FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**RC/LON/00AE/OC9/2019/0146**
Property	**:**	**Flat 6, 27 Harlesden Road, London NW10 2BY**
Applicant	**:**	**27 Harlesden Road (London) Limited**
Representative	**:**	**Mr Daniel Djaba (Director)**
Respondent	**:**	**Ms Sarah Waddington**
Representative	**:**	**In person**
Type of application	**:**	**Costs - rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member(s)	**:**	**Tribunal Judge Donegan**
Date of paper determination	**:**	**15 January 2020**
Date of decision	**:**	**16 January 2020**

DECISION

Decision of the tribunal

The application for a costs order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules') is refused.

The background

1. This application arises from a lease extension claim for Flat 6, 27 Harlesden Road, London NW10 2BY ('the Flat') under chapter II of Part I of the Leasehold Reform, Housing and Urban Development Act 1993 ('the Act'). The respondent is the long leaseholder of the Flat and the applicant is the freeholder of 27 Harlesden Road.

2. The respondent served a section 42 notice of claim on the applicant on 21 September 2016, seeking a new lease of the Flat and proposing a premium of £8,500. The applicant served a counter-notice on 22 November 2016, admitting the claim but seeking a higher premium of £14,001. The premium was subsequently agreed at £12,000, following an application to the tribunal under section 48 of the Act.

3. On 19 June 2019 the applicant submitted an application to the tribunal, seeking a determination of the costs payable under section 60 of the Act ('the s60 Application'). The application form included a statement of truth, signed by the applicant's former solicitors (Hart Brown). It was accompanied by a signed costs schedule dated 03 January 2018, quantifying the applicant's legal costs in the total sum of £4,639.80 (including VAT). The schedule did not include the applicant's valuation fee.

4. Directions were issued on 25 June 2019 and the s60 Application was listed for hearing on 21 August 2019. The applicant served a revised costs schedule, on 10 July 2019. This quantified its legal costs at a much lower figure of £2,685.15 (including VAT) but included arithmetical errors. A third schedule was produced on 15 August 2019, showing a total figure of £2,481.80 (including VAT).

5. The respondent served detailed points of dispute on 15 August. She subsequently made an application to strike out the s60 Application, which she withdrew at the start of the 21 August hearing. The parties agreed settlement terms during a break in the hearing and these were embodied in a consent order, which resulted in the withdrawal of the s60 Application. The recitals in the consent order recorded that the parties had "*agreed the Applicant's recoverable costs under Section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 in respect of the Applicant's Solicitor's fees at £1,800.00 (inclusive of disbursements and VAT*)".

6. On 16 September 2019, the respondent wrote to the tribunal seeking a costs order against the applicant, pursuant to Rule 13 of the 2013 Rules ('the Rule 13 Application'). Directions were issued on 21 October 2019 ('the Rule 13 Directions') and the Rule 13 Application was allocated to the paper track, to be determined upon the basis of written representations. Neither of the parties has objected to this allocation or requested an oral hearing. The paper determination took place on 15 January 2020.

7. Paragraph 4 of the Rule 13 Directions required the applicant to serve its statement in response by 18 November 2019. No such statement was served and the respondent sought a barring order in a letter to the tribunal dated 18 November. In a letter dated 20 November, Hart Brown informed the tribunal that it was no long representing the applicant. On 12 December, Mr Daniel Djaba wrote to the tribunal explaining that the applicant would now be representing itself. He described his role "*as the designated Director of 27 Harlesden Road Limited*".

8. In a letter dated 17 December, Mr Djaba requested an extension for service of the applicant's response (until 03 January 2020). That request was refused in a letter from the tribunal dated 19 December. However, paragraph 7 did state:

   "This application will need to be determined by Judge Donegan in the New Year. This will not be before 3 January 2020. If the applicant submits a response by that date, to the tribunal and to Ms Waddinton, with an explanation as to why it failed to comply with the tribunal's directions, and why it should be allowed to rely upon that response, Judge Donegan will consider whether to grant its request. He will also consider whether Ms Waddington needs to have the opportunity to respond before the tribunal determines this application. These are decisions for Judge Donegan to make."

9. On 31 December, Mr Djaba wrote to the tribunal requesting a further extension to 13 January. That requested was refused in a letter dated 06 January. Notwithstanding that refusal, the applicant filed a 23-page response to the Rule 13 Application on 13 January 2020. The tribunal disregarded this response when deciding the Costs Application, as it was almost two months late and the only reason given for the delay was the change of representative from Hart Brown to Mr Djaba. Given that Hart Brown ceased acting by 20 November, the response could and should have been served much earlier. Further, there was no application to admit the response out of time.

10. The respondent produced a determination bundle in accordance with paragraphs 6 and 7 of the Rule 13 Directions. The tribunal considered the documents in that bundle and the 21 August hearing bundle when deciding the Costs Application.

11. The relevant legal provisions are set out in the Appendix to this decision.

The law

12. The respondent seeks a costs order under Rule 13(1)(b), based on the applicant's unreasonable conduct. She does not seek an order for wasted costs under Rule 13(1)(a).

13. Rule 13(1)(b) is engaged where a party has acted "*…unreasonably in bringing, defending or conducting proceedings…".* The Tribunal's power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act'), which provides:

> "*(1) The costs of and incidental to –*
> *(a) all proceedings in the First-tier Tribunal, and*
> *(b) all proceedings in the Upper Tribunal,*
> *shall be in the discretion of the Tribunal in which the proceedings take place."*

It follows that any rule 13(1)(b) order must be limited to the costs of and incidental to the proceedings before this tribunal, namely the s60 Application.

14. Not surprisingly, the respondent referred to the decision of the Upper Tribunal ('UT') in ***Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC),*** which outlined a three-stage test for deciding rule 13 applications. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order. The second and third stages both involve the exercise of judicial discretion, having regard to all relevant circumstances and there need not be a causal connection between the unreasonable conduct and the costs incurred. Given the requirements of the three stages, rule 13 applications are fact sensitive.

15. At paragraph 20 of ***Willow Court***, the UT referred to the leading authority on wasted costs, ***Ridehalgh v Horsefield [1994] Ch***, where Sir Thomas Bingham MR considered the expressions "*improper, unreasonable or negligent*" and said:

> *""Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalties. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct that would be regarded as improper according*

to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes 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 a practitioner's judgment, but is not unreasonable."

16. At paragraph 24 of ***Willow Court***, the UT said *"An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance in Ridehalgh v Horsefield at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"*

17. At paragraph 43 of ***Willow Court***, the UT emphasised that Rule 13(1)(b) applications *"…should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right."*

18. The respondent also referred to various First-tier Tribunal ('F-tT') decisions on Rule 13 costs (***Queensbridge, Tong, Kaur, Peachdrive, Questor*** and ***Loosemore***). Although these were considered, they were of limited assistance as the tribunal is not bound by other F-tT decisions and each case turns on its own facts.

The grounds of the Rule 13 Application

19. The respondent's case was set out in an expanded version of her letter dated 16 September 2019, which ran to 11 pages. In brief, her grounds for seeking a Rule 13 order were:

(a) The applicant acted unreasonably in its pre-action conduct and in bringing the s60 Application. In particular, it sought unreasonable terms in the new lease and refused to complete the lease extension without payment of disputed service charges and the disputed section 60 costs. Further, it led the respondent to believe that it would complete the lease extension once the s60 Application was resolved. On the morning of the hearing, on 21 August 2019, the applicant's counsel stated (for the first time) that the applicant was unwilling to complete the lease extension as there had been a deemed withdrawal (under section 53).

(b) The applicant acted unreasonably in conducting the s60 Application by claiming excessive legal fees in the original costs schedule. These were substantially reduced in the second schedule, without explanation. Further, the second schedule included arithmetical errors and the sum agreed at the hearing (£1,800 including VAT and disbursements) was far below the sums claimed in either schedule. The respondent suggested that the applicant's counsel had been instructed to settle at all costs, to avoid a Tribunal determination.

20. In relation to ground (b), the respondent submitted that the agreed figure of £1,800 represented legal fees of just £612.29 plus VAT, disbursements of £14.64 and a valuation fee of £850 plus VAT. This assumed that the valuation fee, which she had agreed previously, was a solicitor's disbursement.

21. In relation to stage two of ***Willow Court***, the respondent submitted that a Rule 13 order should be made as the legal fees agreed were over £3,000 less than those claimed in the original costs schedule. She suggested that the applicant knew the legal fees were excessive when its former solicitors signed the statement of truth on the s60Application. Further, there had been no explanation for the substantial reduction in the second schedule which then had to be corrected due to the arithmetical errors. The sum claimed in the third schedule (£2,481.8) was similar to her solicitor's assessment of a reasonable figure (£2,227.46 plus VAT). Had this figure been claimed originally, then the case could have settled much earlier.

22. The respondent also submitted that the applicant's counsel made two false assertions at the 21 August hearing:

(a) the legal fees had been reduced in the second schedule due to a change of fee earner at Hart Brown; and

(b) the applicant's surveyor needed to know about the service charge dispute because it would impact on the valuation.

23. The respondent suggested that the s60 Application had been issued to harass her to agree its legal fees and the applicant only settled when it realised she could not be bullied into agreeing them. She also referred to her health problems, which had been exacerbated by the stress of dealing with the s60 Application.

24. As to stage three, the respondent claimed £1,016.50 for her time spent resisting the s60 Costs Application (53.5 hours @ £19 per hour) and £238.67 plus photocopying charges for her disbursements. She is a former media and entertainment solicitor but is no longer practicing and has therefore used the litigant in person rate. She relied on a detailed breakdown of her work and explained that the time claimed reflected her lack of relevant legal experience. This can be contrasted with the applicant, who was legally represented throughout the s60 Application.

The tribunal's decision

25. The application for a Rule 13(1)(b) costs order is refused.

Reasons for the tribunal's decision

26. The threshold for making a Rule 13(1)(b) costs order is a high one. As stated at paragraph 24 of ***Willow Court*** *"…the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level."*

27. The tribunal first considered whether the applicant had acted unreasonably in bringing or conducting the s60 Application. When doing so, it only considered the period from 19 June 2019 (the date the application was made) until 21 August 2019 (the date the application was withdrawn). Anything outside this period cannot be taken into account, as it did not involve 'bringing or conducting' proceedings. It follows that none of the applicant's pre-application conduct, including any refusal to complete the lease extension, is relevant.

28. It was reasonable for the applicant to issue the s60 Application, given that these costs were disputed. The tribunal does not accept this was motivated by an intention to harass or bully the respondent. However, it was unreasonable for the applicant to rely on an out of date and inflated costs schedule. The original schedule was dated 03 January 2018, approximately 18 months before the application was made and the total sum claimed (£4,369.80) was almost double that claimed in the second and third schedules. The change of fee earner is no excuse. The new fee earner should have checked the schedule and corrected it before signing the statement of truth on the application form and then submitting the application.

29. Hart Brown largely corrected the position by serving the second costs schedule on 10 July 2019. Although this contained arithmetical errors, the revised sum claimed was far more realistic and was much closer to the eventual settlement figure. Further, it was similar to the figure suggested by the respondent's solicitor. At this point, it is appropriate to comment on the terms of the consent order. The figure of £1,800 was agreed "*in respect of the Applicant's Solicitor's fees at £1,800 (inclusive of disbursement and VAT)*". This did not cover the valuation fee, which did not form part of the s60 Application and which the applicant had previously agreed at £850 plus VAT. The applicant only sought a determination of the legal fees (payable under section 60(1)(a) and (c)). The valuation fee is not a solicitor's disbursement in this case; rather it is a separate fee payable under section 60(1)(b). All of this means the agreed figure of £1,800 represents legal fees of £1,487.80 plus VAT of £197.56 and the disbursements of £14.64. The valuation fee of £850 plus VAT is payable on top.

30. The second costs schedule was served shortly after the s60 Application was made. It appears that the new fee earner quickly realised that the sums claimed in first schedule were overstated and sought to correct them. The Tribunal finds that the applicant acted unreasonably from 19 June to 10 July 2019. However, the unreasonable conduct ended when the second costs schedule was served. It was not unreasonable for the applicant to continue with the case after that time or settle at the hearing. Indeed the tribunal encouraged the parties to have settlement during the early part of the hearing, given the modest sum then in dispute.

31. The tribunal does not accept that the applicant's counsel made false assertions at the 21 August hearing. It appears that the costs were corrected when the new fee earner checked the first schedule. The tribunal is not in a position to comment on the relevance of the service charge dispute to the applicant's valuation (or the valuation fee), as there has been no evidence on this point. Further it was not unreasonable for the applicant's counsel to raise the deemed withdrawal point at the hearing.

32. Having decided there was unreasonable conduct from 19 June to 10 July 2019, the tribunal then considered whether to exercise its discretion and make a costs order. When doing so it considered the limited duration of this misconduct (21 days) and the effect on the respondent.

33. In her expanded letter of 16 September 2019, the respondent explained that she received the s60 Application on 09 July 2019 when it was forwarded (by email) by her former solicitor. This was just one day before the second costs schedule. The respondent's time breakdown reveals that she only spent one unit (six minutes) dealing with the case on 09 July and all further work was undertaken after the second schedule. Given this fact and the limited duration of the unreasonable

conduct, the tribunal is unwilling to make a costs order. The means the third stage of ***Willow Court*** does not apply and the Rule 13 Application fails.

Name: **Tribunal Judge Donegan** **Date:** **16 January 2020**

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

Appendix of relevant legislation

The Tribunals, Courts and Enforcement Act 2007

Section 29 Costs or expenses

(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Orders for costs, reimbursement of fees and interest on costs Rule 13

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 and land 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.

...

(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 to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(a), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(b) and the County Court (Interest on Judgment Debts) Order 1991(c) 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.The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.