



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

Case Reference : CHI/00ML/LIS/2018/0061

Property : Flat 5, St Anne's Court, Nizells Avenue, Hove
BN3 1PR

Applicant : Greyclyde Investments Limited

Representative : Wagner & Co

Respondent : John W R Davies & Cheryl T Roach

Representative : -

Type of Application : Application for costs

Tribunal Member : Mr D Banfield FRICS

Date of Decision : 3 April 2019

DECISION

The Tribunal declines to award costs against the Respondent.

Background

1. This determination arises from a claim for costs incurred by the Landlord in respect of their application under S.27A Landlord and Tenant Act 1985.
2. The Tribunal made its determination on the substantive issue on 28 February 2019 and invited further submissions in respect of a claim for legal costs of £3,088.38 received from Wagner & Co.
3. The Applicant was invited to identify the legislation under which the application was made and the Respondents were invited to reply.
4. A witness statement has been received from Mark Henry Wagner dated 12 March 2019. No reply has been received from the Respondents.
5. Mr Wagner's witness statement refers to The Fifth Schedule Part I, clause 6 of the lease which refers to "The cost of any expenses incurred by the Lessors in obtaining the maintenance contribution from the Lessee"
6. Part I of the Fifth Schedule contains a "shopping list" of matters in respect of which the Lessee is required to contribute, i.e. the maintenance charge. Clause 4(iii) contains the covenant on the part of the Lessee to contribute 4.7% of the costs, expenses outgoings and matters mentioned in Part I of the Fifth Schedule.
7. In his submissions he says that Litigation is always seen as a last resort. In support he refers to a letter before action sent on 9 July 2018 and that the outstanding service charges were discussed extensively before the claim was issued. The Respondent has failed to comply with a number of the Tribunal's orders, has failed to make any contribution to the service charges prior to the issue of the claim and was told by the Judge at the CMC that they had no defence to the claim on the basis of an apparent set off.
8. Under the heading Wasted Costs Mr Wagner refers to the issue being considered in the "Willow Court Management" case and sets out his understanding of the effect of that decision.
9. He cites as examples of unreasonable behaviour;
 - Failed to pay maintenance contributions or ground rent,
 - they were given every opportunity to explain their dispute,
 - An issue regarding an insurance claim was discussed at the CMC and they were told to bring a claim in the County Court.
 - They could have taken legal advice
 - The lessees failed to comply with directions requiring the Lessor to make further applications and incur unnecessary costs.
10. Whilst not unreasonable conduct to defend proceedings even if a defence maybe (sic) unmeritorious. It is unreasonable conduct however to;

- Fail to make payment of any service charges properly demanded, and a claim set-off which was hopeless.
 - Be given all opportunities prior to the issue of the claim to reach a resolution but then fail to make payment.
 - Be told by the Tribunal that the defence of “set off” would not succeed
 - Be given every opportunity to defend the claim but then fail to comply with any orders made by the Tribunal.
11. It would be unreasonable for the costs of this claim to be passed onto the other leaseholders through the service charges

The Law

12. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) 2013 state: -
- (1) The Tribunal may make an order in respect of costs only –
 - (a) Under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
 - (b) If a person has acted unreasonably in bringing, defending or conducting proceedings in (ii) a residential property case, or (iii) a leasehold case

Discussion and Decision

13. Although Mr Wagner sets out the clauses of the lease whereby legal costs may be charged to the service charge account he also says that it would be unreasonable to pass the costs onto the other leaseholders through the service charge.
14. Recovery of costs by reference to The Fifth Schedule part I of the lease can only refer to whether they may be placed on the service charge account; they cannot be used to seek recovery from a single lessee. Furthermore, the Tribunal could not make a determination on matters that affect other lessees without first giving them the opportunity of participating in the proceedings.
15. Turning now to the second part of Mr Wagner’s witness statement reference is made to “Wasted Costs”. The power to make an order for wasted costs under rule 13(1)(a) and section 29(4) of the 2007 Act is concerned with the conduct of a “legal or other representative” of a party, and not the conduct of the party themselves. It is a distinct power which should not be confused with the power under rule 13(1)(b).
16. The remaining powers the Tribunal has to award costs are therefore contained in Rule 13 (1)(b) set out in paragraph 12 above.
17. In assessing any liability for costs under this rule it must first be noted that it is the party’s actions in bringing, defending or conducting proceedings

that is the issue. For a respondent, conduct before proceedings have commenced is not therefore a relevant consideration.

18. After stripping out the behaviour prior to the issue of proceedings we are potentially left with a failure to comply with directions, a failure to seek legal advice, a failure to pursue the insurance claim issue and a failure to either accept or act on the position regarding the unavailability of the “set off” defence.
19. With the benefit of the guidance obtained from the Willow Court decision and set out in the following extracts the Tribunal must first determine whether the Lessees have acted unreasonably.

23. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who **fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly** or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24 We do not accept these submissions. 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* 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?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the

examples he gave would justify the making of an order under rule 13(1)(b). 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

32. In the context of rule 13(1)(b) we consider that the fact that a party acts without legal advice is relevant at the first stage of the inquiry. 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.

20 Applying the Willow Court guidance above the Tribunal does not consider that the Respondents' conduct by largely failing to engage with the Tribunal's proceedings is sufficient to meet the test of unreasonableness and the Tribunal therefore declines to make an order for costs against the Respondent.

21 As already stated the Tribunal makes no determination whether these costs are recoverable through the service charge.

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
2. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
3. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.