



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

Case Reference : **LON/00BK/LSC/2019/0017**

Property : **Flat 8, 72 Eaton Square, London SW1W
9AS**

Applicant : **Ms Sylvia Birrane**

Respondent : **72 Eaton Square Limited**

Type of Application : **Supplemental cost applications
following application for determination
of liability to pay service charge**

Tribunal Members : **Judge P Korn
Mr J Barlow FRICS
Mr A Ring**

**Date of receipt of all
written submissions** : **25th July 2019**

**Date of Supplemental
Decision** : **27th August 2019**

SUPPLEMENTAL DECISION ON COSTS

Decision of the Tribunal

The Tribunal makes no cost orders.

The background

1. This application is supplemental to an application (the “**Main Application**”) made by the Applicant pursuant to section 27A of the Landlord and Tenant Act 1985 (the “**1985 Act**”) for a determination as to the payability of certain service charges in relation to the Property.
2. The Main Application was unsuccessful in that the Tribunal found wholly in favour of the Respondent in determining that all of the disputed service charge items in respect of which the Tribunal had jurisdiction were payable in full.
3. The Applicant has now made (a) a cost application pursuant to section 20C of the 1985 Act (a “**Section 20C Application**”) and (b) a cost application pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (a “**Paragraph 5A Application**”). A Section 20C Application is an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be added to the service charge. A Paragraph 5A Application is an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be charged direct to the tenant as an administration charge under the lease.
4. The Respondent has made a cost application pursuant to paragraph 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“**the Tribunal Rules**”). Whilst the Respondent has in its application quoted the whole of Rule 13(1), its submissions are such that the application would appear to be an application for a cost order specifically under Rule 13(1)(b) on the basis that the Applicant has “*acted unreasonably in bringing ... or conducting proceedings*” in this case.

Applicant’s written submissions

5. The Applicant’s written submissions contain various criticisms of the Respondent’s managing agents, of Mr Ziv (a director of the Respondent company) and of the Respondent’s failure to inform her that it was engaging a barrister. They also contain some comments on the issues which formed the basis of the Main Application.

Respondent’s written submissions

6. In its submissions, the Respondent notes that the Tribunal has found wholly in favour of the Respondent in relation to the Main Application.
7. The Respondent also notes that in its decision in *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)* the Upper Tribunal gave some guidance on the application of Rule 13(1)(b), stating that unreasonable conduct is an essential pre-condition of the power to order costs under Rule 13(1)(b) and that – once the existence of the power has been established – the exercise of the power is a matter for the discretion of the tribunal. As regards whether the conduct is sufficiently unreasonable for these purposes, the Upper Tribunal set down a two-stage test: (i) has the person acted unreasonably from an objective perspective and (ii) if so, ought the tribunal to make an order for costs? If the two-stage test is passed then there is a third stage, namely to determine the terms of any cost order.
8. In the Respondent’s submission, the Applicant’s claims against the Respondent were part of a vexatious campaign of litigation stemming from her dispute with the tenant of Flats 5 and 6. Having found herself unable to resolve her personal dispute with the tenant of Flats 5 and 6 she then unreasonably set about pursuing vexatious litigation against the Respondent. She made a series of unsubstantiated claims against the Respondent, including assertions that the service charge was too high which were unsupported by any credible evidence. In addition, shortly before the hearing the Applicant sent a large volume of documents to the Respondent on a near daily basis and long past the deadline directed by the Tribunal. She also made little attempt to put forward her case in a coherent and concise manner.

The Tribunal’s analysis

Applicant’s cost applications

9. The Applicant has applied for an order that in relation to the costs incurred by the Respondent in connection with these proceedings the Respondent should be prevented from either putting those costs through the service charge or charging them direct to the Applicant as an administration charge under the lease.
10. The Applicant has been wholly unsuccessful on the Main Application and her case on the disputed issues was very weak. Her cost applications appear to constitute an attempt to re-argue points which we have already decided in connection with that Main Application, and we are not persuaded that she has made any new points which are helpful to her cost applications. The Tribunal has considerable discretion in respect of both of these applications, both of which we consider to be without merit.
11. The Applicant’s cost applications are therefore both refused.

Respondent’s cost application

12. Paragraph 13(1)(b) of the Tribunal Rules states as follows: “*The Tribunal may make an order in respect of costs ... if a person has acted unreasonably in bringing ... 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)* (also referred to in the Respondent’s written submissions) the Upper Tribunal considered what is meant by acting “unreasonably” and also considered the issue of causation.
14. As to what is meant by “unreasonably”, the Upper Tribunal said that whilst what constitutes acting unreasonably is fact-sensitive, the approach to be followed when determining whether conduct has been unreasonable is as set out in the case of *Ridehalgh v Horsfield (1994) 3 All ER 848*.
15. 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.
16. 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, but that conduct could not be described as unreasonable simply because it led to an unsuccessful result. The Upper Tribunal in *Willow Court* added that for a lay person to be unfamiliar with the substantive law or with tribunal procedure or to fail properly to appreciate the strengths or weaknesses of their own or their opponent’s case should not be treated as unreasonable. Tribunals should also not be over-zealous in detecting unreasonable conduct after the event.
17. On the issue of causation, the Upper Tribunal in *Willow Court* stated that the exercise of the Tribunal’s power to make a cost order under paragraph 13(1)(b) was not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned but that nevertheless the nature, extent and consequences of the unreasonable conduct (if the Tribunal were to find that there had been unreasonable conduct) were relevant factors to be taken into account in deciding whether to make an order and (if so) in deciding the form of the order.
18. As noted by the Respondent, *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.

19. 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). In the context of the present case, therefore, the Respondent cannot rely on the Applicant's conduct prior to the making of the application, save arguably as context for what follows.
20. Taking the factual matrix as a whole, our view is that the Applicant's case in respect of the Main Application was very weak but that she sincerely believed that she was justified in pursuing it. Also, as noted in our decision on the Main Application, we do have a concern that at times the Respondent had failed properly to deal with queries raised by the Applicant, and this will have fuelled the Applicant's belief that the Respondent was at times being obstructive. Her frustration at either not receiving sufficient information from the Respondent or at least believing this to be the case may well also have led her to the conclusion that the only way to clarify the issues was to bring the Main Application.
21. We do not accept that the Applicant has conducted proceedings in a vexatious manner, in that we do not accept that she has tried to harass the other side rather than advance the resolution of her case. In addition, as stated by the Upper Tribunal in *Willow Court*, for a lay person to be unfamiliar with the substantive law or with tribunal procedure or to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case should not be treated as unreasonable.
22. In conclusion, therefore, we do not accept that the Respondent has shown that the Applicant has acted unreasonably for the purposes of Rule 13(1)(b). As the Respondent's application has failed to pass the first stage of the test set out in *Willow Court*, it follows that it is unnecessary to go on to consider stages two and three. Accordingly, the Respondent's cost application is refused.

Name: Judge P. Korn

Date: 27th August 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.