FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/HIN/2016/0017**
Property	**:**	**17 St Quinitins Avenue, London W10 6NX**
Applicant	**:**	**Triplerose Limited**
Respondent	**:**	**The Royal Borough of Kensington & Chelsea**
Type of Application	**:**	**Supplemental cost applications following a Consent Order relating to the substantive issues on an appeal against an Improvement Notice**
Tribunal Members	**:**	**Judge P Korn** **Mr M Cairns MCIEH**
Date of Consent Order	**:**	**17th January 2017**
Date of Supplemental Decision	**:**	**27th March 2017**

DECISION ON COSTS

Decisions of the Tribunal

(1) The Tribunal makes no order quashing the provision for payment of the Respondent's fee of £441.00 contained in the Improvement Notice, and for the avoidance of doubt it upholds the Respondent's right to levy this charge.

(2) The Tribunal makes no order against the Respondent for reimbursement of the application and/or hearing fees paid by the Applicant.

(3) The Tribunal makes no order for costs against the Respondent pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The background

1. This application is supplemental to an appeal (the "**Main Application**") by the Applicant against an improvement notice (the "**Improvement Notice**") dated 18th August 2016 served on it by the Respondent in respect of the Property.

2. A hearing took place in relation to the Main Application and the parties reached a settlement at that hearing. The terms of that settlement are contained in a Consent Order dated 17th January 2017. That Consent Order lists the works already undertaken by the Applicant as at the date of that hearing and also lists the further works which the Applicant undertook at that hearing to carry out. The questions of (i) the payment of the Respondent's fee of £441.00 (referred to in the Improvement Notice), (ii) the reimbursement of the Applicant's application fee and hearing fee and (iii) any cost applications pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Rule 13(1)(b)**") were left to be determined by the Tribunal on receipt of written submissions on the same. a

3. The Applicant has now made an application for orders (i) quashing the provision for payment by it of the Respondent's fee of £441.00, (ii) for the reimbursement of the Applicant's application fee and hearing fee and (iii) for costs against the Respondent pursuant to Rule 13(1)(b).

4. Both the Applicant and he Respondent have made written submissions.

5. The Improvement Notice listed various Category 1 hazards relating to Excess Cold and Fire and various Category 2 hazards relating to Falls Between Levels, Electrical Hazards, Structural Collapse And Falling Elements and Collision And Entrapment.

Applicant's written submissions

6. The Applicant argues that it has not disputed the necessity of the works but has only sought reasonable arrangements for carrying out the same in the light of the issue of subsidence at the Property. It has explained the problem to the Respondent from the outset, and many of the works specified were related to the subsidence issue.

7. The Respondent proceeded with the Improvement Notice unreasonably. Works carried out pursuant to the Improvement Notice could be compromised by further movement in the structure if works to address the subsidence were not completed first, there was a potential conflict with the Applicant's insurance claim and there was the potential for duplication. The Respondent threatened that it would issue an Improvement Notice unless the Applicant could confirm a start and end date for the works in circumstances where the Applicant had shown that this information could not be supplied.

8. In addition, the Respondent has claimed that the Applicant did not fully engage with the Respondent but the chain of correspondence between the parties suggests otherwise. Furthermore, a substantial requirement of the Improvement Notice was the installation of gas central heating within Flat 1, but this requirement was later withdrawn.

9. In connection with its Rule 13(1)(b) cost application the Applicant has referred specifically to the Upper Tribunal case of *Willow Court Management Company (1985) Ltd and Mrs Ranta Alexander and others LRX/90/2015*. The Applicant considers that the Respondent's behaviour passes the test of unreasonable conduct as the Improvement Notice was premature and then should not have been persisted with, the Respondent denied receipt of certain documentation and then failed to comply with certain directions, the Respondent failed to go ahead with a telephone mediation which it had previously agreed to and then failed to respond to letters dated 12th and 16th January 2017 from the Applicant.

Respondent's written submissions

10. The Improvement Notice was served by the Respondent pursuant to its duties and powers under Part 1 of the Housing Act 2004. It identified two Category 1 hazards and four Category 2 hazards.

11. As regards the fee of £441.00, it is the Respondent's policy for improvement notices to carry a charge to cover officer time in preparing the notice. The charge is based on a standard hourly rate of £52 per hour which is considered to be modest.

12. The Applicant's insurer's report on the subsidence classed the movement as Category 2, which suggested a slight movement between 1mm and 5mm. In the Respondent's view, the subsidence had little effect on the works required by the Improvement Notice.

13. Specifically in relation to the issue of gas central heating, the tenants of Flat 1 did not want gas central heating to be installed. As regards the laying of glass fibre quilt and insulating of the loft hatch, these works were capable of being undertaken regardless of the slight subsidence and were essential to ensure the health, safety and well-being of the tenants.

14. As regards the window, the Respondent was merely asking for the cracked window glazing to be renewed. As regards the external door, this was in a poor condition and ill-fitted, allowing draughts and loss of heat. Both of these problems contributed to the excess cold hazard and represented a danger particularly for the vulnerable tenants including the child in the ground floor flat.

15. The Applicant's refusal to install a fire alarm system, a smoke detector and additional electrical sockets was misconceived given that these were unconnected to the cause of subsidence.

16. As regards the installation of window catches and restraints, this was not onerous and there was no evidence that it would affect the subsidence. Similarly, the required works to the doors and gate simply involved easing and adjusting them.

17. The Applicant was advised of the hazards and the need to remove them back in May 2016. By the time of the hearing the Applicant had carried out the majority of the works and had undertaken to carry out the rest (other than upgrading the gas central heating) and therefore the Improvement Notice was agreed to be quashed because the Applicant had by that stage materially complied with it, not because it had won the argument as to whether the Improvement Notice should have been served. Furthermore, the Respondent had given the Applicant over 3 months within which to provide an appropriate timescale for carrying out the works.

18. The Applicant failed to provide a copy of the structural surveyor's report on being asked for it on numerous occasions, and the Applicant failed fully to engage with the Respondent until some time after the Improvement Notice was served.

19. In relation to Rule 13(1)(b) and the *Willow Court* case, the Respondent had a perfectly reasonable explanation for not wanting to undertake telephone mediation as set out in Jade Williams' witness statement.

The Tribunal's analysis

General points

20. The Applicant in this case had laid great emphasis on the subsidence issue and the requirements of its insurer. It has also focused, for the purposes of its cost applications, on the extent to which it has corresponded with the Respondent and on the Applicant's failure to go ahead with a telephone mediation.

21. As noted by the Respondent, the Applicant was advised of the hazards as early as May 2016. They included a Category 1, Band A Excess Cold hazard and a Category 1, Band C Fire hazard. There were also four Category 2 hazards. The works required in order to remedy these hazards ranged in nature and in difficulty.

22. The Applicant does not dispute that these hazards existed, and the Respondent was under a duty (in relation to the Category 1 hazards) to take appropriate enforcement action. The Applicant has not even sought to argue that the enforcement action required by the Respondent was inappropriate or disproportionate, merely that it was premature because of the presence of subsidence.

23. Whilst it is arguable that the presence of subsidence could have had some relevance to some of the works specified by the Respondent, it seems clear that it was not a relevant excuse in relation to many of the works specified. In any event, the structural surveyor's report would appear to indicate that the degree of subsidence was less severe than the Respondent had been suggesting.

24. In our view, whilst the Applicant may genuinely have been concerned by the possible impact on the subsidence and on its insurance claim of carrying out the works specified in the Improvement Notice, its whole approach suggests a lack of concern about the serious hazards affecting the Property. We consider the uncontested hazards identified by the Respondent to be a serious risk to the health and wellbeing of occupiers, particularly vulnerable occupiers and particularly taking the hazards in aggregate, and we get no sense that these hazards were being taken seriously by the Applicant, let alone with an appropriate sense of urgency.

25. The Applicant has argued that it engaged with the Respondent more fully than the Respondent has suggested and it has also made much of the issue of the telephone mediation. However, even if it is the case that the Applicant generally responded promptly to correspondence, the issue is the nature of its response. The Respondent was obliged to take enforcement action, and in our view the Respondent was possibly even slightly too indulgent in allowing the Applicant so much time to

provide a timetable for the works. The issue at that point was not whether the Applicant responded to correspondence but its failure to carry out works to alleviate the hazards identified in anything like a timely manner given the nature of those hazards.

26. The Applicant's position might have been more tenable if it had made early efforts to carry out those works which so clearly would not adversely affect the subsidence problem and would have gone some way to alleviating one or more hazards, but instead the Applicant chose to use the subsidence as a blanket excuse for its failure to respond constructively to the Improvement Notice.

27. In relation to the telephone mediation, it seems that Mr Buckley may have exceeded his authority by suggesting a telephone mediation, but we are not satisfied that the Applicant was prejudiced by this misunderstanding in the overall context of the dealings between the parties. Equally, the Applicant has not shown that any failings on the Respondent's part in relation to compliance with directions caused the Applicant significant prejudice, and any such failings are in our view much less significant than the Applicant's own failure to engage appropriately with the Improvement Notice itself.

Respondent's £441.00 charge

28. Section 49(1)(a) of the Housing Act 2004 gives local authorities the power to levy a charge to cover their administrative costs in connection with the service of an improvement notice.

29. For the reasons given above, we are satisfied that the Respondent acted reasonably in issuing the Improvement Notice and that there is no basis in principle for quashing its right to levy the charge.

30. The Applicant has not sought to argue that the amount of the charge is itself unreasonable, but in any event we consider it to be normal for work in connection with the service of an improvement notice. Therefore the £441.00 charge is payable in full.

Applicant's application and hearing fees

31. Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 gives the Tribunal power to order the Respondent to reimburse the Applicant's application and hearing fees. Whilst the Improvement Notice was quashed by consent, this was only because the works required had either been carried out or (with one exception) been agreed to be carried out, and therefore it is not the case that the quashing of the Notice represents victory for the Applicant. Again, in our view the Respondent has acted reasonably in connection

with this process and therefore it would not be appropriate to order it to reimburse the Applicant's application and hearing fees.

32. Therefore we decline to order the Respondent to reimburse the Applicant's application fee or hearing fee.

Applicant's Rule 13(1)(b) application

33. The Applicant's application under Rule 13(1)(b) is for an order that the Applicant pay the Respondent's legal costs. The relevant part of Rule 13(1)(b) states that *"the Tribunal may make an order in respect of costs only - … (b) if a person has acted unreasonably in … defending or conducting proceedings in … (ii) a residential property case, or (iii) a leasehold case …"*.

34. In the case of *Ridehalgh v Horsfield (1994) 3 All ER 848* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct admits of a reasonable explanation. This formulation was adopted by the Upper Tribunal (Lands Chamber) in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007*. Costs are therefore not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings. Recently, as noted by both parties, it has also been considered by the Upper Tribunal in the case of *Willow Court*, where the Upper Tribunal applied its analysis of what constitutes unreasonable conduct to the facts of three separate cases.

35. The Applicant submits that the Applicant's conduct at various stages of these proceedings amounted to unreasonable conduct.

36. For the reasons given above, we do not consider that the Respondent's conduct has come anywhere close to the sort of conduct envisaged by Rule 13(1)(b). The Respondent was under a statutory duty to take enforcement action in respect of the hazards identified, and in our view it then approached them in a reasonable and proportionate manner. Whilst it could be argued that the Respondent's actions have not at all times been faultless, any minor failings have certainly not amounted to acting unreasonably for the purposes of Rule 13(1)(b).

37. Therefore we decline to make a cost order pursuant to Rule 13(1)(b).

Name: Judge P. Korn **Date:** 27th March 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.