical to that of the Upper Tribunal, and accordingly it is satisfied that it should follow the decision in *Leeds CC.*

21. The tribunal accepts Mr Lederman's general position that there has been a very significant delay in bringing this application, without good reason, and that the Respondents have at all times been expertly legally represented by specialists in the field. The length of delay in the circumstances was gross and, where as here there is no good excuse for that delay, the tribunal should be slow to excuse a failure to comply with deadlines. The purpose of the short 28 day time limit includes ensuring finality to costs litigation and that it takes place while the substantive proceedings are fresh in the mind. Granting the application to extend time will lead to a detailed assessment procedure, since the Respondents have provided such scant detail on costs that summary assessment would be difficult. The substantive service charge application has been determined, and justice has thus been had. What is at stake is an order from this tribunal for costs, which is in any event a discretionary order. The tribunal is satisfied that the circumstances of this case do not justify an extension of time.

The substantive application

22. In light of the tribunal's decision not to extend time for bringing this application for costs, the decision it would have reached if it had jurisdiction to consider the application becomes irrelevant. However, the tribunal has considered it appropriate in the circumstances to give an indication to the parties as to the decision it would have reached on the application had it been considered.

23. The Respondents' costs application followed a hearing which lasted four days (plus an ineffective hearing on 10 September 2014 which was adjourned by oral application that day) to determine the payability of service charges for the years ending 2011 to 2014. The Applicant claimed around £50,000 in respect of each of the two subject flats. On the Respondents' calculation as a result of the determination, their service charge accounts are substantially in credit.

24. The Respondents in approaching the word "unreasonably" in Rule 13 invited the tribunal to bear in mind (following *Halliard Property Co. Ltd. V Belmont Hall and Elm Court RTM Co. Ltd.* LRX/130/2007 and *Ridehalgh v Horsefield* [1994] 3 All ER 848):

1. It is intended to cover behaviour which does not permit a reasonable explanation.
2. It includes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case;
3. conduct cannot be described as unreasonable simply because it leads to an unsuccessful result.

25. In considering the application, the Respondents asked the tribunal to treat the conduct of Mr Mahpud as that of the Applicant and the tribunal would have been satisfied that it should do so. Though at various times he sought to distance himself from the Applicant and maintain that he was simply the managing agent, it is clear (for example from his request for permission to give instructions to new legal representatives during the period of the adjournment, when he was still under cross examination) that he was and is the controlling mind of the Applicant. The tribunal refers to its comment at paragraph 10 of its decision. Mr Mahpud has been a director of the Applicant since September 2013, and no other person has been put forward as providing instructions on behalf of the Applicant. He was also at the material time the director of the managing agent.

26. The Respondents accordingly considered the following to be grounds for an order for costs against the Applicant:

Mr Mahpud's general conduct.

27. The tribunal was unimpressed with Mr Mahpud as a witness. It remarked in paragraph 15 of the decision:

"The tribunal found considerable difficulty in following Mr Mahpud's line of thinking in respect of a number of aspects of management of the building, issuing demands, accounting and preparation for these proceedings. The tribunal found that he often gave repetitive and occasionally incoherent answers to questions. The tribunal's overall impression was that Mr Mahpud had not fully grasped the mechanics of administering the service charge account and managing the building professionally. Even with the assistance of counsel, it was a challenge for the tribunal to draw from the documentation before it, numbering some 1200 pages, the evidential matrix relating to the items in dispute."

28. The tribunal would have accepted the Respondents' position that Mr Mahpud's approach to the proceedings had been evasive and caused delay. His evidence lasted for two days given his frequent inability to provide a coherent response to questions.

29. The Respondents in addition submitted that Mr Maphud was also responsible for delay, wasted costs and an abortive hearing due to his inability to attend the hearing listed for 10 September 2014, but provided no detail of the circumstances. This adjournment had been due to his wife having not travelled earlier in her pregnancy to London

to deliver her baby, and being prohibited on medical advice from travelling at a late stage. It appears that the Respondents did not seek to place great emphasis on these circumstances in their application for costs The tribunal did not consequently hear further evidence about them and would not have made an order for costs arising from this adjournment.

30. The Respondents also referred to the Applicant's conduct in these proceedings prior to their transfer to the First Tier Tribunal. However, the tribunal considers such conduct does not fall within the meaning of conduct "in the proceedings" for the purposes of Rule 13.

31. The Respondents relied on the concession not given until day one of the hearing in relation to the credit to the Respondents' service charge account of £10,000 as agreed between the parties in previous tribunal proceedings.

32. The tribunal considered that Mr Mahpud's conduct in giving evidence had not just been limited to incompetence or incoherence, but had been intended to avoid giving straightforward answers. His evidence being more than just confused, but also disingenuous, the tribunal would have considered it appropriate to make an order for costs for some of the additional hearing time necessitated to deal with Mr Mahpud's evasiveness in giving oral evidence.

Fabrication of section 20 consultation

33. The tribunal recorded that the Respondents' case in respect of the statutory consultation process allegedly carried out by Number 1 International was that the consultation documents were a sham. The tribunal in paragraph 32 of its decision said:

"Having carefully considered the evidence, the tribunal was not persuaded that it was likely that such notices were served contemporaneously. The tribunal's reservations, expressed elsewhere in this decision, about the Respondent's hearsay only evidence as to what correspondence had been received, were not sufficient to satisfy it that the Number 1 International s.20 notices had indeed been served."

34. The tribunal went on (in paragraph 35) to find that the evidence did not support Mr Mahpud's case that he had in fact issued a s.20 notice, as he claimed.

35. Mr Lederman suggested that the wording of the tribunal's decision did not indicate that it had concluded that Mr Mahpud had lied. However, the only finding the tribunal needed to reach was whether there had been compliance with the consultation requirements. Unlike Mr Dovar and the tribunal, Mr Lederman did not have the advantage of having been present during the substantive hearing. Mr Mahpud's name appeared on the purported s.20 notice. The tribunal having heard his

oral evidence and considered the conflicting documentary evidence and testimony of the Respondents' witnesses, and for the avoidance of doubt, is satisfied that Mr Mahpud lied in evidence as to the issue of the s.20 consultation notices. The tribunal had no difficulty in rejecting his evidence as to those notices as lacking credibility and inconsistent. These notices were a sham which was maintained throughout the proceedings and hearing, and the tribunal would have considered these circumstances as justifying an order for costs against the Applicant.

Failure to credit sums paid by the Respondents

36. The tribunal was satisfied that, without good reason, Mr Mahpud had failed to account for certain payments to the Respondents' service charge accounts, as set out in the decision, and made a serious but unsupported allegation of dishonesty against the former managing agent Mr Fattall. The tribunal considers that this is unreasonable conduct which would have justified an order for costs against the Applicant, who had wasted time throughout the proceedings and at the hearing, without rational reason for maintaining its position.

Failure to engage with the single joint expert

37. The Respondents sought costs in respect of the delay caused by the Applicant's failure to engage with the single joint expert, and in seeking an adjournment at the hearing on 14 and 15 July 2014 to put further questions to the expert. The failure to engage with the expert was properly reflected in the Respondents' position in respect of the electricity charges being accepted by the tribunal. Whilst the Applicant's conduct was unreasonable, and could have justified an order for costs, the additional time taken up in dealing in cross examination with the expert on issues which had not been raised prior was not substantial – it was perhaps not more than an hour.

Failure to produce insurance documentation

38. The tribunal would not have been minded to make an order for costs against the Applicant in respect of its failure to produce insurance documentation. Whilst the Respondents have continuing concerns that the Applicant left the building uninsured for periods of time, and failed to produce sufficient documents in the proceedings, the tribunal determined that service charges in respect of insurance were payable continuously throughout the period in dispute on the basis of the available documentation.

Conclusion

39. The tribunal had the benefit of sitting over four days to hear the substantive application. It would have taken an overall view of the additional time and costs taken up in dealing with the unreasonable conduct of Mr Mahpud and the Applicant. Taking into account all of the matters discussed above, if it had considered the application for

costs it would have granted it, and made an order for costs of one day of the hearing plus some preparation (though not proportionate preparation since it was Mr Mahpud's evasiveness orally which particularly characterised his unreasonable behaviour and caused delay).

The application to withdraw the Applicant's application for costs.

40. The tribunal considers that the application for costs made by Mr Mahpud of Number 1 International was wholly without merit. Given the outcome of the proceedings under s.27A, it is difficult to discern any reasonable grounds for having made this application, or that Mr Mahpud, even when unrepresented, could have sensibly considered it possible that he would have obtained such an order. Whilst the tribunal acknowledges Mr Lederman's submissions that a party who thus acts on legal advice and reduces the issues in dispute should not be penalised in costs, the tribunal finds it entirely appropriate in the present case that the Respondents should have their costs of preparing a response to Mr Mahpud's hopeless application which was unreasonably brought. It accordingly grants the application for withdrawal on terms that the Applicant pay the Respondents' costs, to be summarily assessed, and the subject of an Order to be issued to the parties.

The Parties

41. An issue arose as to the identity of the proper parties to the substantive and costs application, since it transpired that in July 2014 the registered proprietor of flat 3 became Henry Sehayek and Dalia Noonoo. The pervading view was that the tribunal could not amend the parties to proceedings transferred from the County Court, but it invited counsel to consider the terms of any appropriate order. The parties have permission to apply to the tribunal within 14 days of the date of issue of this decision for any such order.

F. Dickie 13 November 2015