**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **LON/00AC/LBC/2018/0066** |
| **Property** | **:** | **Flat 2, 722 High Road, North Finchley, London N12 9QD** |
| **Applicant** | **:** | **Absko Limited (landlord)** |
| **Representative** | **:** | **The Brooke Consultancy LLP** |
| **Respondent** | **:** | **Mr Christian Haartje (tenant)** |
| **Representative** | **:** | **Gentle Mathias LLP** |
| **Type of Application** | **:** | **Costs – rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** |
| **Tribunal Members** | **:** | **Judge N Hawkes**<br>**Ms S Coughlin MCIEH** |
| **Date and venue of paper determination** | **:** | **4 March 2019 at 10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | **:** | **4 March 2019** |

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**DECISION**

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## Decision of the Tribunal

The respondent's application for an order for costs against the applicant pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is allowed and the applicant is ordered to pay the respondent the total sum of £5,500 (inclusive of disbursements and VAT).

## The application

1. By a letter dated 17 November 2018, the respondent seeks an order for costs against the applicant pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("rule 13").

2. Directions were given by the Tribunal on 20 November 2018 ("the Directions") leading up to a paper determination which took place on 4 March 2019.

3. By paragraph 22 of the Directions, the applicant was, by 22 January 2019, required to send the respondent a response to the application setting out the reasons for opposing the application, with any legal submissions; any challenge to the amount of the costs being claimed, with full reasons for such challenge and any alternative costs; and details of any relevant document relied upon with copies attached.

4. If the applicant had complied with this direction, the respondent would have then had until 5 February 2019 to send the applicant a statement in reply and both parties' statements of case would have been included in the bundle prepared by the respondent for the Tribunal's determination.

5. The applicant failed to comply with this direction and, instead, sent the Tribunal a letter dated 26 February 2019 setting out its submissions. This letter is over two weeks out of time and it arrived after the first date provisionally set for the Tribunal to make its determination (which was originally due to take place in the week commencing 25 February 2019).

6. The applicant's representative states that the reason for the lateness of the applicant's submissions is that they moved offices in August 2018. However, it is for the applicant to ensure that the respondent has the applicant's representative's up to date contact details; it appears from the Tribunal's file that documents concerning this application were sent to the applicant's representative as well as to the Tribunal by email dated 8 January 2019 (i.e. not simply by post); and arrangements could have been made for post to be forwarded to the new offices following the change of address.

7. Further, if the Tribunal were to take the late submissions into consideration in making this determination, the respondent would be prejudiced because he has not had any opportunity to respond.

8. In all the circumstances, the Tribunal has not placed any weight on the submissions contained in the letter dated 26 February 2019 which was filed and served on behalf of the applicant in breach of the Tribunal's Directions.

## The Determination

9. The Tribunal's power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007 , which includes provision that:

*29. Costs or expenses*

*(1) The costs of and incidental to—*

*(a) all proceedings in the First-tier Tribunal …*

*shall be in the discretion of the Tribunal in which the proceedings take place.*

*(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.*

*(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules …*

10. Rule 13(1)(b) of the Tribunal Procedure Rules provides so far as is material:

*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—*

*…*

*(ii) a residential property case*

11. Rule 13 was considered by the Upper Tribunal in Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC).

12. The first question is whether the applicant has acted unreasonably. Secondly, if the applicant has acted unreasonably, the Tribunal must consider whether in the light of the unreasonable conduct it has found it ought to make an order for costs. If so, the third stage is what the terms of the order should be.

13. As regards the first question, at [27] of Willow Court, the Upper Tribunal stated that "unreasonable conduct is an essential pre-condition of the power to order costs under the rule".

14. The Tribunal notes, in particular, that at [24], the Upper Tribunal stated:

*"… An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in Ridehalgh v Horsefield at 232E, despite the slightly different context. "Unreasonable" conduct includes 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. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"*

15. In the respondent's statement of case it is asserted that:

(i) The applicant is a commercial property company which has been legally represented at all times.

(ii) The applicant did not seek to comply with the directions which were made by the Tribunal in the substantive proceedings.

(iii) The respondent was told on 1 November 2018 that the applicant's evidence would be sent out that day but this did not happen.

(iv) No response was received by the respondent to an email putting the applicant on notice that if the applicant proceeded with the application the respondent would seek to strike out the substantive application and recover his costs.

(v) On Monday 5 November 2018, just 38 minutes before the Tribunal was due to inspect the Property,

the applicant filed a notice withdrawing the application on the basis of its own breach of the Tribunal's directions.

(vi) The alleged breaches of covenant were not breaches of covenant at all; the applicant had waived the alleged breaches having offered to grant the respondent a longer lease in place of the existing lease.

(vii) The applicant was aware that the respondent lives abroad and would have to travel to England to defend himself.

(viii) The applicant draws the inference that the purpose of the application was to put pressure on the respondent to take a new 125 year lease at a premium.

16. The Tribunal accepts the facts set out in the respondent's statement of case (no statement of case disputing these facts having been filed within time); finds that there is no reasonable explanation for the conduct complained of (which the Tribunal has considered as a whole); and determines that the applicant has acted unreasonably in its conduct of the proceedings.

17. The Tribunal determines that that, in all the circumstances of this case, taking into account:

(i) the matters set out in the respondent's statement of case dated 17 December 2018; and

(ii) the applicant's failure to keep the respondent notified of its representative's change of address and failure to comply with the Tribunal's Directions dated 20 November 2018;

the Tribunal ought to exercise its discretion to make an order for costs.

18. At [29] of Willow Court, the Upper Tribunal stated:

*"Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid",*

*subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct."*

19. Further, at [30] the Upper Tribunal stated that the nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account.

20. At [40] it is stated that unreasonable conduct is a condition of the Tribunal's power to order the payment of costs by a party, but once that condition has been satisfied the exercise of the power is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned.

21. In the present case, in determining the level of the costs to be paid by the applicant, the Tribunal has taken into account all of the circumstances of the case and, in particular, the following factors:

    (i) The nature and seriousness of the unreasonable conduct complained of (including the fact that an application for the determination of an alleged breach of covenant may be a preliminary to court proceedings to forfeit the lease).

    (ii) The fact that it would have been apparent that the application was not being progressed by the applicant.

    (iii) The nature and limited complexity of the application, having regard to the respondent's position that the alleged breaches of covenant had been waived (as a result of which the Tribunal considers that the hourly rates and the time spent by respondent's representatives falls to be reduced).

22. Taking all of these matters into account, the Tribunal determines that the sum payable by the applicant to the respondent is £5,500.00 (including VAT and disbursements).

Judge Hawkes

4 March 2019