FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/OC9/2023/0098**
Property	**:**	**Flat 14, Merton House, Merton Road, London SW18 5LA**
Applicants	**:**	**Steve and Ruth Johnson as attorneys for Brenda Johnson**
Representative	**:**	**Rachel Coyle of counsel**
Respondent	**:**	**London Borough of Wandsworth**
Representative	**:**	
Type of application	**:**	**For the determination of the liability to pay costs under rule 13(1)(b) Tribunal Procedure (First-tier) Tribunal) (Property Chamber) Rules 2013.**
Tribunal members	**:**	**Judge Simon Brilliant**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**04 April 2024**

DECISION

Introduction

1. This is an application under r.3(1)(b)(iii) of the Tribunal Procedure (First-tier

Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") which provides that the Tribunal may make an order in respect of costs in a leasehold case only if a person has acted unreasonably in bringing, defending or conducting proceedings.

2. A leasehold case is defined in r.1(3) of the 2013 Rules as a case in respect of which the Tribunal has jurisdiction under any of the enactments specified in s.176A(2) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

3. s.176A(2)(e) of the 2002 Act gives the Tribunal jurisdiction under the the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). So a case brought under the 1993 Act attracts r.13(1)(b)(iii) of the 2013 Rules. This is such a case.

4. A question which potentially rises is whether an order for costs can be made pursuant to r.13 of the 2013 Rules in a leasehold case when what is said to be unreasonable behaviour by Party A has led to Party B commencing proceedings, but Party A then climbs down shortly after those proceedings have been commenced and before the hearing.

5. In other words, can a r.13 application be directed at costs incurred by the applicant in the making of the substantive application following the unreasonable behaviour of the respondent, but no criticism can be made of the defending or conducting of those proceedings per se by the respondent.

6. I shall refer to these proceedings as "the r.13 proceedings". I shall refer to the proceedings in respect of which those costs are being claimed as "the s.48 proceedings".

The parties

7. The applicants ("the attorneys") are the attorneys of Brenda Johnson ("the tenant") under a lasting power of attorney dated 23 June 2019. The tenant holds a long lease of Flat 14, Merton House, Merton Road, London SW18 5LA ("the flat"). The respondent ("the landlord") holds the freehold reversion.

The determination

8. The determination took place on paper. I was given a well-prepared bundle containing 98 pages, which I have read carefully. I obtained further papers both from the parties and the Tribunal.

Summary of the facts

9. By a notice dated 21 June 2022, the attorneys served on behalf of the tenant a notice under s.42 of the 1993 Act. This was a notice to acquire an extended lease of the flat. The premium proposed was £5,000.

10. The landlord purported to serve a counter notice under s.45(1) of the 1993 Act. This admitted the right to acquire a new lease, but proposed a premium of £10,000.

11. However, this notice, dated 30 August 2022, was out of time.

12. Accordingly, the landlord was no longer able to object to the acquisition of an extended lease at the proposed premium.

13. s.49(1)(a) of the 1993 Act provides that where the tenant's notice has been given in accordance with s.42, but the landlord has failed to give the tenant a counter-notice in accordance with s.45(1), the Tribunal may, on the application of the tenant, make an order determining, in accordance with the proposals contained in the tenant's notice, the terms of acquisition.

14. Such an application has to be made within six months of the date when the counter notice should have been served: s.49(3).

15. Had such an application been made, it would have provided a cheap and swift means by which the attorneys, on behalf of the tenant, could have secured an extended lease at a premium of £5,000. The application could not have been opposed.

16. Instead, the parties exchanged lengthy correspondence about (a) whether the counter notice had indeed been served in time and (b) in any event, how much the premium should be.

17. s.48(1)(a) of the 2013 Act provides that where the landlord has given the tenant a counter-notice under s.45 which states that the landlord admits that the tenant had on the relevant date the right to acquire a new lease of his flat, but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date when the counter-notice was so given, the Tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.

18. As I have said, that is not the position in this case as no counter-notice was given in time.

19. On 20 February 2023, the attorneys, on behalf of the tenant, made an application in form 10 to the Tribunal under s.48 of the 1993 Act for a determination of the premium remaining in dispute. This application was given case number LON/00BJ/OLR/2023/0144.

20. As will be appreciated from the above, the s.48 application was misconceived. The correct application should have been made under s.49 of the 1993 Act.

21. In the attorneys' reply it is suggested in paragraph 9e that they really had no choice but to make the application they did. I reject this. It was the responsibility of the attorneys to apply to the Tribunal under the correct section and they cannot excuse their failure so to do by relying on the assertions of the landlord in correspondence, or what may or may have been said by the Tribunal which does not give legal advice and is not acting on behalf of the landlord.

22. Following the commencement of the s.48 proceedings, the parties settled the dispute on terms that the premium would be £5,000. This was the amount the attorneys had offered to pay prior to issuing proceedings.

23. On 05 April 2023, the new lease of the flat was completed. The landlord rightly points out that by that date the tenant had lost the right to a new lease as the tenant was out of time and the s.42 notice was deemed withdrawn: see ss.49(3) and 53(2) of the 1993 Act. Accordingly, the tenant no longer had a right to a new lease at the time of the settlement.

24. On 19 May 2023, the attorneys' solicitors sent an email to the landlord claiming the costs of the s.48 application

25. On 22 May 2023, the landlord emailed the attorneys' solicitors disputing any liability to pay the costs of the s.48 application and replying that there was a formal procedure in place to deal with such disputes.

26. On the same day, the tenant's solicitors wrote to the Tribunal:

We write to advise that the parties have now concluded the lease but the [attorneys intend] to make an application for costs based on the [landlord's] unreasonableness.

27. On 26 May 2023, the Tribunal emailed the parties, attaching an application for the determination of reasonable costs under s.60 of the 2013 Act. This was the wrong form, because s.60 deals with the conveyancing costs of the landlord of and incidental to the granting of the new lease. It does not deal with an application for r.13(1)(b)(iii) costs.

28. On 04 July 2023, the Tribunal wrote to the landlord, enclosing the attorneys' solicitors' letter dated 22 May 2023. The Tribunal asked for the landlord's comments, and stated:

If it is confirmed that terms have been agreed between the parties the Tribunal will close its file as its jurisdiction is at an end.

29. On 05 July 2023, the landlord's solicitors confirmed that all outstanding matters in respect of the new lease had been agreed. It continued:

We would be grateful if you could please kindly withdraw the application and close your file.

30. On 13 July 2023, the Tribunal wrote to the parties stating that the file had purportedly been closed. No order has ever been made concerning the disposal of the s.48 proceedings. I doubt whether the file could lawfully be closed without an order by a judge either (a) giving permission to withdraw under r.22 of the 2013 Rules or (b) making a consent order under r.35 of the 2013 Rules. To regularise matters, I will make an order backdated to 05 July 2023 giving permission to the withdrawal of the s.48 application.

The application before me

31. Following the refusal of the landlord to pay the tenant the costs of the s.48 proceedings, the attorneys' solicitors made the r.13 application on 19 June 2023. The costs claimed amounted to £1,405.00.

32. They sent in an application notice accompanied by a covering letter ("the covering letter"). The incorrect application notice was used. What was issued was an application under section 91(2)(d) of the 1993 Act whereby a landlord makes a claim against a tenant for certain non-contentious costs pursuant to section 60(1) of the 1993 Act.

33. However, the application notice has to be read with the covering letter of even date. It is well established that a formal notice can be treated as including matters set

out in a letter accompanying the notice, but not actually set out in the notice itself: see, for example, Hopkins v Beacon [2011] EWHC 2899 (Ch), which concerned an adverse possession statutory notice (Land Registry Form NAP) which could be construed to include additional information contained in an accompanying letter, even though that information was required to be in the notice itself.

34. The covering letter concluded:

We are claiming costs in the proceedings in the amount of £1,405.00 and we consider this amount to be reasonable.

35. The proceedings which were being referred to were clearly identified in the letter as the s.48 proceedings as case number LON/00BJ/OLR/2023/0144 was set out at the top.

36. By a letter dated 13 November 2023, the attorneys' solicitors wrote to the Tribunal confirming that the claim for costs as set out in the covering letter was in fact in respect of the costs of the s.48 proceedings, and was based on rule 13(1)(b)(iii) of the 2013 Rules.

37. On 15 November 2023, Judge Dutton wrote to the parties explaining that the attorneys' solicitors had now for the first time explained that the true basis for the application was for costs under rule 13(1)(b)(iii) of the 2013 Rules. The application in respect of costs was accordingly deemed to have been made pursuant to that rule.

38. Judge Dutton directed that the attorneys should set out their reasons for saying that the landlord had acted unreasonably and why such behaviour was sufficient to invoke the rule in light of Willow Court Management Company Ltd v Alexander [2016] UKUT (LC).

The details of the r.13 application

39. In essence, the rule 13 application is based on the following:

(a) The landlord acted unreasonably in disputing whether or not the counter-notice was valid.

(b) The landlord failed to respond to the attorneys' solicitors attempts to resolve the matter.

(c) The attorneys had to file an official complaint.

(d) The response to the complaint suggested that the landlord was not willing to engage in further negotiations and that an application to the Tribunal needed to be made.

(e) Accordingly, the attorneys, on behalf of the tenant, had no other choice but to issue the application notice, leading to unnecessary costs being incurred.

40. The Tribunal then gave directions for statements of case to be served in respects of the r.13 application.

The costs claimed

41. The attorneys' solicitors have confirmed that the sum of £1,405.00 claimed in the r.13 proceedings were costs incurred in making the s.48 application.

The statements of case

42. The attorneys, on behalf of the tenant, duly served a statement of case settled by Rachel Coyle of counsel. It was dated 08 December 2023 and fully setting out their arguments. They also served a second costs schedule in the sum of £2,794.00. This was for costs incurred since the date of the first costs schedule.

43. The landlord served a second statement of case in reply dated 05 January 2024.

44. The attorneys served a reply dated 29 January 2024, settled by the same counsel as before. They also served a third costs schedule in the sum of £4,814.80. This was for costs incurred since the date of the second costs schedule.

Can costs be claimed in respect of a misconceived application?

45. The s.48 application was misconceived. It was open to being struck out under rule 9(3)(e) of the 2013 Rules.

46. In my judgment, costs under rule 13(1)(b)(iii)) of the 2013 Rules cannot be engaged where the proceedings to which the application for costs relates are open to being struck out under rule 9(3)(e) of the 2013 Rules. No application was ever made for the s.48 proceedings to be deemed to be s.49 proceedings instead.

Can an application for costs be made under rule 13(1)(b)(iii) if the proceedings are settled without any substantive steps being taken and/or any directions having been given.

47. As I have found against the attorneys on the other issue, I shall deal with this briefly. I am unable to accept Ms Coyle's attractive submissions for these reasons:

(a) The attorneys did not bring the s.48 proceedings.

(b) The attorneys did not unreasonably defend the s.48 proceedings.

(c) The attorneys did not unreasonably conduct the s.48 proceedings.

Conclusion

48. For the reasons given above I dismiss the application for costs.

Simon Brilliant **04 April 2024**

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.