4298

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/OC9/2016/0379 & LON/OOAZ/OLR/2016/0113**
Property	:	**FFF, 1 Medusa Road, Catford, London, SE6 4JW**
Applicant	:	**Victor Batorijs**
Representative	:	**Royds Withy King, Solicitors**
Respondent	:	**Ajay Kumar Anand**
Representative	:	**Cheal Asset Management Ltd**
Type of Applications	:	**(1) Section 91 of the Leasehold Reform, Housing and Urban Development Act 1993** **(2) Costs – Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Members	:	**Judge I Mohabir** **Mr W R Shaw FRICS**
Date and venue of Decision	:	**4 October 2016** **10 Alfred Place, London WC1E 7LR**

DECISION

Introduction

1. The Applicant makes two applications in these proceedings. These are:

   (a) an application under section 91 of the Leasehold Reform, Housing and Urban and Development Act 1993 (as amended) ("the Act") (as Respondent under section 60 of the Act for the grant of a new lease in relation to the property known as First Floor Flat, 1 Medusa Road, Catford, London, SE6 4JW ("the property").

   (b) an application under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("Rule 13") for an order for costs against the Respondent that he, through his representative Mr Kumar, had acted unreasonably in the conduct of the proceedings relating to the grant of a new lease for the property.

2. It is sufficient to note that both applications arise out of the earlier application made by the Applicant to determine the premium he had to pay to the Respondent for the grant of a new lease in relation to the property ("the lease extension proceedings").

3. The landlord's statutory costs claimed under section of the Act are £6,760.

4. The costs claimed by the Applicant under Rule 13 are £15,660 including VAT and disbursements.

Relevant Statutory Provisions

5. Section 60 of the Act provides:

Costs incurred in connection with new lease to be paid by tenant.
(1) Where a notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely—
(a) any investigation reasonably undertaken of the tenant's right to a new lease;
(b) any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56;
(c) the grant of a new lease under that section;
but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

(2) For the purposes of subsection (1) any costs incurred by a relevant person in respect of professional services rendered by any person shall only be

regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) Where by virtue of any provision of this Chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then (subject to subsection (4)) the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

(4) A tenant shall not be liable for any costs under this section if the tenant's notice ceases to have effect by virtue of section 47(1) or 55(2).

(5) A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before a leasehold valuation tribunal incurs in connection with the proceedings.

(6) In this section "relevant person", in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter, any other landlord (as defined by section 40(4)) or any third party to the tenant's lease.

6. Rule 13(1) provides that:

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) ...
(ii) ...
(iii) a leasehold case."

Decision

7. The hearing in this case took place on 4 October 2016. The Applicant and Respondent were represented by Mr Bates and Mr Cuninghame respectively, both of Counsel.

Section 60 costs

8. Mr Bates, for the Applicant, referred the Tribunal to *inter partes* correspondence to demonstrate the confusion about who the correct Respondent should be in these proceedings and the qualifications of Mr

Kumar who has acted as his representative and valuer in the lease extension proceedings.

9. Mr Bates also pointed out that the Tribunal placed no reliance on the valuation evidence given by Mr Kumar in the lease extension proceedings and contended that it had provided no value at all.

10. Mr Bates submitted that if the reasonable paying party test is to be satisfied then only an hourly rate of £19 should be awarded in respect of the costs incurred by Mr Kumar's conduct of the lease extension proceedings on behalf of the Respondent.

11. Mr Bates then took the Tribunal through the Respondent's breakdown of costs and made submissions on which items should be disallowed or reduced, effectively as a detailed assessment of the costs. In conclusion, he submitted that the Respondent's section 60 costs that should be allowed overall should be approximately £1-1,500.

12. Mr Cuninghame, for the Respondent did not make any submissions in relation to the Respondent's section 60 costs.

13. The Tribunal raised the potential issue with Counsel about whether the indemnity principle had been breached in relation to the Respondent's costs given that there was no evidence that Mr Kumar had a retainer with the Respondent or what his charging rates are. Mr Bates made limited submissions on the point, which is dealt with below by the Tribunal.

14. It is right that a degree of confusion has been caused on the part of the Applicant (and the Tribunal) as to who represents the Respondent in these proceedings. Correspondence has variously been written on his behalf by Cheal Asset Management Ltd, KPLA & Co and or Mr Kumar, whether in person on behalf of the Respondent or the other companies. It is common ground that the Respondent, Mr Kumar and other personnel of the companies are in fact all family members dealing with property investment. Nevertheless, it is Mr Kumar's stated position that he is an employee of KPLA & Co, which is the managing agent instructed by the Respondent.

15. Both Counsel agreed that the indemnity principle applied to a landlord's entitlement to recover its costs under section 60 of the Act. However, the entitlement is limited in its scope to the statutory criteria in subsection (1)(a) to (c).

16. In the Upper Tribunal (Lands Chamber) in ***Metropolitan Property Realizations Ltd v Moss*** (LRA/149/2012) it was held at paragraph 26 of the judgement that the absence of a client care letter or some evidence of a retainer by a solicitor acting on behalf of the landlord was not fatal to recovery of any costs incurred by the solicitor. The Deputy President, Martin Roger QC, went on to say that a Tribunal had to consider all of the evidence before it and

ask if, on balance, a contract existed between the landlord and its solicitors, which obliged the landlord to make payment for legal services supplied.

17. In ***Columbia House Properties (No.3) Ltd v Imperial Hall Freehold Ltd*** (LRX/51/2014), it was held at paragraph 11 of the judgement that the scope of costs recoverable for professional services provided to a landlord under section 33 of the Act also included the costs incurred by a managing agent. Although this decision concerned a collective enfranchisement case, the statutory provisions of section 33 and section 60 of the Act do not materially differ.

18. Applying the same reasoning in the above decisions of the Upper Tribunal to the present case, the Tribunal was satisfied that the absence of any evidence of Mr Kumar's retainer by the Respondent or the fact that he acted in his capacity as either a valuer or on behalf of the managing agent was not, in principle, a bar to recover the costs claimed as having been incurred by him on behalf of the Respondent in the lease extension proceedings.

19. As to the quantum of the Respondent's costs, the Tribunal accepted the submission made by Mr Bates that Mr Kumar's valuation and proposed draft lease had little value. A reading of the papers in this case reveals that despite Mr Kumar's professed 25 years experience in property matters, he did not possess the requisite technical knowledge in the area of law. This was evident from the errors in the terms of the new lease drafted by him and his flawed valuation.

20. It follows, therefore, that the hourly rate of £240 claimed by Mr Kumar was not appropriate for the services provided by him. However, for the reason stated earlier, the Tribunal was satisfied that KPLA & Co and/or Mr Kumar had provided professional services to the Respondent, albeit in a limited way. Consequently, the Tribunal did not accept Mr Bates' submission that the hourly rate of £18 for a litigant in person was appropriate.

21. The question before the Tribunal was what hourly rate should be applied for the provision of KPLA & Co and/or Mr Kumar's services? There was no such evidence and, in the absence of such, it would be an entirely arbitrary exercise by the Tribunal to adopt an alternative figure.

22. The Tribunal, therefore, concluded that a detailed assessment approach to the assessment of the Respondent's costs was inappropriate in these circumstances. Instead, the Tribunal, having regard to the totality of the evidence before it, summarily assessed the Respondent's section 60 costs at a global figure of £1,500 including VAT and disbursements (if any) as being reasonable.

Rule 13 Costs

23. It was common ground between the parties that for any application under Rule 13 to succeed, the 3 stage test set out in the Upper Tribunal decision of ***Willow Court Management Co Ltd v Alexander*** [2016] UKUT 0290 (LC) and conjoined appeals has to be satisfied. These are:

    (a) firstly, a Tribunal has to find that a person has acted unreasonably;

    (b) if so, secondly, a discretionary power is then engaged and a Tribunal has to go on to consider whether, in the light of the unreasonable conduct, it ought to make an order for costs or not;

    (c) if so, thirdly, what the terms of the order should be.

24. Mr Bates submitted that the Respondent had acted unreasonably in a number of ways. The material complaints were he had instructed unqualified representatives to deal with the lease extension proceedings despite Mr Kumar's assertion that he had "25 years experience" and then purported to charge an hourly rate of £240 commensurate with a firm of solicitors with knowledge and experience in this area of work. This had not been demonstrated.

25. In addition, the Respondent, through Mr Kumar, had adopted a difficult approach during lease negotiations and had produced a draft lease that was flawed and inappropriate. Mr Bates pointed out that Mr Kumar had been previously criticised by this Tribunal for the same conduct in the case of ***Rizk v Anand*** (LON/00AJ/OLR/2016/0347) where had taken the same stance in relation to the draft lease terms.

26. Furthermore, it was submitted that the Respondent had failed to accept a better offer in settlement, which could have avoided the additional costs incurred by the Applicant by having a contested hearing. It is perhaps convenient for the Tribunal to deal with this submission here.

27. In effect, what the Applicant is seeking to do is to import concepts found in Part 36 of the Civil Procedure Rules into what could properly be regarded as unreasonable behaviour by a party to proceedings. To accede to this submission would, in the Tribunal's judgement, unnecessarily widen the scope of what conduct could be regarded as being unreasonable. In this area of work, offers and counter offers are routinely made by parties in an attempt to reach a settlement. If this was potentially to be regarded as amounting to unreasonable conduct it could have the effect of not only limiting or frustrating negotiations and would almost inevitably result in technical and unrealistic points being taken by one party or the other when costs fall to be considered with further costs being incurred. Moreover, the Tribunal accepted the submission made by Mr Cuninghame that the Tribunal was not a cost shifting regime in this regard. For these reasons this submission fails.

28. Finally, Mr Bates submitted that evidence of Mr Kumar's unreasonable conduct was found in the failure to produce an acceptable valuation. He pointed out that the same approach taken by Mr Kumar had been also criticised by another Tribunal at paragraphs 22 and 23 in the case of ***Groves & Anor v Anand*** (LON/00AC/OCE/2015/0129).

29. For the above reasons, Mr Bates submitted that an order for costs under Rule 13 should be made and the costs should be made on an indemnity basis after March 2016. When it was put to him by the Tribunal, he contended for gross costs of £10-12,000 by way of set off against the Respondent's section 60 costs.

30. In summary, Mr Cuninghame submitted that it was not unreasonable conduct for the Applicant not to seek legal or valuation advice or representation, especially in a forum such as this. Similarly, negotiations about the draft lease terms could not be regarded as unreasonable conduct and weight should be attached to the fact that the Respondent is not a lawyer. There is no obligation on him to be represented by a firm of solicitors.

31. The Tribunal accepted the further submissions made by Mr Cuninghame that pre-litigation conduct regarding the validity of the Applicant's section 42 notice and difficulties in communicating with the Respondent within the context of this case did not meet the threshold of unreasonable behaviour of the ***Willow*** stage one test.

32. In conclusion, Mr Cuninghame submitted that the Respondent's conduct generally could not be regarded as being unreasonable to satisfy the ***Willow*** stage one test and, therefore, the exercise of the Tribunal's discretion under stage 2 was not engaged and so no order for wasted costs could be made against him.

33. Having carefully considered the evidence in this case, the Tribunal was satisfied that the Respondent, through the conduct of KPLA & Co and/or Mr Kumar had acted sufficiently unreasonably to satisfy the ***Willow*** stage one test. The Tribunal reached this conclusion for the following reasons.

34. The stance taken by Mr Kumar regarding the terms of the new lease was wholly without regard to the statutory provisions of the Act. He maintained that stance up to and including the lease extension hearing. This undoubtedly resulted in significant additional wasted costs being incurred by the Applicant's solicitors.

35. Despite Mr Kumar professing to have "25 years experience" in property generally, his statutory valuation prepared in the lease extension proceedings had not been prepared in accordance with the statutory assumptions required by the Act. It was simply opinion based and contained no proper analysis of the valuation evidence he relied on. Again, the Applicant's solicitors would have incurred additional wasted costs in having to meet what was a misconceived valuation report.

36. Materially, the conduct of KPLA & Co and/or Mr Kumar in this case was similar to the conduct he had taken in the two earlier Tribunal cases referred to above and for which he had also been criticised. Whilst, strictly speaking, this conduct did not occur in these proceedings, it demonstrates a course of conduct, which has remained unchanged despite the forbearance exercised by the previous Tribunals and, therefore, informs the decision in this instance. In the Tribunal's judgement, it cannot be just or equitable for KPLA & Co and/or Mr Kumar to continue to conduct proceedings generally in this way which has resulted, in this case, in the Applicant unnecessarily incurring additional wasted costs without consequence. Such conduct must be regarded as being sufficiently unreasonable to require a costs order to me made under Rule 13 now under the ***Willow*** stage two test.

37. As to the terms of the order, Mr Bates contended for wasted costs of £10-12,000. Mr Cuninghame contended for a figure of £5,000. Ordinarily, a tenant would expect to incur costs of approximately £2,500 to £3,500 excluding VAT and disbursements for what could be regarded as a "straightforward" lease extension transaction. In the Tribunal's judgement this was such a case and it was without complexity. By reason of KPLA & Co and/or Mr Kumar's conduct, the Applicant was required to incur the additional litigation costs in the lease extension proceedings and, ultimately, in having to make these further applications to the Tribunal.

38. In assessing what additional wasted costs should be paid by the Respondent, the Tribunal adopted a summary assessment approach permitted by Rule 13(7)(a). The Tribunal assessed the wasted costs to be £9,000 plus VAT and disbursements, which are to be set off against the Respondent's section 60 costs and paid within 28 of service of this decision on the parties.

Judge I Mohabir

9 November 2016