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	**:**	**Respondents application for permission to apply for costs**
Tribunal members	**:**	**Judge C Goodall** **Mrs A Rawlence MRICS**
Date of decision	**:**	**30 September 2019**

DECISION ON THE RESPONDENT'S APPLICATION FOR PERMISSION TO APPLY FOR COSTS

Background

1. The Respondent has applied for permission to apply for costs in this case in a submission dated 6 September 2019.

2. The grounds for the application are:

   (a) The Applicant unreasonably evolved a scheme which had never been submitted to the Respondent as a form of licensing application (i.e. an abuse of process); and

   (b) The Applicant unreasonably failed to resolve planning issues before appealing against the Respondent refusal to issue a licence.

3. As a result of these two grounds, it is said that the appeal by the Applicant was ill-founded and unnecessary.

Law

4. 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."

5. 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.

6. 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.

7. 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.

8. 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 detail of the application for permission to apply for costs

9. In relation to the ground set out in 2(a) above, the Respondent complains that it made a preliminary application to the Tribunal seeking clarification on the ambit of the appeal, on the basis that the Applicant was seeking an order that was outwith the jurisdiction of the Tribunal, and that application was not dealt with by the Tribunal. The complaint is that the Respondent was never given the opportunity to determine the scheme which the Applicant eventually evolved. Appealing against refusal to grant a licence was therefore unreasonable and vexatious.

10. The point the Respondent seems to be making is that the licence application was for a particular scheme which reflected the layout of the site as it actually was on the ground following works by the Applicant. When it came to the hearing, counsel for the Applicant suggested that the Respondent could impose conditions in its licence (including layout conditions) that went back to the previous licence. The Respondent seems to be suggesting that this suggestion was unreasonable and vexatious.

11. Ground 2(b) of the application is that it was unreasonable to appeal because the planning issues should have been resolved first.

12. As the Respondent has pointed out in its submission, there was a debate about this issue initially at the hearing. The Tribunal of its own volition asked whether the proper course was to adjourn until the planning issues were resolved. It heard argument on the point and was persuaded by counsel for the Applicant that the appeal should proceed on the basis of the undoubted existing planning consents.

Determination

13. There is absolutely no prospect of the Respondent establishing that the Applicant has acted unreasonably in bringing, defending or conducting proceedings (within the definition given in *Willow Court*), on the grounds of this application.

14. On ground 2(a):

    (a) Firstly, in fact, counsel's argument as outlined in paragraph 10 above was accepted by the Tribunal in paragraph 130 of the decision. We did not take the view that the Respondent had to grant a licence for the layout in the application, because there was no planning permission for that layout. There was planning permission for a previous layout, and we took the view that the Respondent could condition any licence it granted so that it did not permit anything beyond the layout for which a planning consent existed. This point was therefore in the Respondent's favour.

    (b) How it can be argued that any argument advanced by the Applicant and accepted by the Tribunal was unreasonable and

vexatious is difficult to follow. Its acceptance by the Tribunal indicates precisely the opposite.

(c) Secondly, the formulation of the proposed scheme was prior to the appeal proceedings and was not therefore an act in the conduct of the proceedings.

15. On ground 2(b), this point was expressly considered by the Tribunal at the hearing and the Respondent failed to persuade the Tribunal that it would be right to adjourn until the planning issues were resolved. By definition, far from this course being an unreasonable act in the conduct of the proceedings, by accepting the Applicant's argument, the Tribunal decided that the argument was reasonable.

16. In truth, by seeking permission to apply for costs, the Respondent is simply demonstrating that it disagrees with the decision. The issues raised in this application are substantive issues about the outcome of the appeal, which the Respondent seems to want to re-litigate. The Respondent's remedy is to appeal those elements of the decision, not to seek costs.

17. The application for permission to apply for costs out of time is refused. There is no prospect of success. There is no conduct of which the Respondent has complained that comes anywhere close to falling within the definition of unreasonable conduct as defined in *Willow Court*. It would not be in the interests of justice, and the overriding objective, to allow the application.

Appeal

18. 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)