



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

Case Reference : **LON/00AW/LAM/2018/0013**

Property : **33 Tregunter Road, London SW10 9LS**

Applicants : **Rosanna Burcheri and Patrice Maffre,
leaseholders of Flat 1**

Respondents : **Laura Fargna, and Roger and Sandra
Lowe**

Type of Application : **Supplemental cost application following
application for appointment of manager**

Tribunal Members : **Judge P Korn
Mr N Martindale FRICS**

**Date of receipt of all
written submissions** : **9th April 2019**

**Date of Supplemental
Decision** : **13th May 2019**

SUPPLEMENTAL DECISION ON COSTS

Decision of the tribunal

The tribunal makes no order under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Tribunal Rules”).

The background

1. This application is supplemental to an application (the “Main Application”) made by the Applicants pursuant to section 24 of the Landlord and Tenant Act 1987 for the appointment of a manager in relation to the Property. The respondents to the Main Application were 33 Tregunter Road Limited (the First Respondent), Laura Fargna (the Second Respondent) and Roger and Sandra Lowe (the Third Respondents).
2. The Main Application was successful in that the tribunal agreed to appoint the Applicants’ proposed manager, albeit that the tribunal did not agree to all of the terms of the Applicants’ proposed management order.
3. This supplemental application is a cost application made by the Applicants pursuant to paragraph 13(1)(b) of the Tribunal Rules against the Second Respondent and the Third Respondents. For ease of reference, the Second Respondent and the Third Respondents will be referred to in this decision simply as “the Respondents” as they are the sole respondents to this supplemental application. In addition, the First Respondent to the Main Application will be referred to in this decision as “the Company”.

Applicants’ written submissions

4. The Applicants submit that the Respondents acted unreasonably in a number of ways. The Respondents repeatedly and consistently failed to agree to the appointment of a manager despite the clear lack of management of the Property and the inability of the shareholders and company directors to agree to take the necessary management steps. They also repeatedly and consistently failed to agree to the identity of the manager.
5. In particular, the Applicants argue that if the Respondents had agreed earlier in the process that a manager should be appointed then the cost of the application would have been significantly reduced. They also consider that the Respondents’ continuous opposition to the appointment of Alison Mooney (the manager appointed by the tribunal) was in order to be obstructive and to waste time. They add that “*given that Ms Mooney clearly was an appropriate manager (see paragraph 42 of the Tribunal Decision) the Second and Third Respondents should not have resisted her appointment*”. They also object to the Respondents’ refusal to “*abide to the suggestion by the Court that Mrs Mooney was a suitable Manager for the purpose of the Application*”.

6. In conclusion the Applicants state that the Respondents' conduct throughout the proceedings was vexatious, obstructive and solely designed to slow down the resolution of the case.

Respondents' written submissions

7. The Respondents in their written submissions refer the tribunal to the three-stage test for considering cost applications set out in the decision of the Upper Tribunal in *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)*. They submit that unreasonable conduct is an essential pre-condition to the power to order costs under paragraph 13(1)(b) of the Tribunal Rules and that the tribunal may only take into account behaviour relating to bringing, defending or conducting proceedings. It therefore follows that the Respondents' conduct leading up to the application may not be taken into account in considering whether that pre-condition has been met. Furthermore, where a respondent is joined as party to existing proceedings it is only that person's conduct from the date of joinder that can be taken into account.
8. The Respondents further state that the Applicants refused to engage with them as individuals on any management issues until they were joined to the proceedings. The Main Application was not made until 14th September 2018, and most of the alleged conduct relied upon by the Application took place before that date. The Respondents were only notified as interested persons pursuant to directions issued on 21st September 2018 and the substantive documentation required to be served in support of the Main Application was only served on the Company on 22nd October 2018. The Respondents asked to be joined to the proceedings on 19th November 2018 and – although all parties were acting on the assumption that they would be joined as parties from either 5th November or 19th November – they were only technically joined at the hearing itself.
9. The Respondents agreed to the principle that a manager should be appointed in their statement of case served on 26th November 2018. The differences between the parties were therefore just in connection with the identity of the manager and the terms of the management order. The Respondents do not accept that it was unreasonable of them to seek the appointment of Mr Cleaver over Mrs Mooney, and as regards the terms of the management order the Respondents were successful in obtaining a number of changes to those terms.
10. Even if, which is not accepted by the Respondents, the Applicants have satisfied the stage one pre-condition, the Respondents do not accept in any event that the tribunal should exercise its discretion to make a cost award. The Applicants refused to engage with them as individuals prior to their joinder to proceedings, the original form of management order sought by the Applicants was unreasonably wide and the Respondents have been largely successful in persuading the tribunal to address their concerns in relation to the wording of the management order.

The tribunal's analysis

11. We note that the Applicants refer in their submissions both to paragraph 13(1)(b) of the Tribunal Rules and to the power to make a wasted costs order under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). However, the reference to wasted costs is erroneous, and it seems clear that the Applicants’ intention was just to apply for a cost order under paragraph 13(1)(b) of the Tribunal Rules and not for an order under the 2007 Act or indeed for an order under paragraph 13(1)(a) of the Tribunal Rules which itself cross-refers to the 2007 Act.
12. Paragraph 13(1)(b) of the Tribunal Rules (“Rule 13(1)(b)”) states as follows: “*The Tribunal may make an order in respect of costs ... if a person has acted unreasonably in bringing, defending or conducting proceedings in ... a leasehold case*”.
13. In the Upper Tribunal decision in *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)* the Upper Tribunal considered, inter alia, what is meant by acting “unreasonably”. In *Willow Court* the Upper Tribunal stated that whilst what constitutes acting unreasonably is fact-sensitive, the approach to be followed when determining whether conduct has been unreasonable was as set out in the case of *Ridehalgh v Horsfield (1994) 3 All ER 848*.
14. In *Ridehalgh v Horsfield* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. This formulation was adopted by the Upper Tribunal in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007* and (as noted above) in *Willow Court*. One principle which emerges from these cases is that costs are 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.
15. Sir Thomas Bingham also said that unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case, and he added that conduct could not be described as unreasonable simply because it led to an unsuccessful result.
16. As noted by the Respondents, *Willow Court* also sets out a three-stage test. The first stage is to show that a person has acted unreasonably. The second stage is the discretionary stage of deciding whether – if unreasonable conduct has taken place – the tribunal should make an order for costs. The third stage – if the tribunal decides that it should make an order for costs – is to determine the terms of any cost order.
17. As regards the first stage of the three-stage test, Rule 13(1)(b) relates to a party’s conduct in bringing, defending or conducting proceedings. Conduct prior to that point cannot therefore form the basis for a cost award under Rule 13(1)(b). The Respondents were joined to the proceedings no earlier than 19th November

2018 and they then agreed to the principle that a manager should be appointed on 26th November 2018, i.e. just a week later.

18. The issues in dispute after 26th November 2018 were the terms of the management order and the identity of the manager. The Respondents' objections to the terms of the management order were not unreasonable objections, and indeed the tribunal agreed with the Respondents on certain key points. As regards the identity of the manager, whilst the tribunal agreed to the appointment of Mrs Mooney it does not follow that the Respondents acted unreasonably in seeking the appointment of an alternative manager.
19. Mr Cleaver was a perfectly plausible choice of alternative manager, and there is no evidence that the Respondents proposed him as manager merely in order to frustrate the process. The application for the appointment of a manager arose out of a situation of serious conflict between the relevant parties, as such applications usually do, and it is understandable that the Respondents had some reservations about the Applicants' choice of manager. As regards the tribunal's statement part way through the hearing that it was leaning towards agreeing to appoint Mrs Mooney as manager, we simply do not accept that the Respondents' decision to press on with their opposition to Mrs Mooney's appointment came anywhere close to unreasonable conduct for the purposes of Rule 13(1)(b). Whilst the tribunal felt that it would be helpful to the parties to give a preliminary indication as to its thinking at that point in the proceedings, the Respondents were perfectly entitled to continue to argue the case for the appointment of Mr Cleaver.
20. The Applicants have therefore failed to meet stage one of the test set out in *Willow Court*, and it is therefore unnecessary to go on to stages two and three. We do not accept that the Respondents have acted unreasonably within the meaning of, and for the purposes of, paragraph 13(1)(b) of the Tribunal Rules, and accordingly, we decline to make an order under paragraph 13(1)(b) of the Tribunal Rules.

Name: Judge P. Korn

Date: 13th May 2019

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.