FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/17UK/LIS/2018/0034**
Property	**:**	**Apartment 17, Bretby Hall, Bretby, Burton on Trent, Derbyshire DE15 0QQ**
Applicants	**:**	**Christopher and Adele Pratt**
Representative	**:**	**None**
Respondents	**:**	**Bretby Hall Freeholders Ltd (1)** **Bretby Hall Management Company Ltd (2)**
Representative	**:**	**Nelsons Solicitors**
Type of Application	**:**	**Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 ("the Act") and for an order under section 20C of the Act**
Tribunal Members	**:**	**Judge C Goodall** **Deputy Regional Valuer V Ward**
Date of Decision	**:**	**10 January 2019**

DECISION ON THE RESPONDENTS' APPLICATION FOR COSTS

Background

1. The Applicants live in Apartment 17 at Bretby Hall in Bretby, Derbyshire, which they have leased for a term of 125 years under a lease dated 11 April 2003. On 17 June 2018 they applied for a determination from the Tribunal under sections 27A and 20C of the Act of the correct apportionment of (a) the service charge and (b) the insurance premium they must pay under their lease for the years 2007 to 2018 ("the Application").

2. Of its own volition, the tribunal raised as a preliminary issue whether the application should be stuck out under Rule 9(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") because the issues raised had already been determined in a case that had already been decided. For the reasons that are more fully set out in a preliminary decision dated 19 September 2019, the tribunal determined that:

    a. For 2014 and years prior to 2014, the Application, in so far as it related to the service charge apportionment would be struck out as that issue had already been determined in a previous tribunal decision in 2015;

    b. The service charge apportionment issue for years after 2014 could be pursued, and directions were made for that issue to be determined. The tribunal explained that "it was for the Applicants to show that there is a legal basis for the Tribunal to allow re-litigation of the service charge apportionment issue. The Applicants may wish to take legal advice on this issue, which is not straightforward. If the Tribunal decides that there is no basis for re-opening the issue, as it has already been decided in the 2015 decision, there is a possibility (which has already been brought to the parties' attention in the Respondents' submission in relation to this preliminary decision) of an application for costs on the basis that the Applicants have acted unreasonably. The Tribunal wishes to draw this risk to the Applicants attention" (para 19 of the preliminary decision);

    c. The question of apportionment of insurance premiums had not previously been litigated and should be allowed to proceed.

3. By a letter dated 8 October 2018, the Applicants sought to withdraw their whole Application. The wording used in that letter was "after receiving advice, and albeit reluctantly, we are withdrawing our application". This request was approved by the tribunal on 12 October 2018.

4. By a letter from their solicitors dated 16 October 2018, the Respondents applied for an order that the Applicants should pay their costs of the Application under Rule 13 of the Rules. The grounds of this application were set out in that letter and have been considered carefully by the tribunal.

5. The Applicants oppose the costs application. Their arguments are set out in their undated submission, received on 26 November 2018, which the tribunal has also considered with care.

6. Neither party has requested a hearing of the costs application, which the tribunal has therefore considered based on the written representations referred to above. This is the determination of the costs application.

Law

7. Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") provides that:

> 13.—(1) The Tribunal may make an order in respect of costs only—
> ...
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
> ...
> (iii) a leasehold case ...

8. This case is a leasehold case, as it concerns a dispute over which the Tribunal has jurisdiction under the Landlord and Tenant Act 1985.

9. The leading case on applications under Rule 13(1)(b) is *Willow Court Management Co (1985) Ltd v Alexander & Othrs [2016] UKUT 290 (LC)* ("Willow Court").

10. In Willow Court, the Upper Tribunal (inter alia):

    a. Accepted that a passage from the Court of Appeal case of *Ridehalgh v Horsefield [1994] Ch 205* illuminated the meaning of the word "unreasonable". That passage said:

    > "Unreasonable" also 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 other 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 as reflecting on a practitioner's judgment, but it is not unreasonable.";

    b. Rejected an argument that unreasonable conduct should be widely interpreted to include such conduct as failing to adequately prepare for a hearing, failing to adduce proper evidence in support of their case, or failing to state their case clearly (paragraphs 23 and 24);

    c. Said, in paragraph 25:

    > "For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with

tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable."

d. And expressed the view in paragraph 26 that:

"We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event … these cases are often fraught and emotional; typically, those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense."

11. In paragraph 32 of Willow Court (in a section headed "The position of unrepresented parties"), the Upper Tribunal said this:

"When considering objectively whether a party has acted reasonably or not, the question is whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way in which that party acted. In making that assessment it would be wrong, we consider, to assume a greater degree of legal knowledge or familiarity with the procedures of the tribunal and the conduct of proceedings before it, than is in fact possessed by the party whose conduct is under consideration. 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. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings."

12. Paragraph 35 of Willow Court is also relevant, where the Upper Tribunal said (in a section headed "The withdrawal of claims"):

"It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and to abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs."

13. Willow Court suggested that the tribunal should adopt a three-stage approach to unreasonable conduct costs applications. Firstly, the tribunal should consider whether there has been unreasonable conduct. Secondly, and if so, the tribunal should decide whether it ought to exercise its discretion to make a costs order, and thirdly, if so, it should determine what the terms of the order should be.

Representations

(a) the Respondents

14. The Respondents (via their solicitor's letter of 16 October 2018) point out that in relation to the application for determination of apportionment of service charges prior to 2015, they have succeeded in having that application struck out on the

grounds that it had previously been the subject of a tribunal determination. They argue that this demonstrates that the conduct of the Applicants in bringing a second set of proceedings on substantially the same grounds was unreasonable conduct. They also argue that to bring proceedings and then to withdraw them is itself unreasonable. Whilst acknowledging that the Applicants are litigants in person, they say they are "sophisticated" litigants. They also comment that the time for seeking advice (as the Applicants did prior to withdrawing their application) was before launching proceedings, rather than after receiving the tribunal's determination on the preliminary application.

15. If the tribunal accepts the Respondents' arguments, the solicitors argue that the Applicants should be ordered to pay the whole of the Respondents' costs, calculated as £4,099.80 (incl VAT).

(b) the Applicants

16. The Applicants say they are lay persons. They say they had not known of the legal principle that the same issue should not be litigated twice prior to it being brought to their attention in the preliminary decision. They took advice (which the tribunal had specifically suggested they should) following the preliminary decision, and as a result of that advice, they decided to withdraw their application. They say that they should not be penalised for failing to appreciate a technical argument.

Discussion

17. The normal rule in proceedings in the Property Chamber is that each party bears their own costs; the tribunal is not a "costs-shifting" jurisdiction, in contrast with the courts.

18. The normal rule can be overridden in the event of unreasonable conduct in bringing, defending, or conducting the proceedings. The tribunal's first task is therefore to determine whether the Applicants brought or conducted the proceedings unreasonably, within the sense of that word as defined in the section on "Law" above.

19. The Respondents' first ground for establishing unreasonable conduct is that the Applicants sought to re-litigate an issue that had already been decided in 2015, by asking for a review of the apportionment of service charge in the 2008-2014 years. That issue was not the key issue in the 2015 proceedings, and the Applicants say that they were not aware of the legal principles governing the re-litigation of issues. The tribunal has no basis upon which it can reasonably disbelieve this claim. Nor does it have any basis for ascribing expertise to the Applicants apart from their involvement in the 2015 case. The law on finality of decisions was not explored in the 2015 decision. The tribunal's view is therefore that merely raising the issue of apportionment of service charges for years where that issue had previously been decided, where the Applicants did not fully appreciate the legal consequence of that, is not itself unreasonable. The guidance in paragraph 32 of Willow Court seems to the tribunal to be particularly apt.

20. It also has to be recognised that there were other elements of the application made by the Applicants that were not struck out, and which therefore could have continued to a determination, and the Respondents did not fully succeed in the preliminary decision.

21. The second point made by the Respondents is that abandoning the application was unreasonable conduct. The tribunal rejects that suggestion. Indeed, it seems to the tribunal that it was the very essence of reasonable conduct for the Applicants to withdraw their claim. They were warned of the consequences of losing their case on apportionment of the service charge for the years 2015-2018 by the Respondents and the tribunal, were advised to take advice by the tribunal, took advice, and acted upon it. It cannot be unreasonable for any applicant to withdraw an application having been advised to do so by competent advisers. Again, Willow Court (at paragraph 35) has apt advice on this element of the costs application.

22. Finally, the Respondents' argued that the Applicants should have sought legal advice prior to commencing proceedings, which would have revealed the weaknesses in their case and avoided the Respondents needing to incur costs. The tribunal rejects that argument. The Property Chamber is a tribunal to which unrepresented parties should have access without fear that failure to take advice prior to an application will be considered to be unreasonable conduct.

23. For these reasons the tribunal determines that the Applicants did not act unreasonably in bringing or conducting the proceedings. The application for costs against them must therefore fail.

Appeal

24. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)