FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2018/0365**
Property	**:**	**Flat 5, 41 Craven Hill Gardens, London W2 3EA**
Applicant	**:**	**38/41 CHG Residents Company Limited ("CHG")**
Representative	**:**	**Dale & Dale Solicitors Limited**
Respondent	**:**	**Ms Iris Hyslop**
Representative	**:**	**N/A**
Type of application	**:**	**Costs - rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member	**:**	**Judge Amran Vance**
Date of directions	**:**	**25 October 2019**

DECISION

Background

1. Following a hearing on 20 and 21 March 2019, the tribunal issued its decision in this application on 15 April 2019. In that decision, the tribunal determined Ms Hyslop's service charge liability for the service charge years 2016/17 and 2017/18 (actual costs) and the 2018/19 (budgeted costs). Permission to appeal that decision was refused by the Upper Tribunal on 8 July 2019. Ms Hyslop applied for permission to seek judicial review of the Upper Tribunal's decision on 31 July 2019 and a decision on that application is awaited.

2. The applicant now seeks an order for payment of its costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("The Rules"). The amount sought is £9,453.50 plus £2,682 for the rule 13 costs application.

3. Directions in respect of the Rule 13 application were issued on 15 July 2019 in which the tribunal indicated that unless either party requested a hearing, the costs application would be determined based on the parties' written representations. No oral hearing was requested, and the application has therefore been determined on the papers.

The Law

4. Rule 13(1) of the 2013 Rules provides as follows:

> (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.

5. Rule 13(1)(a) is not relevant to this application as it concerns costs incurred by legal representatives. Clarification as to how this tribunal should approach a rule 13(1)(b) costs application has been provided in the detailed decision of the Upper Tribunal in *Willow Court Management Company (1985) Ltd v Ms Ratna Alexander* [2016] UKUT (LC). At paragraph 24 of its decision, it approved the guidance given in *Ridehalgh v Horsefeld* [1994] Ch 205 which described "unreasonable" conduct as including conduct that is "vexatious, and designed to harass the other side rather than advance the resolution of the case". It was not enough that the conduct led, in the event, to an unsuccessful outcome.

6. The Upper Tribunal then went on to set out a three-stage test for rule 13 costs orders. The first stage is whether a person has acted unreasonably. This is an essential pre-condition of the power to award costs under the rule. If there is no reasonable explanation for the conduct complained of, the behaviour will

properly be adjudged to be unreasonable. This requires the application of an objective standard of conduct to the facts of the case. The second and third stages involve the exercise of discretion on the part of the tribunal. At the second stage the tribunal must consider whether, in the light of the unreasonable conduct identified, it ought to make an order for costs. The third stage is what the terms of the order should be.

The Applicants' Case

7. The applicant contends that:

   (a) following the tribunal's decision in a previous application before this tribunal, to which Ms Hyslop was a respondent, (LON/00BK/LSC/2015/0437) it accepted that Ms Hyslop had no liability to contribute towards company expenditure. Despite the applicant communicating this to her, and the tribunal, on 30 November 2018, Ms Hyslop subsequently relied upon a Scott Schedule in which she disputed company expenditure costs, filed a witness statement that mainly referred to disputed company expenditure, and maintained that dispute at the hearing of the application;

   (b) despite not disputing many of the costs incurred in respect of the service charge years in issue, Ms Hyslop failed to discuss or pay anything towards the undisputed costs;

   (c) it was by far the successful party in the application, with Ms Hyslop only securing very modest reductions to her service charge liability for the years in dispute. However, her challenge resulted in the applicant having to expend a disproportionate amount of time and effort in defending her challenges;

   (d) Ms Hyslop is no stranger to litigation before this tribunal. This, it points out, is the latest of a number of cases involving her and the applicant, since 2004. It argues that unless the applicant pursues litigation, Ms Hyslop makes no voluntary payments towards service charge costs demanded from her;

   (e) the applicant is a lessee-owned company, whose shareholders are 33 of the 36 leaseholders (not including Ms Hyslop), and has no income other than the service charge it demands. Ms Hyslop's persistent non-payment forces it into litigation.

Ms Hyslop's Case

8. A lot of the contents of Ms Hyslop's statements of case dated 8 August 2019 and 20 August 2019, in response to those of the applicant, amount to criticism of the tribunal's decision and the applicant's conduct, including past litigation conduct, and are irrelevant to this rule 13 application. The relevant points raised are:

      (a) she continued to dispute the company expenditure because the applicant had previously claimed that it had made credits to the service charge account (following the tribunal's decision in

LON/00BK/LSC/2015/0437, but at the hearing of this application admitted that these had not yet been credited. She said she had no faith in 'promises' made by the respondent;

(b) she has never refused to pay service charge costs that she is liable to pay and which have been properly demanded.

Decision and Reasons

9. Ms Hyslop was the respondent in this application, so the first stage of the *Willow Court* test requires me to determine if Ms Hyslop acted unreasonably in defending or conducting these proceedings.

10. I do not accept the applicant's submission that she acted unreasonably in challenging the company expenditure that had incorrectly been demanded from her as service charge. The applicant's position is that it conceded that these costs were not payable by Ms Hyslop in its letter to the tribunal of 30 November 2019. In that letter, Mr Gream, one of the directors of the applicant company referred to the tribunal's previous decision in LON/00BK/LSC/2015/0437, which concerned the 2014/15 and 2015/16 service charge years, in which the tribunal determined that certain sums of company expenditure, demanded as service charges, were only payable by the thirty-one lessees in the Building who had extended their lease, and varied the terms of that lease. In his letter, Mr Gream said:

> "We have examined the accounts for the service charge years ending March 2015 and March 2016, plus those for March 2017 and March 2018, and our provisional analysis of the required adjustments are attached to this letter. The final adjustments may vary slightly after further verification and approval".

11. The table accompanying the letter showed adjustments to Ms Hyslop's account of £14.02 for the 2016/2017 service charge year and £26.23 for the 2017/18 service charge year.

12. I do not consider the contents of Mr Gream's letter to amount to a clear and unequivocal concession that company expenditure for the 2016/17 and 2017/18 service charge years were not payable by Ms Hyslop. I accept that this was his intention, but he does not identify the specific heads of expenditure that require adjustment, and nor does he explain how the provisional adjustments to Ms Hyslop's account were calculated. Further, he said in that letter, that further verification and approval was required before final figures could be calculated. Given that Ms Hyslop is an unrepresented litigant, and given the lack of clarity surrounding the applicant's intended concession, it was not unreasonable, in my view, for her to challenge the company expenditure demanded from her as service charge after receipt of Mr Gream's letter of 30 November 2019.

13. In my view, it was only when Ms Hyslop received the applicant's comments to her Scott Schedule, on about **5 February 2019**, that she was provided with an unequivocal concession that the company costs were not payable by her. However, in those comments, the applicant incorrectly stated that Ms Hyslop had already received a credit adjustment to her account for this company

expenditure. At the hearing, Mr Gream conceded that this was incorrect, and the adjustment had not yet been made. Given the incorrect statement in the Scott Schedule regarding the adjustment I do not consider it unreasonable for Ms Hyslop to maintain her challenge to these costs until the hearing of the application.

14. I do not accept that Ms Hyslop's failure to pay anything towards the undisputed service charge costs, or to discuss these with the applicant, is relevant to the question of whether to make a Rule 13 costs order. It is only her defence of the application, or the way in which she has conducted the proceedings, that is relevant.

15. Whilst I agree, that the applicant was, overall, the successful party in this application, it made multiple concessions in respect of the service charges payable by Ms Hyslop in light of our determination in LON/00BK/LSC/2015/0437, and Ms Hyslop has succeeded in several of her challenges. In particular, the tribunal concluded that it was not reasonable for the applicant to demand a £200,000 reserve fund contribution for 2018/19 given the lack of evidence of a programme of planned and cyclical works, and given the sums already held in the general reserve fund.

16. I accept that Ms Hyslop has been overzealous in seeking to challenge multiple heads of expenditure for which her financial contribution is small. However, on balance, and with one exception, I do not consider that, on this occasion, doing so amounted to unreasonable litigation conduct. Whilst I consider the extent of her challenges give rise to genuine questions of proportionality, I have had regard to Ms Hyslop's status as an unrepresented litigant, and her, albeit limited, degree of success in in this application. I do not consider her conduct, overall, can be described as unreasonable in the sense that it was "vexatious, and designed to harass the other side rather than advance the resolution of the case".

17. The exception is her repeated assertion that there has been historic misuse of sums collected from leaseholders towards reserve funds, or as she describes it "Trust Funds". As identified in paragraph 5 of the tribunal's decision of 19 November 2018, there has been a long history of litigation between Ms Hyslop and the applicant before this tribunal. The tribunal has had to determine her liability for the years 1995/6 to 1999/2000 inclusive; 2010/11; and 2013/14 to 2018/19 inclusive. This issue of alleged misuse of reserve fund monies has been raised by her on several occasions in previous litigation (for example, in LON/00BK/LSC/2012/0275, where the tribunal considered her allegations to be unevidenced).

18. At paragraph 60 of the tribunal's decision in LON/00BK/LSC/2015/0437, it was stated that Ms Hyslop's contentions regarding misuse of reserve fund monies amounted to a repetition of the arguments that she had raised in previous proceedings before this tribunal. At paragraph 61, the tribunal recorded that Ms Hyslop acknowledged that the tribunal had no jurisdiction to determine issues relating to breach of trust except to the extent that this was necessary to decide a question arising under section 27A of the 1985 Act (see *Solitaire Property Management Company Limited, Holding & Management*

(Solitaire) Limited v Holden & Others [2012] UKUT 86 (LC). At paragraph 62, the tribunal concluded that embarking on a breach of trust inquiry was not necessary to determine this dispute in circumstances where Ms Hyslop was unable to say when funds were misappropriated, by whom, and in what amount, let alone provide any evidence whatsoever to corroborate her assertions.

19. Despite that decision, Ms Hyslop continued to assert that there had been a historic misuse of reserve fund expenditure in this application. At paragraph 68 of the decision in this application the tribunal once again concluded that Mrs Hyslop's assertions were unsupported by any evidence. I am satisfied that there was no reasonable explanation for Ms Hyslop to repeat these unevidenced assertions, given the previous determination in LON/00BK/LSC/2015/0437, and that this constitutes unreasonable litigation conduct. I have had regard to the fact that Ms Hyslop has acted without the benefit of legal advice in this, and the previous application, but she has appeared frequently before this tribunal. I am satisfied that, in all the circumstances of the case, in repeating her contentions, again without supporting evidence, she acted unreasonably in the conduct of these proceedings.

20. Turning to the second stage in the *Willow Court* test, should the tribunal, in the light of the unreasonable conduct identified, make an order for costs?

21. In considering my discretion to make such an order, I bear in mind the tribunal's overriding objective in in rule 3, which is to enable the tribunal to deal with cases fairly and justly, which includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the tribunal.

22. I have considerable sympathy for the applicant's position. It is a lessee-owned company, whose only income is through the collection of service charges. The chronology of this, and its previous application to this tribunal, and an examination of Ms Hyslop's history of payments towards service charges demanded from her, supports the applicant's assertion that unless it pursues litigation, Ms Hyslop makes no voluntary payments towards such service charge demands.

23. However, the only conduct in these proceedings that I have identified as unreasonable, is Ms Hyslop's repeated challenge about historic misuse of reserve fund expenditure. Given that this was simply a repeat of her previous assertions in LON/00BK/LSC/2015/0437, without any new relevant supporting evidence, there was no reason for the applicant to incur anything other than minimal or nominal costs in addressing that challenge, and there is no evidence to suggest that anything other than minimal costs were incurred. The issue was disposed of in four sentences in the applicant's statement of case, and in one sentence in Mr Gream's witness statement.

24. The applicant has provided a line by line breakdown of the legal costs it has incurred, and no reference is made in that breakdown to advice provided, or work undertaken, to address the misuse of reserve funds allegation. That is altogether unsurprising given the complete lack of evidence to support her

assertion and the lack of any relevance of such allegations to the applicant's application.

25. Nor did Ms Hyslop's unreasonable conduct in pursuing her misuse of reserve fund argument have any serious effect on the tribunal hearing of this application. The issue was disposed of quickly at the hearing, without substantive argument from either party, and was addressed in one paragraph of the decision of 15 April 2019.

26. It should have been immediately evident to the applicant that there was no merit in Ms Hyslop's allegations, and that they had no relevance to this application. As such, it was unnecessary to incur any significant costs in addressing the challenge. In all the circumstances, and given that Ms Hyslop was unrepresented in this application, I do not consider it would be proportionate to make a rule 13 costs order in this case. Given this conclusion, there is no need to address the third stage of the *Willow Court* test.

Concluding Remarks

27. Whilst, on this occasion, I have declined to make a Rule 13 costs order, given the history of the litigation between the parties, I consider it appropriate for me to make some concluding remarks that my assist the parties in the unhappy event that further litigation over service charges ocurrs:

    (a) Ms Hyslop should bear in mind that her arguments application amounted to unreasonable conduct, and a future tribunal is very likely to come to the same conclusion if she repeats these allegations without evidence;

    (b) if Ms Hyslop pursues a disproportionate challenge in respect of the payability of service charges in future proceedings, the tribunal determining that application may well regard that as unreasonable conduct, which may put her at risk of a rule 13 costs order being made;

    (c) if the applicant considers that Ms Hyslop's conduct, in future proceedings to be inappropriate, perhaps because of repeated allegations about misuse of reserve/trust fund monies, or because her challenge is disproportionate, it is entitled to make an early application for her to be debarred from taking further part in the proceedings, or part of them, under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. If the applicant had made such an application in this case, and Ms Hyslop had persisted in pursuing arguments that had been the subject of a debarring order, I would have had no hesitation in concluding such conduct to be unreasonable, and a rule 13 costs order, if requested, would have been made.

Name: Amran Vance **Date: 25 October 2019**

Appendix - Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).