FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AE/OLR/2021/0767**
HMCTS code (paper, video, audio)	**:**	**V:VIDEO**
Property	**:**	**31A Burton Road, London NW6 7LL**
Applicants	**:**	**(1) Ms E Gorobets** **(2) Mr J Ferrer**
Representative	**:**	**Mr F Hoar of counsel**
Respondent	**:**	**Connaught Estates Ltd**
Representative	**:**	**Mr K Velmi (director)**
Type of application	**:**	**Section 48 of the Leasehold Reform, Housing and Urban Development 1993 and for a determination as to whether the Respondent should pay costs.**
Tribunal members	**:**	**Judge S Brilliant** **Mr K Ridgeway MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**30 March 2022**
Date of decision	**:**	**22 April 2022**

DECISION

Summary of the Tribunal's decision

The appropriate premium payable for the new lease of 31A Burton Road, London NW6 7LL ("the Flat") is £19,000 rounded up.

Background

1. This is an application made by the applicant leaseholders, pursuant to section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"), for a determination of the premium to be paid for the grant of new lease of the Flat.

2. By a notice of claim dated 04 February 2021, served pursuant to section 42 of the Act, the applicants exercised the right for the grant of a new lease of the Flat. At the time the applicants held the existing lease granted on 03 July 2007 for a term of 99 years from 25 March 2006. The unexpired term at the date of the notice was 84.13 years. Therefore, no question of marriage value arises. The annual ground rent is £300 for the first 25 years, £600 for the next 25 years, £1,200 for the next 25 years and £2,400 for the remaining 24 years.

3. The applicants proposed to pay a premium of £14,000 for the new lease.

4. On 08 April 2021, the respondent freeholder served a counter-notice admitting the validity of the claim and counter-proposed a premium of £30,000 for the grant of a new lease. The notice also took issue with the proposed terms of the lease.

The application

5. On 14 September 2021, the applicant applied to the Tribunal for a determination of the premium to be paid.

6. Directions were given on 16 December 2021. By paragraph 5 of the directions it was ordered that the parties' valuers must by 27 January 2022 exchange valuations and meet to clarify the issues in dispute. The meeting might be by way of telephone conferencing.

7. By paragraph 6 of the directions it was ordered that the parties must by 10 February 2022 exchange statements of agreed facts and disputed issues and send copies to the Tribunal. By paragraph 7 of the directions it was ordered that the parties must exchange expert reports at least three weeks before the hearing (ie on or before 9 March 2022).

8. The respondent chose not to instruct an expert and, accordingly, did not call any expert evidence at the hearing.

The hearing

9. The hearing in this matter took place remotely on 30 March 2022. The applicant was represented by Mr Hoar of counsel. The respondent was represented by its director Mr Velmi.

10. At the start of the hearing Mr Hoar invited us to debar the respondent from defending the application on the basis that he had repeatedly breached the Tribunal's directions. Mr Hoar said that if we were against him on that application, it should be made very clear to Mr Velmi that he could call no evidence of his own.

11. We did not consider it proportionate to debar the respondent from defending the application. But we did make it very clear to Mr Velmi that, whilst he could cross-examine the applicants' expert, Mr I Davies FRICS, he could give no evidence of his own. We rejected an application by Mr Velmi for the late production of certain emails.

12. Neither party asked the Tribunal to inspect the Flat and the Tribunal did not consider it necessary to carry out a physical inspection to make its determination.

Location and description

13. The Flat is a self-contained flat on the ground floor of a 19th-century three-storey end of terrace converted house. It is situated on an established residential street located off Kilburn High Road. There are good local amenities. Parking is restricted to residents.

14. The Flat consists of an entrance hall, two bedrooms, an open plan living room and kitchen area with doors to the rear garden/yard, and a bathroom/WC. The total area is 62.50 m^2/ 673.00 ft^2.

Basis of Mr Davies' calculation

15. Mr Davies calculated the premium payable on the following basis:

(1) The valuation date is 04 February 2021.

(2) The unexpired term at the valuation date was 84.13 years.

(3) The ground rent is steeped as set out above.

(4) The capitalisation rate is 6.5%

(5) The deferment rate is 5%.

(6) There is no relativity figure required as there is no marriage value.

(7) The reversionary value of the Flat is £650,000.

(8) The freehold value has a 1% uplift.

The comparables

16. Mr Davies relied on the following comparables:

65 Callcott Road	£650,000	August 2020
49 Callcott Road	£640,000	October 2019
45 Cotleigh Road	£627,500	March 2021

17. Having read Mr Davies' summary of the comparables in paragraph 24 of his report, we are satisfied that his figure of £650,000 as the value of the Flat is a fair and appropriate figure.

Mr Velma's cross examination

18. Mr Velma's cross examination of Mr Davies was measured and courteous. He did not quibble with the figure of £650,000. He was concerned with yield. Whilst he did not challenge the figures actually used by Mr Davies, Mr Velma made the fair point that there are always brackets within which the capitalisation rate and deferment rate sit. He asked Mr Davies why he had not used 5.5% for the capitalisation rate. Mr Davies explained that there is a bracket for the capitalisation rate, which is between 6% and 7%. It was therefore fair and reasonable for him to have settled on the figure of 6.5%.

Mr Davies also said that he was confident with the figure of 5% deferment rate (which is, of course, consistent with the authorities).

19. Mr Velma was at pains to point out that he did not really challenge Mr Davies' valuation or calculations.

Discussion

20. On one view, Mr Velma's stance on cross-examination compels us to accept Mr Davies' valuation of the premium at £19,000 rounded up. However, we are an expert Tribunal and the respondent is acting in person. So we have considered with some care whether Mr Davies' valuation stands up. As outlined above, we have no hesitation in finding that it does stand up.

Costs

21. Although some emails passing between the parties were in the bundle, the overall position is that Mr Velma failed to engage with the proceedings. In particular, he did not prepare the first draft of the new lease, he failed to instruct a surveyor to act as an expert witness or provide a witness statement and he gave no advance warning of the stance he would be taking at the hearing. No one knew before the hearing, not least the Tribunal, that he was not challenging what Mr Davies had to say. We have been shown various emails from earlier in the year, and at no stage did Mr Velma say he accepted Mr Davies' evidence. Twice, on 17 January 2022 and 10 February 2022, Mr Velma was warned that his failure to engage with the proceedings would lead to an application for "wasted costs".

22. Mr Hoar made an application for costs on the basis of the respondent acting unreasonably in defending and conducting these proceedings. The application is made under rule 13(1)(b)(iii) of the Tribunal Procedure (First–tier Tribunal) (Property Chamber) 2013 Rules ("the 2013 Rules"), which is the equivalent of a wasted costs order.

Unreasonable conduct: the law.

23. Rule 13(1)(b)(iii) of the 2013 Rules provides:

The Tribunal may make an order in respect of costs only … if a person has acted unreasonably in bringing, defending or conducting proceedings in … a leasehold case …

24. The jurisdiction to award costs under rule 13 was examined y by the Upper Tribunal in Willow Court Management (1985) Ltd v Alexander [2016] UKUT 290 (LC), [2016] L&TR 34.

25. The head note in L&TR reads as follows:

> *(1) The Court of Appeal guidance on what constitutes "unreasonable" conduct in the context of wasted costs applies in FTT proceedings for the purposes of r.13(1)(b), rather than this term having a wider interpretation, Ridehalgh v Horsefield [1994] Ch 205 applied. The test for unreasonable conduct 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, is there a reasonable explanation for the conduct complained of?*
>
> *(2) A systematic or sequential approach to applications under r.13(1)(b)*

should be adopted. At the first stage the question is whether the person has acted unreasonably. At the second stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the terms of the order should be. At both the second and third stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. Whether the party whose conduct is criticised has had access to legal advice is relevant at the first stage of the enquiry, as the behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice; it may also be relevant, though to a lesser degree, at the second and third stages, without allowing it to become an excuse for unreasonable conduct. At the third stage, a causal connection with the costs sought is to be taken into account, but the power is not constrained by the need to establish causation.

(3) Applications under r.13(1)(b) should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right. They should be dealt with summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. Those submissions are likely to be better framed in light of the tribunal's substantive decision rather than in anticipation of it, and applications at interim stages or before the substantive decision should not be encouraged.

26. Turning to the actual words used by the Upper Tribunal, the following paragraphs are germane:

24. … "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. 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 [in Ridehalgh v Horsefield [1994] Ch 205]: is there a reasonable explanation for the conduct complained of?

28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable 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. A discretionary power is then engaged and the decision maker moves to a 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 a third stage is reached when the question is what the terms of that order should be.

29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant

tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case 'in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal.' It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to As the first stage,

27. As to the first stage, we are of the firm view that no reasonable person in the position of the applicant would have acted as it has done in these proceedings. This is applying an objective standard of conduct to the facts of this case. The fact that the Respondent was acting in person is no excuse for the blatant disregard of the directions.

28. As the second stage, we consider that, in the light of the unreasonable conduct, we ought to make an order for costs.

29. As of the third stage, we consider that this is a case in which the Respondent should pay the Applicants' assessed costs from 27 January 2022 (see paragraph 6 above). It was pointless for the application to go to a hearing window after that date without a realistic challenge ever being made to the Applicants' expert's report which was a very fair one to both parties.

Assessment of costs

30. At the end of the hearing we give directions:

(a) the Applicants by 4.00 PM 13 April 2022 are to provide to the Tribunal and the Respondent a new schedule of costs from 27 January 2022;

(b) the Respondent was warned that the schedule of costs already produced was likely to suffer a considerable reduction;

(c) the Respondent by 4 PM 27 April 2022 is to provide to the Tribunal and the Applicants any representations about or objections to the new schedule;

(d) the Applicants by 4 PM 11 May 2022 are to provide the Tribunal and the Respondent any reply.

31. The costs will then be assessed summarily.

Name: Simon Brilliant Date: 22 April 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).