



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

Case Reference : **BIR/00CR/LSC/2018/0009**

Property : **40 Pippin Avenue, Halesowen,
West Midlands, B63 2PW**

Applicant : **Ms Angela Clancy**

Representative : **Not represented**

Respondent : **14-44 Apperley Way and 18-44 Pippin
Avenue Halesowen RTM Company
Limited**

Representative : **Beale & Company Solicitors LLP**

Type of Application : **Application for costs under Rule 13 of
the Tribunal Procedure (First-tier
Tribunal) (Property Chamber) Rules
2013**

Tribunal Members : **Judge M K Gandham
Mr N Wint FRICS**

**Date and venue of
Hearing** : **Paper determination**

Date of Decision : **21 January 2020**

DECISION ON THE RESPONDENT'S APPLICATION FOR COSTS

© CROWN COPYRIGHT 2020

Introduction

1. This application is made pursuant to a decision of the Tribunal dated 22 July 2019 under the above reference, in which Ms Angela Clancy ('the Applicant') made various applications in respect of the leasehold property known as 40 Pippin Avenue, Halesowen, Birmingham, B63 2PW ('the Property').
2. The Tribunal, in that decision, determined that: the Respondent's service charge budgets were reasonable; that no section 20C order should be made in favour of the Applicant; that the amount of the administration charge was excessive (so the Tribunal reduced the same) and that the Applicant should only be liable to pay 25% of any administration charges in respect of litigation arising from the application.
3. On 19th August 2019, the Respondent requested that the Tribunal grant an order in respect of costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Tribunal received submissions from the Respondent, on 10th September 2019, and a response to those submissions from the Applicant, on 1st October 2019. Neither party requested an oral hearing.

The Law

4. The limited powers for a Tribunal to award costs are contained within Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant parts of that rule are set out as follows:

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

- (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. *Once a power to make an order for costs is engaged, there is no general rule that an unsuccessful party will be ordered to pay the costs of the successful party, as under the CPR 44.2(2)(a). The only general rule 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 0290 (LC), (*Willow Court*) the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13 and suggested that a three-stage process should be adopted when dealing with such applications:
- Firstly, the tribunal should consider whether the person against whom an order is sought has behaved unreasonably;
 - Secondly, the tribunal must consider whether, in the light of the unreasonable conduct it has found, it ought to make an order for costs or not; and
 - Finally, it should decide what the terms of that order should be.

The Upper Tribunal discussed the assessment of unreasonable behaviour and considered that in deciding whether behaviour was reasonable required a “*value judgement*”. It saw no reason to depart from guidance given in *Ridehalgh v Horsefield* [1994] Ch 205 (*Ridehalgh*), where the expression of “unreasonable” conduct was defined as:

“... 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.”

The Upper Tribunal also expressed its thought that, alone, it would be improbable that the failure of a party to adequately prepare for a hearing, to adduce proper evidence for their case, to state a case clearly or to seek a wholly unrealistic or unachievable outcome, would justify the making on an order under rule 13(1)(b).

In relation to lay people, the Upper Tribunal considered that they should not be considered unreasonable for being unfamiliar with the substantive law or tribunal procedure, for failing to appreciate the strengths and weaknesses of theirs or their opponent’s cases and for lacking presentation skills or performing poorly at the hearing, and went on to state that (para 32):

“...The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings.”

Submissions

Respondent's submissions

7. The Respondent, in its submissions, referred to the decision in *Willow Court* and the three-stage approach to be adopted by the Tribunal for applications made under rule 13.
8. The Respondent submitted that the Applicant had acted unreasonably in both bringing and conducting the proceedings. It referred to the fact that there had been substantial correspondence between the parties prior to the making of the original application and that the Respondent had tried to resolve the disputes in a way that was proportionate, for example it had invited the Applicant to inspect the accounts, an invitation which was not taken up by the Applicant.
9. The Respondent referred to the fact that the Applicant's application to the Tribunal had not been limited to service charge disputes but that she, in addition, had made serious allegations of harassment and fraud against the Respondent, which were irrelevant and unsubstantiated.
10. The Respondent stated that the Applicant's case was vague and did not clearly set out a case for the Respondent to answer and that a witness statement by a surveyor, Mr Jepps, was filed at a late stage and raised issues outside the remit of the application. The Respondent stated that this led to further costs being incurred as the Respondent had already, at that point, filed and served a statement.
11. The Respondent also referred to the fact that the Applicant had failed to comply with deadlines given in directions and that, save for a minor reduction in an administration charge, the Applicant's application had failed entirely. The Respondent noted that the Tribunal had also rejected the Applicant's application for a section 20(c) application and submitted that, in doing so, it had accepted that the Respondent's costs in defending the application were reasonably incurred.
12. Although the Applicant did not have the benefit of legal representation, the Respondent submitted that a Tribunal should not have excessive indulgence or allow the lack of representation to become an excuse for unreasonable behaviour, as referred to in *Willow Court*.
13. Regarding the Tribunal's discretion to make an order, the Respondent stated that the conduct complained of was serious. The Respondent acknowledged that, although the vague queries raised by the Applicant did not ultimately affect the outcome of the decision, the Respondent did have to incur costs seeking to understand and respond to the case and that there was no need to establish a casual nexus between costs incurred and the behaviour sanctioned.

14. The Respondent invited the Tribunal to make an order that the Applicant pay the Respondent's costs or a substantial percentage of them on a summary basis, by agreement of a sum between the parties or by way of a detailed assessment by the County Court.
15. The Respondent attached a detailed statement of costs amounting to a sum of £73,463.30 (inclusive of VAT).

Applicant's response

16. The Applicant submitted that wasted costs applied to representatives not litigants in person and that her conduct had been reasonable. She stated that any shortcoming by her had already been taken in to account by the Tribunal in its original decision and disputed the assertion that the Tribunal had accepted that any of the Respondent's costs were reasonable.
17. The Applicant confirmed that she had been engaged in her second formal complaints procedure with the Respondent immediately prior to her application. She stated that there was a persistent refusal by the management company to maintain the block and that charges had been deducted from the accounts illegitimately.
18. She stated that the Respondent's offer for her to view one year's accounts would not have allayed her concerns as her concerns did not relate to just one year. She stated that the Respondent had failed to balance the accounts in 2015 and had not yet produced accounts for the year ending 2018.
19. She referred to conduct of the Respondent, which she considered unreasonable and disruptive, and, in relation to the allegations of fraud and harassment, she referred to the fact that the Tribunal had already excluded these issues and that it was the Respondent, not her, who had tried to raise them at the hearing.
20. She stated that, in relation to the service charge disputes, she had only queried a small number of individual items and two sets of works and the deluge of paperwork produced by the Respondent was unnecessary.
21. In relation to the statement from Mr Jepps, she referred to the fact that it had been permitted by the Tribunal and that it had revealed that certain items of expenditure had been misdirected and that other items, such as legal charges, had been wrongfully deducted.

The Tribunal's Determination

22. As this is an application under Rule 13(1)(b), not an application as to wasted costs under Rule 13(1)(a), the fact that the Applicant was not represented is irrelevant.

23. The Tribunal is mindful of the guidance of the Upper Tribunal on the correct approach to costs claimed under Rule 13 and must firstly consider whether the Applicant has acted unreasonably.
24. Prior to making her application, the Applicant made various complaints to the managing agents and both parties refer to the substantial correspondence between them in this respect. It is clear that these complaints had not been resolved to the Applicant's satisfaction. The Tribunal notes that the Respondent did invite the Applicant to view the accounts but, as the Applicant submits, she did not believe that this would have resolved the issues, which appeared to have spanned over a number of years.
25. The Tribunal notes that the Applicant had referred to the lack of maintenance on her block and anomalies regarding various items of expenditure in her application to the Tribunal. In addition, the Applicant made an application regarding the reasonableness of an administration charge, which the Tribunal did uphold, reducing the cost of the charge.
26. It is clear to the Tribunal that the Applicant had genuine concerns regarding the management of the estate and charges on the accounts and that she had tried to resolve these directly, via the managing agents' complaints procedure, prior to making her application. As such, the Tribunal does not consider that her action in bringing the proceedings was "*vexatious*" or "*designed to harass the other side rather than advance the resolution of the case*" but consider that her application to the Tribunal could be reasonably explained.
27. In relation to her conduct of the proceedings, although her application referred to serious allegations against the directors that were beyond the remit of the Tribunal's jurisdiction, this was made clear to the Applicant and she did not raise these issues at the hearing.
28. The Respondent referred to the fact that the Applicant had raised points that were vague and had failed to set out her case clearly. The Respondent also referred to failures to comply with disclosure obligations and having to make an application to the Tribunal for an order that the Applicant comply with the same. Such matters are not unusual, in the Tribunal's experience, when dealing with lay representatives and the Tribunal does not consider such behaviour would amount to unreasonableness as defined in *Ridehalgh* and are, in fact, similar to those matters which the Upper Tribunal stated would be improbable for justifying an order in *Willow Court*.
29. The inclusion of Mr Jepp's statement had been allowed by the Tribunal; however, the skeleton argument forwarded by the Respondent the day prior to the hearing, had also been admitted even though this too raised a legal point which had not previously been raised by the Respondent.

30. The skeleton argument referred to the fact that, as the Respondent had failed to carry out a triennial balancing procedure in 2015 as required under the provisions of the lease, the Tribunal should, in fact, be considering whether the budgets were reasonable rather than items in the accounts. Although the Tribunal accepted this argument at the hearing, it was not then surprising that the Applicant's application relating to the reasonableness of the service charges failed, as her queries related to the accounts rather than the budgets. This did not mean that her queries were without merit and the Tribunal did make it clear in its decision that, had the accounts been in question, there were certain items - such as the legal costs - for which it may have found in the Applicant's favour.
31. In addition, the Tribunal noted in its decision that, had this argument been put forward at an earlier stage, the issues relating to the service charge would clearly have been narrowed to the reasonableness of the budgets and the copious amounts of documents produced by the Respondent would have been greatly reduced. Accordingly, the Tribunal determined that the Applicant should only be liable for 25% of any administration charges, which would clearly have to be reasonable, in their decision.
32. Again, although the Tribunal did not allow the application under section 20C of the Landlord and Tenant Act 1985, the Tribunal made its reasoning clear and at no point did the Tribunal consider the reasonableness of the Respondent's costs.
33. Taking in to account all of the above, the Tribunal does not consider that the Applicant acted unreasonably in either the bringing or conducting the proceedings. Having not passed the threshold for the making of an order the Tribunal is not concerned with the second or third stage.
34. The Tribunal would have the parties note that the Tribunal had not been provided with the statement of costs when it made its original decision under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. Had it been so, the Tribunal would have raised serious concerns regarding the reasonableness and proportionality of costs amounting to over £73,000 when dealing with a case where the issues were fairly straightforward and the service charges in respect of the Property amounted to less than £5,000.
35. As previously stated, the Tribunal also had reservations regarding the recovery of legal costs under the provisions of the lease, which it referred to in its original decision, and the parties are strongly encouraged to have regard to the terms of the lease prior to incurring further costs in this matter.

Appeal Provisions

36. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber).

Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM

.....
Judge M. K. Gandham