FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/HIN/2016/0006**
Property	**:**	**53 Marchmont Street, London WC1N 1AP**
Applicant	**:**	**Brookheights Limited**
Representative	**:**	**Portico, Property Managers**
Respondent	**:**	**London Borough of Camden**
Representative	**:**	**Ms Janice Juneman**
Type of Application	**:**	**Rule 13(1)(b) penal costs**
Tribunal Members	**:**	**Judge John Hewitt** **Mr Stephen Mason BSc FRICS FCIArb**
Date and venue of Determination	**:**	**22 August 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**24 August 2016**

DECISION

Decision of the tribunal

1. The tribunal determines that the respondent's application for a penal costs order is refused.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. The respondent local housing authority served on the applicant an improvement notice dated 7 March 2016. On 4 April 2016 the tribunal received an application from the applicant in which, in effect, the applicant sought to appeal all or part of the improvement notice.

4. The improvement notice was served pursuant Part 1 of the Housing Act 2004. That part of the Act imposes duties on local housing authorities (LHAs) to take steps to improve the standards of residential housing in within their area. There are a number of enforcement steps open to LHAs subject, of course to the facts and circumstances of each individual case.

5. Having received the subject application the tribunal issued directions which are dated 11 April 2016. Included in those directions was a requirement on the part of the applicant to file and serve its file of case papers and a requirement on the respondent to file and serve its file of case papers. As regards the respondent that was to be done, initially by 23 May 2016. Later that was extended to 17 June 2016. On 16 May 2016 the tribunal received an application for an extension of time to file and serve its file of case papers on the footing that there was a prospect that matters might be resolved between the parties. That application was granted and the time for each party to file and serve their respective files of case papers was put back a couple of weeks.

6. On 25 May 2016 the tribunal received from the applicant a document that was taken to be an application for consent to withdraw its substantive application/appeal on the footing that matters in contention had been clarified with the respondent.

7. Evidently in accordance with a mediation arrangement which had been put in place, a site meeting took place on 4 May 2016. At this meeting representatives of the applicant and the respondent's environmental health officer and conservation officer all met on site for the first time and discussed the works which were the subject of the improvement notice and the implications in respect of planning consents and listed building consents which the applicant would require to obtain in order that it might meet the respondent's requirements as set out in the improvement notice.

8. Apparently this meeting was positive but the applicant required a written confirmation of a point from the respondent's conservation officer before it deemed it appropriate to formally seek consent to withdraw its appeal. By letter dated 10 May 2016 the applicant's representative reported this to the tribunal and it was in response to that letter that both parties were granted an extension of time in which to file and serve their respective files of case papers. As mentioned in paragraph 6 above by 25 May 2016 the applicant had received the confirmation it required from the conservation officer which enabled it to take the decision not to pursue its appeal.

9. By a letter dated 10 June 2016 the respondent made an application for a penal costs order pursuant to rule 13(1)(b) Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Directions were given on 16 June 2016 [4]. Those directions indicated the application would be determined summarily pursuant to rule 13(7)(a) and that it would be determined on the papers unless either party made a written request to be heard. No such request has been received.

10. Thus in accordance with directions we have a file of papers concerning the application.

    The respondent's statement of case dated 30 June 2016 is at [10-13] which is followed by a number of appendices at [14- 33].

    The applicant's undated statement of case in answer is at [35-40] followed by a number of appendices at [41-75].

    The respondent's statement of case in reply is at [78-82]. It is undated but was filed under cover of a letter dated 14 July 2016

The law

11. Before considering the merits of the application it is convenient to set out the statutory framework for such applications and the law and guidance applicable to them.

12. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides, in effect, that a first-tier tribunal shall have full power to determine by whom and to what extent costs of and incidental to the proceedings before it, are to be paid.

    The payment of such costs are to be in the discretion of the tribunal and subject to the rules of the tribunal.

    As regards this tribunal the relevant provisions are set out in rule 13. As regards the subject case rule 13(1)(b) is applicable and provides that this tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing, defending or conducting proceedings.

13. The powers as regards awards of costs made under this provision by this tribunal were considered by the Upper Tribunal (Lands Chamber)

in three conjoined appeals generically titled *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander and other appeals* which have been reported together as one with Neutral Citation Number: [2016] UKUT 0290 (LC). The decision on these appeals is dated 21 June 2016.

Despite this relevant authority being issued prior to either party serving their statements of case in connection with the application under rule 13(1)(b) presently before us neither party has referred to it in their respective statements of case.

14. Paragraphs 9 – 11 of the *Willow Court* decision sets out in full the material statutory provisions set out in section 29 of the 2007 Act, rule 13 and its background and the overriding objective set out in rule 3 all of which are material to our consideration of this application. The source and structure of this tribunal's power to award costs is clearly set out in those paragraphs so that we need not repeat them in this decision.

15. In the application before us the respondent relies solely on 'unreasonable conduct' on the part of the applicant in bringing and conducting these proceedings. Unreasonable conduct was considered by the Upper Tribunal in paragraphs 22 – 34 of its decision. In paragraph 24 the Upper Tribunal adopted a formulation that 'Unreasonable conduct' is conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. For example: would a person in the position of the party have conducted themselves in the manner complained of? Or, to apply what has been described as an acid test: Is there a reasonable explanation for the conduct complained of?

16. The Upper Tribunal made plain that it is not possible to pre-judge certain types of behaviour as reasonable or unreasonable. It will be fact-sensitive and must be viewed in context. The Upper Tribunal urge lower tribunals not be over zealous in detecting unreasonable conduct.

17. The Upper Tribunal recommends a three stage approach. At the first stage the question is whether a person had acted unreasonably. A decision on that is not a matter for discretion but rather the application of an objective test of the standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.

18. A discretionary power is then engaged and the decision moves to a second stage of the enquiry. At this second stage the tribunal is required to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not. It is only if a tribunal decides that it should make an order

for costs is the third stage reached. That third stage is what the terms (and amount) of that order should be.

19. The Upper Tribunal made it clear (paragraph 30) that at the second and third stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct found will be an important part of the material to be taken into account, but other circumstances may also be relevant. Examples of what they might be are then given.

20. One of those issues may concern the (late) withdrawal of a claim or application. Given that that may have relevance to the application presently before us we draw attention to what the Upper Tribunal had to say. In one of the appeals before the Upper Tribunal it was asserted that an applicant delayed in withdrawing proceedings until after a time when it should have been clear to him that he had achieved as much by concession as he could realistically expect to obtain from the tribunal at a full hearing.

21. The Upper Tribunal made plain that it is important that parties should be assisted to make sensible concessions and to abandon less important points or claims or even, where appropriate, an entire claim. Such behaviour is to be encouraged, and 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 penal costs.

22. It was stressed that concessions are an important part of contemporary litigation and are to be encouraged. In our judgment the same may be said of mediation or other forms of early dispute resolution.

The present application

23. We do not propose to set out in full in this decision the statements of case which the parties have served. They have been read in full.

24. The gist of the case for the respondent is that the applicant was poorly advised and the application was misconceived and should never have been made. It also argues that once brought the application should have been withdrawn at a much earlier stage. It is said that if it had been withdrawn at an earlier stage the respondent would not have incurred the costs of preparing and serving its statement of case which, was originally to have been served by 23 May 2016. It was also asserted that nothing whatever changed between the making of the application on 4 April and its withdrawal on 25 May 2016.

25. The applicant's principal response [35] is set out in 33 closely typed paragraphs describing in some detail the history of the HMO licence granted by the respondent, inspections and site visits carried out and a discussion on what works might be required to satisfy the officer's requirements.

26. Whatever the issues may have been the respondent prepared an improvement notice. It is dated 7 March 2016. It appears there was some delay on the part of the respondent in serving it. Ultimately it was served. The notice (properly) reminded the applicant that it if it wished to appeal all or part of the improvement notice it had to so do within the period of 21 days beginning with the date on which it was served. The appeal was received by the tribunal on 4 April 2016.

27. The grounds of the substantive application to the tribunal were that there were concerns that some of the works required by the improvement notice would or might require planning and/or listed building consent such that it appeared the applicant was being forced to make applications for those consents which were likely to be refused. In effect the applicant sought modifications to the improvement notice with regard to the contentious points.

28. The tribunal gave directions on 11 April 2016. Those directions included a requirement that the parties attempt mediation. Starting on 13 April 2016 the parties entered into correspondence, they were both positive about a mediation meeting and after about a week or so a site mediation meeting was set for 4 May 2016 which, evidently, was the first date that all of the respondent's officers could make. That meeting was attended by Ms Juneman, EHO, her immediate superior Mr Arnold plus a conservation officer, Mr Rose. That meeting appeared to have clarified the nature of some of the works to be carried and the planning/listed building position in relation to them. Written confirmation on planning matters was subsequently received by the applicant. Following receipt, on 25 May 2016 the applicant sought to withdraw its substantive application/appeal.

29. In these circumstances the tribunal was not called upon to determine the merits or otherwise of the points raised by the applicant in its substantive application.

Discussion

30. First we record that in this case the respondent LHA is exercising statutory functions under the Act aimed at improving the stock of private residential accommodation within its jurisdiction. The applicant is exercising a statutory right to appeal an improvement notice served upon it.

31. We also note that the Act makes express provision for an LHA to recover from the party on whom it has served an improvement notice its costs incurred in connection with the preparation and service of the notice. In the present case those costs were put at £1,100 and it appears that the applicant has accepted its liability to effect payment.

32. The Act makes no express provision as regards any costs which a LHA may incur in connection with an appeal against the terms of an improvement notice.

33. At the time of enactment of the Act appeals against improvement notices were made to the Residential Property Tribunal (RPT). At that time the RPT had a limited jurisdiction to award costs, which was capped at a maximum of £500. We infer from this that when the Act was enacted Parliament intended that on appeals to the RPT each party was to be responsible for its own costs subject only to the limited power of the RPT to make an award of penal costs capped at £500.

34. The jurisdiction of the RPT was transferred to this tribunal with effect from July 2013. As regards costs the jurisdiction is set out in rule 13. Although the rules are bespoke for this tribunal they are based on a generic set of rules adopted across a range of first-tier tribunals and we infer that was intended to apply some level of uniformity across such tribunals. The rules do not impose a cap of £500, and the circumstances in which a penal costs order might be made were changed and the expression 'acted unreasonably in' was adopted in place of the expression 'acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings".

35. The above circumstances are slightly different from the three appeals determined by the Upper Tribunal in the *Willow Court* decision. There, all three cases concerned service charge disputes where the sums payable were to due parties controlled by the lessees and where the sums were payable as a matter of contract as set out in the respective leases. Whilst *Willow Court* dealt with a different set of circumstances in our judgment the general guidance on the application of rule 13 set out in the case is broadly applicable to the case presently before us and we propose to adopt it.

36. Accordingly the first question we have to address is: 'Was it unreasonable of the applicant to have filed its appeal with the tribunal?' We find that it was not for several reasons.

37. It is not for this tribunal to speculate on what the outcome of the case might have been if it had gone to a full hearing. The applicant was professionally represented. The grounds for the application set out clear concerns that were held as to the implications arising from the improvement works with planning consents and listed buildings consents. The improvement notice (correctly) reminded the recipient that there was a 21-day period in which to file an appeal. We find that it was not unreasonable for the applicant to have filed the appeal to hold and protect its position pending clarification of the concerns held by its advisers. Whether those concerns were, in the event, right or wrong, is not to the point. We find they were genuinely held. It was made clear in *Willow Court* that simply because a claim or line of argument was ultimately unsuccessful it does not mean that pursuing it is automatically to be regarded as unreasonable conduct.

38. We find that promptly upon receipt of directions the applicant engaged in the process to set up a mediation meeting. There was a little delay in

holding that meeting due to finding a date mutually convenient to the three representatives of the respondent who were to attend. The meeting was held on 4 May 2016. It was positive. Matters were clarified, written confirmation was provided shortly thereafter and upon receipt of it the applicant withdrew its appeal. We find that such conduct on the part of the applicant is far from unreasonable. Indeed, it was a rational and sensible, indeed text book way to clarify issues.

39. In view of this finding we need not go on to address the second and third stages. We do however, wish to make one observation. The respondent claims costs of £2,773.50 based largely on a charge-out rate of £60 per hour for council officers. A substantial part of that sum is £1,260 being 21 hours claimed for Ms Juneman preparing the respondents witness statements and case papers on 27 April 2016. At that time the mediation meeting for 4 May 2016 had been arranged. Also at that time the directions provided that the statement of case did not have to be filed and served until 23 May 2016. In the absence of any explanation it seems to us that it was premature and unreasonable to have incurred those substantial costs just a week before the mediation meeting.

40. We might also add that given the overriding objective and the direction of the tribunal that the parties try and resolves matters by way of mediation, the costs of and preparing for mediation will, in our judgment, rarely be the subject of a penal costs order especially where both parties enter into mediation in good faith and the outcome is successful.

John Hewitt
24 August 2016