FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AH/LBC/2022/0073**
Property	**:**	**Lower Ground Floor Flat 8 Walters Road London SE25 6LF**
Applicant	**:**	**Primeview Developments Limited**
Representative	**:**	**Arron Dowling-Hussey**
Respondent	**:**	**Maxine Reynolds (1)** **Kenaida Samson Bernard (2)**
Representative	**:**	**Stan Gallagher**
Type of application	**:**	**Costs: Rule 13 (1)(b) Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 and Paragraph 5a of Schedule 11 Commonhold and Leasehold Reform Act 2002**
Tribunal member(s)	**:**	**Mrs E Flint FRICS** **Mrs A Flynn MA MRICS**
Venue	**:**	**10 Alfred Place London WC1R 7LE**
Date of hearing	**:**	**28 September 2023**

DECISION

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1. The Tribunal determines that costs will not be awarded against the Respondent under Rule 13(1)(b) Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. The Tribunal determines that under paragraph 5a of Schedule 11 Commonhold and Leasehold Reform Act 2002 contractual costs are not be payable.

Background

1. The Applicant is the freeholder of 8 Walters Road London SE25 6LF ("the Building"), a three storey terrace house, converted into flats. The subject flat is on the lower ground floor of the Building.

2. At a hearing on 23 May 2023 the Applicant sought a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the Respondent tenants were in breach of the covenants contained in clauses 2(k), (n), (p) and (q) of the lease. The Respondents are bound by the terms of the lease dated 11 September 2006 made between Caundle Properties Limited and Maxine Reynolds ("the lease").

3. At the substantive hearing the applicants stated that they had sought to resolve the matters amicably but that the respondents had not engaged with them. Consequently, the applicants had no option but come to the tribunal. It was further asserted that the respondents had acted unreasonably. The tribunal was asked to grant an order for indemnity costs under Rule 13 Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 and clause 2(r) of the lease which states "*To pay on demand all costs charges and expenses (including without limitation and on an indemnity basis legal costs surveyors fees and fees of the lessor and/or managing agents) of and incidental to*

   (i) the preparation and service of a notice under section 146 Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief of the Courts."

4. The respondents indicated at the hearing that they wished to apply for a costs disbarring order under paragraph 5a Schedule 11 Commonhold and Leasehold Reform Act.

5. The tribunal issued Directions in relation to the costs applications with the decision in respect of the substantive application.

Rule 13 costs

6. Mr Gallagher noted that the tribunal's power to award costs is prescribed by Rule 13(1) which states :

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)an agricultural land and drainage case,

(ii)a residential property case, or

(iii)a leasehold case;

7. He continued that the power is both exceptional and discretionary and should be used sparingly. He referred to the tests in Willow Court Management (1985) Limited v Alexander [2016] UKUT 290 (LC). However, as explained by the UT in Rini Laskar v Prescot Management Company Ltd2 [2020] UKUT 241 (LC) at para 34 it is to be remembered "that [this three stage approach] framework is an aid, not a straightjacket." and that "the only "test" is laid down by the rule itself, namely that the FTT may make an order if it is satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings".

8. As the rule requires that there must first have been unreasonable conduct before the discretion to make an order for costs is engaged. If, and only if unreasonable conduct is found does the discretionary power to award costs arise.

9. It is only the Respondents' conduct in defending or conducting the proceedings that is capable of falling within Rule 13(l)(b). Therefore, the Applicant's case (paras 4, 5 & 6 of the Rule 13 Application) that there should have been more engagement, and even admissions, by the Respondents before the proceedings were issued cannot be relied on as conduct falling within rule 13(l)(b). Indeed, he asserted that it is not clear what, if any, behaviour by the Respondents in defending or conducting the proceedings, the Applicant is relying on to make out its allegations of unreasonable conduct.

10. Once the proceedings had been issued, the Applicant refused to meet on site with the Respondents' expert (Mr Tibbatts). Furthermore, the only unreasonable behaviour in the conduct of the proceedings was the refusal by the Applicant to engage to make a joint inspection.

11. The Respondents' conduct is to be assessed against the background facts and circumstances that prevailed. In this case, the utter futility of the proceedings. The Rule 13 Application (para 12(1)) poses the question of whether *"there is a reasonable explanation"* for the Respondents' alleged failure to respond to the Applicant's correspondence and of having not

admitted the breach of the anti-alterations covenant until the commencement of the hearing. The question of whether there is a reasonable explanation for the conduct complained of is the correct test to be applied - see ***Orchard v Mooney*** [2023] UKUT 89(LC)

12. He stated that the reasonable explanation for the Respondents' conduct which is explained more fully in the respondent's paragraph 5a application is that the Substantive Application was not only futile in terms of it being an application devoid of any practical remedy, it relied on very historic works of alteration which, because of the passage of time, the Respondents found very difficult to date (and hence to assess whether or not the works were outside of the applicable limitation period and therefore spent). Moreover, the Applicant's pre-action correspondence had made it clear that the Substantive Application was brought as a device, or part of a strategy to extract more money out of the Respondents in return for the grant of a 1993 Act lease extension as evidenced by the 4 July 2022 letter from the Applicant's solicitors that accompanied the Applicant's 1993 Act counter notice (Applicant's Bundle [66-68]) seeking a premium of £25,000 for a retrospective consent for alterations.

13. Mr Gallagher was of the view that it was surprising in the light of this initiating correspondence on behalf of the Applicant, that the Applicant's Rule 13 Application (para 10) contends that "the matter could have been resolved amicably between the parties". Presumably by the Respondents' submitting to the Applicant's "optimistic" demand (to try and put it neutrally) for a ransom payment of £25,000 dressed up as a premium for a retrospective consent for alterations.

14. He asserted that it was in fact the Applicant who refused to meet on site with the Respondent's expert, Mr Tibbatts. As the tribunal had noted Mr Tankaria (director of the Applicant company) had said that "he thought it was not necessary to have a joint inspection. The proposed joint inspection was far and away the most important initiative in the proceedings directed at resolving them. It was evidence of positive engagement by the Respondents and it was rejected by the Applicant.

15. Moreover, there was a complete absence of any expert evidence by the Applicant. It will be noted that there are no surveyors etc fees in the Applicant's costs schedule. The absence of any expert evidence by the Applicant speaking to the alleged breaches of covenant is important and relevant to the question of whether there is a reasonable explanation for the alleged lack of response by the Respondents. If the Applicant had engaged an expert, not only could there have been a mutual recognition of Mr Tibbatts' expert conclusion that the alterations without consent have stabilised the building and not caused any detriment to the Applicants, any disclosed expert report would have given the Respondents something tangible and specific to respond to. In this

connection it was necessary for there to be a short adjournment during the hearing so that the Applicant could consider the scope of the complained of works of alteration i.e, whether they were as stated in Mr Tibbatts' report as the Applicant being unable to offer no expert evidence on the point.

16. The other alleged breaches of covenant (as to planning consent, building regulations, insuring and encroachment were unfocused and unmeritorious and only served to distract and to further the impression that the proceedings and the pre-action correspondence were "a try on" in furtherance of 4 July 2022 letter's demand for a premium of £25,000 for a retrospective license i.e the Applicant's correspondence did not lend itself to constructive engagement.

17. However, the Respondents did engage with the proceedings themselves (which is what Rule 13(l)(b) is concerned with): a detailed Respondents' Statement of Case was filed and served, supported by Mr Tibbatts' detailed expert reports, which set out the Respondents' case in clear terms. A without prejudice save as to costs offer dated 18 May 2023 was also made by which the Respondents offered to admit the anti-alterations covenant on terms. This offer was not accepted. Clearly therefore there was clear and constructive engagement in the proceedings by the Respondents.

18. The criticism of the Respondents' having admitted the breach of the anti-alterations covenant at the hearing, and not earlier, is unfounded. The Respondents behaved very properly in making the admission at all rather than putting the Applicant to proof. Though the burden of proof was on the Applicant to prove the breach (which included that the works were not so historic that the 12 year limitation period had expired). The Respondents (through their own voluntary searches) found evidence that indicated that, though the works in question were very historic, it appeared that they may have been carried out some time after 31 October 2010 (which meant that a Limitation Act defence was not available). That research involved trawls through old photographs etc in order to date the works, which only unearthed a possible date very shortly before trial. Self-evidently, if the works were not so historic e.g. if the works had been undertaken in, say, the last couple of years, and therefore within the time-frame of reliable memory, it would have been far less of a burden for the Respondents to investigate and respond with greater expedition. It was precisely because the Applicant was relying on such historic works to marshal an alleged breaches claim, that it proved so difficult to find any evidence that indicated when the works in question were carried out: whatever the precise date, we are in the realm of about 12 years ago.

19. The practicalities, of answering such historic allegations goes to the reasonableness of the explanation that the Respondents put forward.

20. For all of these reasons he submitted that the Respondents' conduct was not unreasonable. Hence, the discretion to award costs does not arise.

Paragraph 5a Schedule 11 application.

21. Mr Gallagher stated that there were two strands to the application: the respondents were largely successful in defending the application and that the substantive application was in his view pointless. The only breach upheld by the Tribunal was that which had been admitted: the historic alterations without consent.

22. He submitted that the substantive application was pointless because a finding of a breach here could not lead to an application for forfeiture because a notice of claim for a lease extension under the 1993 Act had already been served.

23. Moreover, there could not be a successful claim for damages because the only expert evidence available suggested that the structure was more stable after the alterations. Furthermore, an order to reinstate was highly unlikely as the alterations had been carried out so long ago.

24. He asserted that this case was more misguided than ***Avon Ground Rents v Ward*** where the FTT held that it was unfair for the respondent to pay contractual costs in a similar case, despite its contractual obligation. The Upper Tribunal dismissed the landlord's appeal.

25. The burden of proof in relation to the alleged breaches lay with the applicant. The applicant did not produce any evidence to substantiate the alleged breaches.

The Tribunal's decision

26. The Tribunal determines that as regards the Rule 13 application the applicant has not produced any evidence to support an assertion that the respondent had acted unreasonably in the conduct of the case. The claim is dismissed.

27. The Tribunal determines that the case as presented to the Tribunal was misguided, its purpose appeared from the correspondence to be an attempt to obtain an additional premium for the lease extension. It would be unfair for the respondents to be obliged to cover the landlord's costs of this application in such circumstances.

Evelyn Flint 28 September 2023

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).