



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00BZ/0AF/2021/0026**

**HMCTS code
(paper, video,
audio)** : **P:Paper**

Property : **15 Shackleton Avenue, Widnes,WA8 9NG**

Applicant : **Peter James Murray
Katie Louise Robinson**

Representative : **Orme Associates
Mr A Orme**

Respondent : **Adriatic Land 3 (GRI) Limited**

Representative : **Knights PLC
Ms E Corcoran**

Type of Application : **Costs- Rule 13 of the Tribunal Procedure
(First Tier Tribunal) (Property Chamber) Rules 2013**

Tribunal Members : **Judge T N Jackson
Mr A Hossain BSc (Soc Sci) BSc (Est Man) MRICS**

Date of Decision : **27th June 2022**

DECISION

Decision

We determine that:

The Applicants' application for their Tribunal costs under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 is refused.

Reasons for decision

Introduction

1. The Applicants have applied for a costs order under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 in relation to proceedings arising from an application by the Applicants under the provisions of sections 21 (1)(a) and section 21 (2) of the Leasehold Reform Act 1967 ('the Act').

Background

2. On 3rd September 2020, the Applicants' representative served on the Respondent a 'Notice of Tenant's claim to acquire the freehold' under the 1967 Act. On 6th October 2020, the Respondent's representative acknowledged the Notice and advised the Applicants' representative that Mr Evans was instructed on behalf of the Respondent to undertake a valuation.
3. By Notice in Reply dated 22nd October 2020, the Respondent's representative admitted the Applicants' claim, stated a draft transfer would follow for approval and requested the Applicants' representative to contact the Respondent's valuer directly to discuss the premium. They stated that *'until the premium is agreed, all discussions will be on a without prejudice basis.*
4. As the Applicants' representative's firm is not regulated by the Solicitors Regulation Authority and is not permitted to undertake regulated legal activity, the Respondent's representative contacted the Applicants' representative by email on 9th December 2020 to ask for the Applicants' email address in order that they could contact them directly to progress the transfer.
5. The Applicants' representative provided the Applicants' email address on 9th December 2020. On the same date, the Respondent's representative sent an email to the Applicants explaining that as their representative is not regulated by the SRA, that they, the Respondent's representative, would need to deal directly with the Applicants or their solicitors. If the Applicants did not intend to instruct solicitors, they were advised that they would need to provide identification documents following which the Respondent's representative would send the draft transfer. The Respondent's representative did not receive a response.
6. The Respondent's representative sent further correspondence to the Applicants namely an email sent 4th January 2021, an email and letter sent 20th January 2021, an email sent 8th February 2021 and an email sent 16th March 2021. No response was received from the Applicants in relation to any of the correspondence.

7. On 17th March 2021, the Respondent's representative received an email from the Applicants apologizing for the delay and explaining that the time wasn't right to proceed but that they were looking to do so later in the year and would be in touch further around September time.
8. The Respondent's representative emailed the Applicants on 18th March 2021 and confirmed that the matter would be placed on hold until further notice and that they would contact them again around September to check the position.
9. On 29th April 2021, the Applicants' representative contacted the Respondent's representative requesting a draft transfer. The Respondent's representative emailed the same day to say that they were in direct contact with the Applicants.
10. On 1st September 2021, the Respondent's representative contacted the Applicants to ask if they were ready to proceed but received no response.
11. On 3rd September 2021, the Applicants' representative, made an application to the Tribunal for a determination of the price and the terms of the transfer. The Applicants' representative did not copy in the Respondent's representative to the Tribunal application nor make them aware of it.
12. On 21st September 2021, the Applicants' representative sent to the Respondent's representative a valuation and a copy of a Tenant's Notice of Request for particulars of right of way and restrictive covenants.
13. On 15th October 2021, the Respondent's representative replied to the Applicants' representative and advised that the Applicants or their solicitor should contact them directly to progress the transfer.
14. On the same date, the Respondent's representative sent a letter to the Applicants enclosing the Applicants' representative letter dated 21st of September 2021, the Respondent's representative's response and the Respondent's representative letter to the Applicants dated the 20th of January 2021 outlining what was needed in order to progress the transfer (namely either the name of solicitors acting on behalf of the Applicants or identification documents if they were not instructing solicitors) all of which had previously been requested on 9th of December 2020.
15. On the 4th of November 2021, Mr. Evans received a letter from the Applicants' representative dated the 29th of October 2021 enclosing their valuation and advising that they were instructed to negotiate the premium. Mr. Evans replied to the Applicants' representative on the same date providing full details of the valuation variables he had used. By letter dated the 16th of November 2021 to Mr Evans, the Applicants' representative acknowledged receipt of the letter of the 4th of November stating that he was "*replying out of courtesy but whilst efforts at settlement via closed correspondence are appreciated, the letter is of no use because we do not wish to enter into such correspondence*".
16. Unaware that an application had been made to the Tribunal, on the 3rd of December 2021, the Respondent's representative contacted the Applicants attempting to progress matters to which no response was received.

17. The Respondent's representative chased the Applicants again by email on 10th January 2022. On 19th of January 2022, the Applicants replied to the Respondent's representative apologizing for the delay and asking what information was needed to progress matters. The Respondent's representative replied via e-mail on the 21st of January 2022. No further response was received from the Applicants and the Respondent's representative chased them again on the 15th of February 2022.
18. Directions were issued by the Tribunal on 16th February 2022.
19. On 18th of February 2022, the Respondent's representative received a copy of the Applicants' application and the Tribunal directions dated the 16th of February 2022.
20. On 3rd March 2022, the Respondent's representative advised the Applicants' representative that the Respondent accepted the premium in the Applicants' representative's valuation. The letter stated that despite the Respondent not agreeing with the valuation, it was accepted to avoid the costs for both parties of complying with Directions for the Tribunal.
21. The Respondent's representative chased the Applicants again on the 15th of March 2022 by e-mail and by letter.
22. On 15th March 2022 the Applicants applied to withdraw the application under the 1967 Act.
23. Directions in the current application were issued on 23rd March 2022.

Hearing

24. Neither party requested a hearing. We were satisfied that we had sufficient information in the written representations and could proceed without a hearing.

Submissions

The Applicants

25. The Applicants' representative provided a written submission received on 28th March 2022. He applies for 'wasted costs' under Rule 13 of the Procedure Rules. He seeks recovery of the following costs:

	£
Application fee payable to FTT for decision on price	100.00
Cost of cheque	0.75
Cost of postage	0.50
Labour and office costs to make application (junior, 1 hour)	80.00
Two letters seeking L's price in open format @ ¼ hour each	40.00
Cost of making this application for wasted costs@	<u>225.00</u>
£150ph * 11/2 hours	
	446.25

26. He submits that he proposed a price in at least September 2021 which was ultimately accepted by the Respondent on 3rd March 2022. Only privileged correspondence was received and the Applicants were never provided with a valuation nor afforded the

opportunity to reach an agreement via the offer and acceptance machinery contemplated by section 9(3) of the Act and Condition 6 of the Leasehold Reform (Enfranchisement and Extension) Regulation 1967. The Applicants' representative submits that the Applicants were forced to ask the Tribunal to decide the price as they were not provided with one despite asking for the same.

27. The Applicants' representative submits that costs incurred appear to be only as the result of recalcitrance, but does not identify by whom other than excluding the Applicants.

The Respondent

28. The Respondent's representative has submitted a Reply dated 12th April 2022 to the application for costs. In the covering letter dated 12th April 2022 the Respondent's representative invites the Tribunal to make an award of costs to the Respondent stating that the Applicants' application for costs is completely unfounded and has caused unnecessary time and expense. Following clarification by the Tribunal office, by email dated 16th June 2022, the Respondent's representative confirmed that they did not wish to make an application for costs.

29. The Respondent's representative submits that the Applicants' representative's submission:

- a. fails to identify whether the application is made against the Respondent or the Respondent's representative;
- b. does not identify whether the application is made pursuant to Rule 13(1)(a), 13(1)(b) or both;
- c. concerns costs which have been incurred by the Applicants in submitting an application for a determination of the premium and terms of the transfer which was made before the Applicants' representative made any attempt to negotiate the premium and at a time when the Applicants had confirmed to the Respondent's representative that they did not want to proceed (and therefore the Respondent was unable to progress negotiation of the terms of the transfer);
- d. provides a schedule of wasted costs where more of the costs claimed have been incurred in respect of the application for wasted costs than the cost of the application for determination of the premium and terms of the transfer;
- e. the Tenants application letter and Tenant's submission for wasted costs have been submitted by Orme Associates. The Statement of Truth on the Tenant's submission for wasted costs does not state that Andrew Orme or Orme Associates are authorized to make the application on behalf of the Applicants (but does say that the "*report complies with the requirements of the Royal Institution of Chartered Surveyors, as set down in Surveyors acting as expert witnesses: RICS practice statement...*") RICS have confirmed to the Respondent's representative that Mr Orme is not a current member of RICS.

30. The Respondent's representative submit that the costs application is unwarranted and should be struck out.

The Rules

31. Rule 13 of the Tribunal Procedure (First -Tier Tribunal) (Property Chamber) Rules 2013 provide as follows:

(1) This 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; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

32. Section 29(4) of the 2007 Act provides that in any proceedings in the Tribunal the Tribunal may-

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

33. Section 29 (5) defines 'wasted costs' as *any costs incurred by a party-*

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay.

Deliberations

Rule 13(1)(a)

34. As the costs application has been made by the Applicants, the onus of proving the case rests on the them. The Applicants' representative's submission does not articulate how it is alleged that the Respondent's representative has acted improperly, unreasonably or negligently. He refers to '*recalcitrance*' but does not say whether this is of the Respondent or his representative. Recalcitrance suggests a

defiance or a stubborn resistance to proceed. However, a review of the correspondence and chronology demonstrates that, as at 9th December 2020 when the Respondent's representative were aware that the Applicants' representative was not registered by the Solicitors Regulation Authority and that correspondence regarding the terms of the transfer needed to be with the Applicants directly or solicitors they chose to instruct, the Respondent's representative were diligent in pursuing the matter directly with the Applicants. They received no response to numerous emails they sent to the Applicants to progress the matter. Once advised by the Applicants on 17th March 2021 that the matter needed to be placed on hold and that the Applicants would be in touch in September, it was the Respondent's representative who took the initiative to contact the Applicants on 1st September 2021.

35. Criticisms of the Respondent's representative corresponding on a 'without prejudice basis' are unfounded as that is an entirely appropriate and professional way in which to proceed on a matter of negotiation.
36. We find no evidence that the Respondent's representative acted improperly, unreasonably or negligently- quite the opposite, as they acted professionally and diligently. We do not award costs under Rule 13 (1)(a).

Rule 13(1)(b)

37. For completeness, we considered whether we should make an order under Rule 13(1)(b) namely where a party has acted unreasonably in bringing, defending or conducting the proceedings. As the Respondent did not initiate the proceedings, we are concerned only with their conduct in defending or conducting the proceedings. For the avoidance of doubt, this does not relate to any conduct before the proceedings were initiated.
38. In such cases, we assess whether conduct has been unreasonable by having regard to the guidance of the Court of Appeal in the case of *Ridehalgh v Horsefield* 1994 3AER 848 when the following definition of unreasonable was given by Sir Thomas Bingham MR:

"Unreasonable means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and reflecting on a practitioner's judgement but it is not unreasonable."

39. The application of Rule 13 was considered by the Upper Tribunal in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 LC. The correct application of the Rule requires us to adopt the following approach when determining an application for costs:
- a. Is there a reasonable explanation for the behaviour complained of?

- b. If not, then as a matter of discretion, should an order for costs be made?
 - c. If an order for costs should be made, what should be the terms of that order?
40. A principle that emerges from the cases is that costs are not to be routinely awarded pursuant to a provision such as Rule 13 merely because there is some evidence of imperfect conduct at some stage of the proceedings. It is a high threshold.
41. In this case, the Respondent's representative was notified by the Tribunal of the application and Directions by letter dated 16th February 2022. We acknowledge that there was a substantial delay on the part of the Tribunal between the application being received on 6th September 2021 and the Tribunal notifying all parties and issuing Directions on 16th February 2022, for which we apologise. The Applicants' representative had not notified the Respondent's representative that such an application had been made.
42. Following receipt of the Tribunal application and Directions, the Respondent's representative accepted the premium. We note the Respondent's representative's correspondence to the Applicants' representative of 3rd March 2022, in which it states that whilst the Respondent does not agree with the valuation, it was accepted in order to minimize further costs accruing for both parties of complying with Tribunal's Directions. On 15th March 2022, the Applicants applied to the Tribunal to withdraw the application with the Respondent's consent. The Respondent's representative has therefore not had the opportunity to take any steps to conduct or defend **the proceedings** and therefore cannot be said to have acted unreasonably in the terms required in Rule 13 (1)(b). We do not award costs under Rule 13 (1)(b).

Rule 13(2)

43. The costs claimed by the Applicants' representative include the application fee. We note that the Applicants' representative did not contact the Respondent's valuer until 29th October 2021 which was over a year after the Respondent's representative had requested the Applicants' representative contact him on 22nd October 2020. Further, the Applicants' representative provided his valuation over a month after he had made the application to the Tribunal. He failed to make the Respondent's representative aware either that he was intending to make an application or when he made the application. Prior to the date of the application, the Respondent's representative had been in direct contact with the Applicants who had said that they wanted to put matters on hold and they would be in touch in September 2021. The Respondent's representative had contacted them on 1st September but did not receive a response. We consider that the application to the Tribunal was premature. We do not make an order to reimburse the application fee.
44. Therefore, the Rule 13 costs application is refused by the Tribunal.

Appeal

45. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.