FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/17UB/PHW/2019/0001**
Property	**:**	**Haytop Country Park, Alderwasley Park, Whatstandwell, Derbyshire DE4 5HP**
Applicant	**:**	**Haytop Country Park Ltd**
Representative	**:**	**Apps Legal Solicitors**
Respondent	**:**	**Amber Valley Borough Council**
Representative	**:**	**Legal and Democratic Services, Amber Valley Borough Council**
Type of application	**:**	**Application for costs**
Tribunal members	**:**	**Judge C Goodall** **Mrs A Rawlence MRICS**
Date of decision	**:**	**30 September 2019**

DECISION ON THE APPLICANT'S APPLICATION FOR COSTS

Background

1. This application arises from the Tribunal decision dated 25 July 2019 under the above reference in which the Applicant succeeded in its appeal against a decision by the Respondent not to grant a licence for a caravan site under the Caravan Sites and Control of Development Act 1960.

2. By an application dated 21 August 2019, the Applicant applied for costs against the Respondent in respect of two issues that had arisen in these proceedings, being:

    (a) An application made by the Respondent on 28 March 2019 that the Applicant's case be struck out; and

    (b) The costs of establishing that the extent of the land actually being used as a caravan site was within the area of land which had the benefit of planning permission.

3. The Application for costs is detailed and reasoned and is treated as the Applicant's case. The quantum of the costs claimed is set out in two Form 260 documents which were later filed with the Tribunal. The costs claimed for ground 2(a) above are £4,056.00. The claim for the costs arising from ground 2(b) are £6,708.90.

4. The Respondent made submissions in response dated 6 September 2019.

5. The Applicant asked for permission to provide a response to the Respondent's submissions, and the Respondent asked for permission to respond to that response. The Tribunal declined both requests; the position of both parties was set out in detail in their first submissions and the Tribunal felt it was able to deal with the application on the basis of those submissions.

Law

6. The First-tier Tribunal is not a jurisdiction, unlike the courts, where the unsuccessful party is normally ordered to pay the costs of the successful party. An order for costs is exceptional, and can only come about through the application of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant parts of that rule are:

    "Orders for costs, reimbursement of fees and interest on costs

    13.—(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—

            (i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(1), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(2) and the County Court (Interest on Judgment Debts) Order 1991(3) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed."

7. The FTT's power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides 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.

8. In *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13.

9. Firstly, the Tribunal should adopt a three-stage process:

(a) Consider whether the person against whom an order is sought has behaved unreasonably:

(b) If so, should the Tribunal exercise its discretion to award costs;

(c) If so, how much should be paid.

10. Secondly, "unreasonable" conduct is discussed in some detail. The distillation of that discussion in this section is not a substitute for a careful reading of the *Willow Court* decision itself. Nevertheless, it seems clear to the Tribunal that:

(a) The Upper Tribunal approved the following passage (from *Ridehalgh v Horsefield* [1994] Ch 2015) as encompassing "unreasonable" conduct:

> "… conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on the practitioner's judgement, but it is not unreasonable."

(b) It is improbable that the following behaviours would constitute unreasonable behaviour (without more): a party who fails adequately to prepare for a hearing; a party who fails to adduce

proper evidence for their case; failure to state a case clearly, or the seeking of a wholly unrealistic or unachievable outcome.

(c) Tribunals should not be over-zealous in detecting unreasonable behaviour.

(d) Lay people who are unfamiliar with the substantive law or tribunal procedure, or who fail to appreciate the strengths and weaknesses of theirs or their opponent's cases, or who lack skills in presentation, or who perform poorly in the tribunal room should not therefore be regarded as acting unreasonably.

(e) The Tribunal must exercise its own value judgement on behaviours under consideration in the application.

The costs of the strike-out application

11. The strike-out application was made around 4 weeks before the case was due to be heard, following directions and the production of documents and submissions in the case. As it could not properly be considered without the Applicant having the opportunity to respond, the Tribunal declined to deal with it as a discrete application and made a procedural decision that it should be considered at the hearing that had already been arranged.

12. At that hearing, the Tribunal was informed at the outset that the parties had agreed that the issues relating to the strike-out application should be addressed within the course of the proceedings, so neither party asked the Tribunal to make an initial ruling on the strike-out application.

13. The Tribunal's decision on the application was to reject it, as is set out in paragraphs 86 to 92 of the decision.

14. The Applicant submitted that the application to strike out was wholly without merit, as had been their position in their written response to the application. It was unreasonable for the Respondent to apply to strike out, this being behaviour that was "not guided by or based on good sense". Costs of dealing with this element of the case should therefore be paid by the Respondent.

15. The Respondent resisted the application for costs on the strike out application. The argument runs over 15 pages of text. As best as the Tribunal can understand it, the argument is that the Applicant's position disclosed irreconcilable inconsistencies in their approach to the interpretation of the two planning permissions which the site benefitted from, and that it was proper to hear the arguments on the way the Applicant presented its case as a preliminary issue, which is what it was seeking when making the strike out application. The Respondent takes the Tribunal to task for not dealing with the strike out application in this way, and argues that there were no discrete costs arising from the strike out

application anyway, because the issue was subsumed in the substantive submissions and debate.

16. The Tribunal does not accept the Respondent's argument. The requirements for a successful strike out application are set out in paragraph 86 of the decision. There has to be no prospect of the Applicant's case succeeding, or it must be established that the Applicant is conducting its case frivolously or vexatiously or their conduct is otherwise an abuse of process. This prospect was rejected by the Tribunal in the decision.

17. Was it unreasonable for the Respondent to seek a strike out? The Tribunal believes so. The strike out application was exclusively focussed on the planning issue; was there a planning consent as required by section 3 of the Caravan Sites and Control of Development Act 1960? The Respondent's case was that there was not because the Applicant could not show that the plans it had produced related to the existing planning consents. In our view, that was a secondary and a subsidiary question. The primary question was whether the site had the benefit of planning permission, and it was incontrovertible that there were two extant planning consents and a previous site licence. Establishing whether these were or were not sufficient to meet the test in section 3 was always going to require a hearing so that the parties could be given the opportunity to present their arguments, as of course the Applicant successfully did on the section 3 point. There was never any prospect of persuading the Tribunal on a strike out application that the Applicant had no reasonable prospect of success in this case, still less that the Applicant was behaving vexatiously in pursuing its statutory right to appeal the Respondent's decision.

18. That does not end the debate on costs. *Willow Court* suggests that, without more, the seeking of a wholly unrealistic or unachievable outcome will not necessarily be regarded as behaving unreasonably. We consider that the test of behaving unreasonably in seeking a strike out is however met in this case. We have in mind the timing of the application and the benefit of the professional advice available to the Respondent. We think that making the application so late in the day, when it had no reasonable prospect of success, smacks of it being a litigation tactic designed to harass rather than being an application genuinely designed to advance the resolution of the case.

19. For these reasons, we do determine that the first limb of *Willow Court* is satisfied. The strike out application was an unreasonable act in the conduct of the proceedings.

20. Our second responsibility is to determine whether we should exercise our discretion, therefore, to award costs. Our view is that we should. Having made our finding above, there is no good reason not to that we can see.

21. The third question then is the quantum of the costs award. This is wholly suitable for summary assessment rather than detailed taxation. The

overall cost claimed is £4,056.00 made up of £880 solicitors costs, counsels fees of £2,500 (broken down into £1,000 for preparing the response to the strike out application and £1,500 for dealing with the strike out issues at the hearing), plus VAT on these sums. Taking a very broad view on the solicitor's costs, we allow £500. This should have been sufficient to allow the solicitor to instruct counsel to prepare a response and consult and inform her clients and other relevant parties. The case was already well advanced, the arguments would have been well assembled, and there would not have been much to think about in terms of deciding whether to challenge the application. We also allow £1,000 for counsel's fees for preparing the response to the strike out application. It is a short document, but we do not think the fee is unreasonable or disproportionate for a response from Queen's Counsel. We do not allow the claim for what we assume is a portion of counsel's fee for the hearing. The Respondent is right in saying that the strike out argument was subsumed within the substantive hearing and it did not engage the Tribunal in a great deal of time.

22. We therefore award the Applicant costs of £1,500 plus irrecoverable VAT. If the Applicant is VAT registered and can set off the VAT, the Respondent should not need to pay it.

The costs of the additional work in connection with the provenance of the 1952 plan

23. The Applicant is correct in saying that the Tribunal expressed an element of surprise when, as the first hearing day was drawing to a close, the Respondent spent a long time challenging the provenance of the "plan referred to" which had been presented as the plan to which the 1952 planning consent referred. Having attended a detailed site inspection earlier that day (which the Respondent's advocate had not attended), it was crystal clear to the Tribunal that the "shoe" shown on that plan was the land on which the Applicant's mobile homes site was situated. We were able to clearly identify the land comprised in the "shoe", and some of the distinguishing features, such as the Common Green, and the historical location of pitches within the trees at the eastern end of the site which had been referenced in other plans. We had also noted that there had not been any suggestion at any point by the Respondent's professional witnesses, who had been responsible for regulation of the site for some years, that the 1952 "plan referred to" did not correctly identify the location of the site. We could not understand where the Respondent's advocate was going in his ongoing challenge to this plan.

24. As it turned out, the Tribunal considers that it was assisted by the additional evidence provided by the Applicant as a result of the directions made by the Tribunal on 20 April 2019. The additional material produced included a much better copy of the original ordnance survey plan and a composite plan showing the boundaries of all the relevant plans juxtaposed together, which enabled the Tribunal to conduct the "round table" discussion about the plan, and provided us with sufficient evidence,

and a measure of agreement between the parties, to allow us to reach the conclusions we did in paragraph 99 of the decision.

25. We also accept that there is strength in the Respondent's submission that the burden of proof lies upon the Applicant in a licensing appeal. There were certainly uncertainties regarding the identification and construction of the plans in this case. It should be said that these uncertainties were not the Applicants responsibility. They came about because of historically poor record keeping by previous statutory authorities. We think the Respondent pursued the points regarding the confusions over the plans as far as it could, and possibly quite close to the edge of what was reasonable, but in the end we do not think it went over the edge and behaved unreasonably in the conduct of its case, as defined in *Willow Court*.

26. We therefore conclude that neither the conduct of the Respondent in pursuing its points regarding the plans, nor the directions of the Tribunal which resulted, have resulted in any costs which can be recovered from the Respondent. That element of the costs claim is rejected.

Appeal

27. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)