FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LRM/2018/0018**
Property	**:**	**PEMBROKE LODGE, 149 LEIGHAM COURT ROAD, LONDON SW16 2NX**
Applicant	**:**	**PEMBROKE LODGE RTM COMPANY LIMITED**
Applicant's Representative	**:**	**Matthew Withers, Counsel (Direct Access)**
Respondent	**:**	**AVON GROUND RENTS LIMITED**
Respondent's Representatives	**:**	**Scott Cohen Solicitors Limited**
Type of application	**:**	**Application for (no fault) right to manage under section 84(3) of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge T Cowen** **Mr J Barlow FRICS**
Venue	**:**	**10 Alfred Place, LondonWC1E 7LR**
Date of decision	**:**	**12 August 2019**

COSTS DECISION

Order of the tribunal

(1) The Tribunal makes no order as to costs under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

(2) The Tribunal makes no order as to costs under section 29(4) of the Tribunals Courts and Enforcement Act 2007.

REASONS FOR ORDER

1. On 13 August 2019, the Tribunal made a substantive order in this matter with reasons. As part of that order, we directed:

   1.1. the Respondent to file evidence and submissions to show cause why the Tribunal should not make an order for costs against the Respondent under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"); and

   1.2. the Respondent's solicitor, Lorraine Scott of Scott Cohen Solicitors Limited to file evidence or submissions to show cause why the Tribunal should not make an order for wasted costs against Scott Cohen Solicitors Limited under section 29(4) of the Tribunals Courts and Enforcement Act 2007.

2. We also directed the Applicant to file and serve evidence of the costs it has incurred in these proceedings.

3. On 25 October 2018, we made a determination on paper that the Applicant was entitled to acquire the right to manage. The decision was based on very limited evidence, so we gave the Respondent an opportunity to supply further evidence if it wanted to pursue one of the issues. The Respondent did so and the 25 October 2018 determination was therefore set aside and directions were given for further evidence to be served by both sides. After extensions of time and the disposal of an application for permission to appeal, the Respondent filed and served a witness statement of Lorraine Scott (the Respondent's solicitor) on 8 April 2019.

4. The witness statement contained no new evidence. It did not put forward any positive case for the Respondent, merely stating that the Respondent had "concerns" about the issue and that the Respondent was seeking "further advice". On the same date, the Respondent's solicitors asked for an extension of time for the filing of an expert's report. That may have been the "further advice" they were referring to.

5. The Tribunal received no communication at all from the Respondent or its solicitors for 3 months. This was in breach of directions made by the Tribunal. Then on 7 August 2019, 3 working days before the hearing, the Respondent's solicitors informed the Tribunal and the Respondent Applicant by email that the Respondent would not be attending and suggested a paper determination.

6. The Applicant's counsel attended the hearing and we decided the matter in the Applicant's favour. In essence therefore, the outcome was that the decision of 25 October 2018 was reinstated after the Respondent had requested a rehearing, caused the Applicant to incur substantial costs and had not contributed anything substantive to the issue.

7. In the light of the conduct of the Respondent and its solicitors, as described above, we ordered the Respondent to show cause why an order for costs should not be made against it under Rule 13 of the rules and we ordered the Respondent's solicitors to show cause why a wasted costs order should not be made against their firm.

8. In response to that order, the Respondent's solicitor, Lorraine Scott, filed and served a statement on 28 August 2019 on behalf of the Respondent and the Respondent's solicitors. The gist of her evidence and submissions can be summarised as follows:

    8.1. The Respondent had always intended to pursue this matter and it was therefore reasonable for them to trigger the setting aside of the preliminary decision and the further hearing.

    8.2. The Applicant has also breached time limits on tribunal directions which has caused delay.

    8.3. The Respondent and its solicitors acknowledge that the Tribunal was not kept informed and apologise unreservedly for that. Ms Scott has set out in her statement the efforts which were made to obtain expert evidence in support of the Respondent's position on the substantive issue.

    8.4. After some time, the Respondent discovered that the only way for expert evidence to be given in support of the Respondent's position would be to undertake a structural survey which would be disproportionately expensive relative to the value of the claim. By this time, the Respondent had also seen the expert evidence of the Applicant. In the light of all of this, the Respondent took the decision simply to let the Tribunal make a decision based on the Applicant's expert evidence.

    8.5. The Respondent received the notice of hearing on 16 July 2019. It initially decided to instruct counsel and/or an agent to attend, but decided eventually not to incur the costs of attending and immediately notified the Tribunal on 7 August 2019 when that decision was made.

9. In order to apply this evidence and submissions to the law, we start with the guidance given by the Upper Tribunal in *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC). This is also cited in the submissions of Lorraine Scott. At paragraph 61, the Upper Tribunal noted that this division of the First-tier Tribunal is a costs-shifting jurisdiction by exception only, and that parties should usually expect to bear their own costs.

10. The relevant part of rule 13(1)(b) of the Rules reads as follows:

> "The Tribunal may make an order in respect of costs only: … (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in …(ii) a leasehold case…"

11. The Upper Tribunal in *Willow Court* at para 28 prescribed a three stage process of issues to decide, in considering rule 13(1)9b) applications, which can be summarised as follows:

    11.1. Whether a person has acted unreasonably (by applying an objective standard of conduct to the facts of the case).

    11.2. Whether, in the light of the unreasonable conduct it has found to have been demonstrated, the Tribunal ought to make an order for costs or not.

    11.3. What the terms of the order should be.

12. It hardly needs pointing out that each of the last two stages is only relevant if the previous stage has been satisfied.

13. The test for determining what constitutes unreasonable conduct for the purposes of rule 13(1)(b) is set out in paragraph 24 of the Upper Tribunal's judgment in *Willow Court* as follows:

> "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 in the position of the party 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?

14. Having considered carefully the evidence and submissions of Lorraine Scott, we have decided that there is a reasonable explanation for the conduct complained of. As is apparent from our substantive decision of 13 August 2019, the almost complete lack of communication by the Respondent to the Tribunal before the hearing gave the appearance that the Respondent had abandoned interest in the proceedings and was simply allowing them to continue for the purposes of increasing delay and causing the Applicant to incur further unnecessary costs.

15. Lorraine Scott's evidence has demonstrated to our satisfaction that the Respondent was, until shortly before 7 August 2019, pursuing the proceedings and was intending to attend the hearing. The major fault on behalf of the Respondent and its solicitors was the failure to communicate that to the Tribunal, for which the Respondent and its solicitors have now apologised. It is our judgment that this failure to communicate, of itself, does not satisfy the exceptional test of being vexatious and designed to harass. It is true that the failure to communicate did lead to unnecessary costs being incurred, but that is not the appropriate test. We have reached the conclusion that it is not conduct which satisfies the strict test in rule 13 of the Rules.

16. On the question of the wasted costs order against the solicitors personally, Lorraine Scott has correctly summarised the jurisdiction in her evidence and submissions as follows:

> Under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 the Tribunal may disallow or order a legal or other representative to meet the whole or part of any wasted costs. "Wasted costs" is defined as 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,
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> 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.

17. For the same reasons as we have set out in relation to the rule 13 costs, we have reached the conclusion that the test for a wasted costs order is also not satisfied.

18. It is therefore unnecessary for us to consider second and third stages of the *Willow Court* test and the various submissions of the parties on the subject of the quantum of costs.

Dated this 22nd day of November 2019

JUDGE TIMOTHY COWEN

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).