FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/OLR/2024/0076**
Property	**:**	**Flat 25, Harvard Court, Honeybourne Road, London NW6 1HL**
Applicant	**:**	**Harvard Court Ltd.**
Representative	**:**	**Max Engel & Co. LLP**
Respondent	**:**	**Helen Elizabeth Fayers**
Representative	**:**	**Comptons Solicitors**
Type of Application	**:**	**Application for an order for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	**:**	**Judge S.J. Walker** **Tribunal Member Ms. M. Krisko FRICS**
Date of Decision	**:**	**4 June 2024**

DECISION ON COSTS

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(1) The Applicant's application for an order for costs is refused.

Reasons

Background

1. On 11 May 2023 the Respondent to this application served on the Applicant, her landlord, a notice under section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") giving notice of a claim to acquire the property. A counter notice was served by the Applicant in this application, the landlord, on 18 July 2023. This accepted that the Respondent had the right to acquire but did not accept all the proposed terms including the premium (see page 63).

There was, therefore, a live statutory claim by the Respondent but at that stage no application had been made to the Tribunal.

2. Negotiations commenced between the parties for the grant of a new lease the terms of which went beyond the scope of the Act. In due course a new lease was entered into between the parties on 2 February 2024.

3. By section 48 of the Act if the Respondent were to make an application to the Tribunal for the determination of matters in dispute between the parties, she had to do so no later than 6 months after the date of the counter notice (see section 48(2)). Therefore, if the parties were unable to conclude an agreement between them the Respondent had until 17 January 2024 to make an application to the Tribunal.

4. On 4 January 2024 the Respondent issued an application in the Tribunal for the determination of the terms of the lease. That application was in due course withdrawn as a new lease was agreed and between the parties and executed.

5. On 28 March 2024 the Applicant made this application seeking an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") requiring the Respondent to pay the Applicant's costs incurred in reviewing, advising, and responding to the application made on 4 January 2024.

6. Directions were issued on 4 April 2024 requiring the parties to provide their statements of case in respect of the application and the preparation of a bundle. Those directions have been complied with and the Tribunal has before it a paginated bundle comprising an index and 127 numbered pages. References throughout this decision to page numbers are to the numbers printed at the bottom centre of the pages in this bundle.

7. The directions provided that the application would be decided on the papers in the week beginning 27 May 2024 unless a request for an oral hearing was made. No such request has been made and so this application is decided on the basis of the documents provided by the parties.

The Relevant Law

8. The general approach to costs in this Tribunal is that it is a no-costs jurisdiction. The Tribunal's powers to make orders for costs is found in rule 13 of the Rules. By virtue of that rule the Tribunal only has power to make an order for costs in three situations, one of which does not apply here as it concerns land registration cases. Those situations are (a) where wasted costs as defined in section 29(5) of the Tribunal Courts and Enforcement Act 2007 are payable and (b) where a person

has acted unreasonably in bringing, defending or conducting proceedings. There is no general discretion in the Tribunal to award costs where it considers this to be appropriate. In this case the application is made under rule 13(1)(b) – unreasonable conduct.

9. The leading case dealing with costs in this Tribunal under rule 13(1)(b) of the Rules is that of Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 0290 (LC). In order for the Tribunal to have the power to make an award of costs it is a necessary pre-condition for it to be established that there has been unreasonable behaviour which must be established objectively.

10. Even if unreasonable conduct is established the Tribunal must them go on to consider whether it ought to make an order or not and, if so, in what terms. In exercising that discretion, the Tribunal must have regard to all the circumstances, including the nature and seriousness of the conduct, its extent, and its consequences. Regard must also be had as to whether or not the unreasonable conduct has in fact caused additional costs to be incurred.

The Parties' Cases

The Applicant

11. The Applicant's case is that by 1 December 2023 the parties had concluded an agreement for a new lease which was to be completed on 19 December 2023. This was on the basis of an e-mail from the Respondent's solicitors. The new lease was for a period of 999 years with a premium of £168,713.

12. Despite this, completion did not take place on 19 December. The Applicant says that they chased the Respondent's solicitors without success (though no documentary evidence of this has been provided) and they argue that they were left with no assurance that completion would take place at all. They say that they were unaware of what the Respondent's intentions were (para 5 at page 19).

13. Then on 4 January 2024 the Applicant was made aware of the Respondent's application to the Tribunal. Their case is that they "*had no alternative but to assume that this matter was not completing and take advice on the application and incur further costs*" (para 6 at page 19).

14. The application was referred to the Applicant's solicitors' litigation team who were instructed to review and advise on the application. Advice was provided and a letter in response was sent to the Respondent's solicitors on 11 January 2024 (pages 6-8). This letter "*asked for clear instructions as to exactly what the Applicant wanted as we understood the lease had been agreed, however a Tribunal application had now been made proceeding in substantially different terms*" (para 7 at page 19).

15. The same day the Respondent's solicitors replied stating that the Tribunal application was a protective measure only. The Applicant complains that this information was provided 5 business days after the application had been made and that there had been no contact or explanation in the interim. They argue that the Applicant's solicitors had a legal obligation to their client and they could not ignore the application. They argue that they had no alternative but to provide advice on the application.

16. The Applicant argues that the Respondent has acted unreasonably in bringing the Tribunal proceedings without communicating to them that this was a purely procedural move and that they still intended to complete. They argue that by doing this they were left with no alternative but to incur further costs in advising on the application.

17. The Applicant's case as regards Willow Court is that the Respondent was unreasonable in not corresponding immediately with the Applicant to inform them that the application was merely protective and that it was unreasonable of them to ignore correspondence, to provide no update as to why completion had not taken place, and to give no indication whether or not completion would in fact take place. They argue that this failure crosses the threshold for making an order. They argue that an order should be made because the effect of the unreasonable conduct was that it led to the Applicant having to seek advice and prepare an additional response.

18. The Applicant seeks legal costs of £3,021 plus £660 for the preparation of this application.

The Respondent

19. The Respondent's case is that, when placed in its context, the application by the Respondent should not have led to surprise. They draw attention to the fact that the new lease was being negotiated outside the provisions of the Act. They also rely on the fact that, in the absence of a completed agreement, the Respondent had until 17 January 2024 to make an application to the Tribunal in order to protect their position.

20. The Respondent argues that the Applicant was aware that the Respondent was dependent upon the sale of the property in order to fund the agreed premium and that the parties were instructing the same solicitors in relation to that sale. The Respondent argues that the proposed completion date of 19 December 2023 was only an aspiration and that correspondence indicated that this date may be in jeopardy. They argue that the nature of correspondence was such that it was obvious why the new lease could not be completed on 19 December (see paras 8 to 12 at pages 46- 47).

21. The Respondent points out that both sides' solicitors' offices were closed from 22 December to 2 January. The application was then made on 4 January 2024. Reliance is placed on an e-mail dated 9 January

2024 from the Respondent to the Applicant which shows that further issues were still outstanding in respect of the negotiated new lease (page 74). They argue that this shows that the Respondent was still proceeding towards completion.

22. The Respondent's case is that they received a lengthy letter from the Applicant on 11 January 2024 in response to which they informed them that the application was protective only.

23. The Respondent argues that it should have been obvious to a reasonable practitioner that the Respondent intended to proceed with the application and that the reason the application had been made was purely protective. They also argue that in any event the reasonable course of action for the Applicant to have taken on receipt of the application was to enquire of the Respondent why it had been made.

24. The Respondent argues that there has been no unreasonable conduct on their part. They argue that the Applicant should have been aware of the need for a protective application without explanation.

The Tribunal's Decision

25. For the reasons set out below the Tribunal is not satisfied that the Respondent to this application has acted unreasonably. Further, even if the failure to notify the Applicant that the application which was made on 4 January 2024 was protective only does amount to unreasonable conduct, it is not appropriate to make an order for costs.

Unreasonable Conduct

26. Given the fact that no application had yet been made to the Tribunal and that, in the absence of a concluded agreement, such an application needed to be made by 17 January 2024, there is no question that it was reasonable for such an application to be made on 4 January 2024. Of course, that is not the Applicant's case. They argue that it was unreasonable for the Respondent not to inform them that the application was protective only and that it was unreasonable not to explain why completion had not yet taken place.

27. Whilst it is unfortunate that the Respondent did not explain the reason for its application when it was made, the Tribunal is not satisfied that failing to do so was unreasonable.

28. The Applicant ought to have been aware of the impending statutory deadline. Indeed, it is clear from their letter of 11 January 2024 that they were aware of it and also aware of the possibility that the application was purely protective – see page 7 where the Applicant states as follows;
"*While it appears your client has made their application to the tribunal to ensure that this is within the statutory time frame…..*"

29. The Applicant has not challenged the Respondent's assertion that the Respondent's completion was dependent upon the sale of the property

and that the sale was being handled by the same solicitors. It is clear from the correspondence that the proposed completion date was not set in stone – hence the e-mail from the Applicant on 13 December 2023 enquiring whether the Respondent was still aiming for a completion on 19 December (page 67). Correspondence was continuing on the basis that the agreement was still progressing, as shown by the e-mail of 9 January 2024 from the Respondent in respect of the provision of a stock transfer form in relation to the sale which refers to a simultaneous lease extension (page 74).

30. The Tribunal concludes that whilst the Respondent's failure to explain the reasoning behind the making of the application was not helpful, it does not cross the high threshold of unreasonable conduct. Given the context, the reasoning was likely to be apparent – and indeed was identified by the Applicant in their letter of 11 January 2024.

Should an Order Be Made

31. Even if the failure to explain the reason for the application was unreasonable, the Tribunal is not satisfied that an order for costs should be made. Here the time line is instructive.

32. The application was made on 4 January 2024. Further correspondence about the ongoing sale with reference to the proposed simultaneous lease extension was received by the Applicant on 9 January 2024 (page 74) which clearly showed that the proposed agreement was still viable. It is not until 10 January 2024 that the litigation team are instructed and the costs sought are all in respect of costs incurred for time spent after 10 January 2024 (see the interim invoice at page 40).

33. The Tribunal does not accept the Applicant's contention that on receipt of the application it had no choice but to assume that the matter was not completing and that, instead, they were required to embark on an immediate and full-blown response to it. That is especially so considering that that response did not begin until after the receipt of further correspondence suggesting that the agreement was still progressing.

34. The Applicant's own case is that they were surprised to receive the application and were unsure of the Respondent's intentions. Yet they were also clearly aware of the possibility that the application was purely protective. The reasonable and obvious course of action at that point would have been to make a simple enquiry of the Respondent to confirm whether or not their surmise that the application was merely protective was correct. A short telephone call would have been sufficient. Had such a call been made no further work would have needed to have been undertaken. Instead, the Applicant has unreasonably assumed that it had no choice but to embark on a comprehensive reaction to the application and it only made an enquiry as to the Respondent's intentions in the context of a three page letter.

35. In addition, there was no immediate urgency to treat the application as being substantive rather than protective only. Whilst it is correct that the Applicant could not simply ignore the fact that the application had been made altogether, there was no need to provide a full-blown response until after the Respondent's intentions were clarified.

Conclusion

36. In the circumstances, therefore, and for the reasons given above the Tribunal decides not to make an order for costs under rule 13(1)(b) of the Rules.

Name: Judge S. J. Walker **Date:** 4 June 2024

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.