12698

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UD/LSC/2017/0020**
Property	:	**The Chapel, Abbey Place, Faversham, Kent ME13 7BG**
Applicants	:	**Erica Moshiri, Brian Monk, Richard Boxall, Anne Juliet Besley & Tim Rouy**
Representatives	:	**Richard Boxall & Mrs Elu**
Respondent	:	**Floorweald Limited**
Representative	:	**Richard Davidoff of ABC Management**
Type of Application	:	**Costs under Rule 13**
Tribunal Members	:	**Judge Paul Letman** **Mr Richard Athow FRICS**
Date and venue of Hearing	: :	**23 October & 12 December 2017** **Ashford Trial Centre & Hotel**
Date of Decision	:	**06 April 2018**

DECISION WITH REASONS

The Parties

1. The Applicants are each owners of the long leasehold interests in the residential units contained with premises known as and situate at The Chapel, Abbey Place, Faversham, Kent ME13 7BG ('the Property'). Erica Moshiri is the lessee of flat 1, Brian Monk lessee of flat 2, Mr Boxall lessee of flat 3, Juliet Besley of flat 4 and Tim Rouy of the live/work house known as flat 6. The Respondent is the Applicants' landlord and freehold owner of the Property.

2. By application in form Leasehold 3 (undated) the lessees sought a determination under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') of their liability to pay and the reasonableness of various service charges in respect of the service charge years 2014/15, 2015/16, 2016/17 and the current year 2017/2018. The application included a request for an order under section 20C of the Landlord and Tenant Act 1985.

3. The above applications were determined by this tribunal by decision (with reasons) dated January 2018. The Tribunal disallowed a number of significant items of charge levied by the Respondent and made a direction under section 20C that the Respondent's costs of the application should not be added to the service charge costs.

The Costs Application

4. The Applicants now apply by submission dated 13 February 2018 for an order for costs pursuant to Rule 13 against the Respondent. Directions were made for the Respondent to reply to the application but no response has been received as directed or at all. The Tribunal assumes nonetheless that the application is opposed, indeed it must itself be satisfied of the grounds for making any order, and proceeds accordingly to determine the application.

The Jurisdiction

5. The tribunal's jurisdiction to make orders for costs under Rule 13 of the Tribunal's Rules is, in so far as is presently material, as follows:

> '13. (1) The Tribunal may make an order in respect of costs only –
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> (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 –
> (ii) a residential property case...'

The tribunal's jurisdiction under section 29(4) of the Tribunal Courts and Enforcement Act 2007 is to make orders for costs wasted as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative of a party and in so far as relevant we include consideration of this jurisdiction in our deliberations below (whether separately referred to or not).

6. As to the test of whether a party or its representative has acted unreasonably, this has been comprehensively reviewed by the Upper Tribunal (UT) in *Willow Court Management Company (1985) Limited v Alexander* & others. In that case the UT approved the guidance in *Ridehalgh v Horsefield* [1994] 3 All ER 848, the well-established lead authority on the wasted costs jurisdiction, with regard to making any costs orders under Rule 13(1)(b).

7. Thus, the UT accepted that 'Unreasonable ... aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case' (as stated by Lord Bingham MR in *Ridehalgh*). Further, the UT confirmed '..That it is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's 'acid test': is there a reasonable explanation for the conduct complained?'

8. As the Applicants' submission acknowledges, the UT directed that in exercising the Rule 13(1)(b) power, a three-stage approach is appropriate. At the first stage the question is whether a person has acted unreasonably. A decision in this respect does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.

9. A discretionary power is then engaged, and the decision maker moves to the second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that the third stage is reached when the question is what the terms of the order should be. For example, whether they should cover all or only some of the costs claimed.

Discussion

10. The Applicants rely upon 3 grounds in support of their submission that the Respondent has acted unreasonably in its defence of the substantive application.

11. Firstly, the Applicants rely upon what they describe as hubris on the part of the Respondent, submitting that it acted unreasonably in persisting in its claim for reserve and contingency funds despite the contrary decision in *Grantham Apartments* and despite so the Applicants presume obtaining unfavourable legal advice on the issues. The Applicants also rely in this regard on the fact that the Respondent had maintained that the major redecoration works were satisfactorily completed in July 2017 yet effectively conceded at the October 2017 inspection that this was not the case and only then, spurred by the application, as the tribunal found, implemented the necessary remedial works.

12. As regards the arguments over reserve and contingency it does not seem to this Tribunal that the Respondent acted unreasonably. First instance decisions are not binding and there is no evidence that the Respondent acted contrary to advice. Parties must be free to argue tenable points of law before the tribunal without fear of being punished in costs, and even if on one view a point may seem weak that does not make it fanciful or vexatious so as to mean the pursuit of that argument was improper or unreasonable.

13. As for the acknowledgment of defects and the expedited remedial work, this in our view is a point in favour of the Respondent, that it made the concession rather than not (see the comments of the UT in *Willow Court* at paragraphs 142-144). It might have been made earlier but it should not be overlooked that it was the Respondent's case that snagging was not completed and that some of the remedial work was simply brought forward. In the circumstances, in our judgement in its actual defence and conduct of these proceedings in this respect the Respondent did not act improperly, unreasonably or negligently.

14. Secondly, the Applicants rely upon an allegation of deception on the part of the Respondent, specifically what is said to be the false claim that it sent the disclosed documents to the Applicants on 23 May 2017 so as to comply with paragraph 8 of the tribunal's directions when these were only in fact received by the Applicants on 26 June 2017. The Applicants also point to what is said to be the false claim by Mr Davidoff at the hearing on 12/12/17 that he had researched JH Property Management.

15. Plainly, any allegation that a party or its representative has deliberately set out to deceive the tribunal, if proved, would be an extremely serious matter and is conduct very likely to satisfy the first stage test of the *Willow Court* guidance and amount to improper and unreasonable conduct. However, we have no hesitation in saying that the evidence before the Tribunal falls very far short of proving that this is the case both in relation to the disclosure and JH Management.

16. It is entirely plausible that delivery of 700 documents sent by post on 23 May might be delayed even by a matter of weeks. Further, why would the Respondent or Mr Davidoff seek to deceive the tribunal about this, when they could as with the other deadlines (as pointed out by the Applicants) simply seek an extension of time. Certainly, without more we are not prepared to find that the documents were not sent as stated by the Respondent and its representative Mr Davidoff.

17. As to the allegation about research into JH Management, given the other information Mr Davidoff was able to provide to the tribunal about this firm as well as Let Solutions Ltd it was clear to the Tribunal that he had indeed made enquires about them and we reject entirely the allegation that 'it can be deduced that the Respondent was being deceptive in this matter.' In our judgment these allegations of deception are wrongly made and the Applicants too quick to ascribe malice where there is none.

18. Thirdly, the Applicants rely upon alleged bullying and harassment on the part of the Respondent as set out at paragraphs 3(a)-(j) of their submission. This

relates so it is submitted to 'spurious allegations of libel and defamation' relating to a witness statement given by some of the Applicants and filed in separate proceedings brought by Mrs Elu against the Respondent.

19. In summary, the said statement alleged 'that the defendant and its managing agent have been dishonest in their dealings at our building and that they are conducting themselves contrary to the leasehold and the law.' The allegations of dishonesty being founded on the Applicants' complaints in these proceedings before this tribunal about the redecorations and guttering works, as well as accounting and costs issues such as the high cost of cleaning and failure to use Kent based contractors.

20. The submission now made by the Applicants in relation to costs is that the Respondent responded to that witness statement with a threat to bring libel proceedings against the relevant Applicants and then proposed a meeting to settle both those claims and the substantive claims, as well as then seeking to exclude Mrs Elu from representing the Applicants. The Applicants contend that these were bullying tactics on the part of Mr Fischer of the Respondent, himself a provider of legal services (via Small Claims London UK Ltd), seeking to intimidate the Applicants from pursuing their claims.

21. We do not accept this third ground. Firstly, it seems to this tribunal that the whole of the above episode, for want of a better description, was collateral to these proceedings, such that it is not properly treated as any part of the defence or conduct of the same. Even if this were not the case, the conduct of the Respondent in threatening libel proceedings (without commenting on the merits thereof) was at least explicable on the basis of the Applicants' witness statement making allegations of 'double' and 'dishonest' dealings (all of which have been rejected by this tribunal as above and in the substantive decision) so as to fall short of being improper or unreasonable.

22. Moreover, even if contrary to the foregoing it could be said that the conduct complained of by the Applicants in this regard crossed the line so as to be improper or unreasonable to a sufficient degree to satisfy the first (*Willow*) stage, as a matter of our discretion we would have declined to make any order on this account. The Applicants were clearly as much to blame and deserving of criticism for this unattractive collateral warfare as the Respondent and in such circumstances we would not regard it as appropriate to make a unilateral order for costs of the kind sought.

Conclusion

23. For the reasons set out above the Tribunal rejects each of the grounds advanced by the Applicants for the making of any Rule 13 or other wasted costs order in these proceedings against the Respondent.

Right to Appeal

Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are

duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under rule 55) or (c) notification that an application for the decision to be set aside (under rule 51) has been unsuccessful.

Dated: as above