FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LAM/2019/0005**
Property	**:**	**22 /23 Hyde Park Place, London W2 2LP**
Applicant	**:**	**Mr David and Mrs Giulia Renton**
Representative	**:**	**In person**
Respondent	**:**	**22/23 Hyde Park Place Freehold Ltd**
Representative	**:**	**DAC Beachcroft LLP**
Type of application	**:**	**Costs pursuant to rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**
Tribunal member(s)	**:**	**Tribunal Judge Dutton** **Mr P S Roberts DipArch RIBA**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**16th March 2020**

DECISION

DECISION

The tribunal determines that the applicants have acted unreasonably in the conduct of proceedings under the provisions of rule 13(1)(b)(ii) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and orders that the applicants should pay to the respondents the sum of £15,932.40. such sum to be paid within 28 days.

REASONS

Background

1. Following from a decision of the tribunal on 10th October 2019 (the Decision), after a hearing on 18th July 2019, when it was determined that the applicants' application for an appointment of a manager be dismissed for the reasons set out in the Decision, the respondent sought to recover costs from the applicants under the provisions of rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the Rules).

2. Directions were issued on 26th November 2019 providing for the matter to be determined as a paper case. There was some delay whilst we investigated the funding of the costs for the respondent, and we invited submissions from both parties. The respondents replied to our request by letter dated 17th February 2020, which was also sent to the applicants. The applicants responded with further submissions dated 5th March 2020. These submissions dealt briefly with the insurance point but extensively with the reasons why they say they should not pay costs at all. The letter sent to the parties on 6th February 2020 said this

   "He has asked that 22-23 Hyde Park Place Freehold Limited should, by 21st February 2020 provide evidence/submissions of its obligation and or entitlement to recover the costs on behalf of the insurance company who has provided cover, and confirms the sum(s) that has been expended by the insurers in this case and any sums that the company has been obliged to pay from its own resources to deal with this application. This response should be sent to Mr and Mrs Renton as well as to the tribunal

   Mr and Mrs Renton must, by 6th March 2020, respond to this evidence/submissions by sending any submission/evidence they rely upon, to both the respondent's solicitors and to the tribunal."

.

3. We are not prepared to consider the other submissions in respect of the merits of the claim. The directions issued on 26th November 2019 gave no right to the respondent to file further submissions on the costs point after 13th December 2019. They had their chance then to say all they wished.

4. Our determination on the insurance point is this. Broadly speaking, the indemnity principle prevents only recovery of costs which a receiving party is not liable to pay. There is a presumption that a party instructing solicitors is liable to pay them. The fact that the party may be effectively indemnified for that liability by an insurer, trade union etc is irrelevant. The only exception, on established authority, would be where there is an agreement to the effect that under no circumstances would the receiving party be liable for the solicitors' costs. The case referred to by the applicants in their later submissions can clearly be distinguished from the present circumstances on the facts alone. The submission from DAC dated 17th December 2019 makes it clear that the primary responsibility to settle the legal costs rest with the respondents. In those circumstances we find that the fact the respondent had insurance cover does not remove any obligation that the applicants may be found to have under rule 13.

5. We go on now to consider the application under rule 13. Prior to our determination we had been provided with a bundle of papers which included the following:
   - The respondent's application together with details of the costs incurred
   - The Decision
   - The directions
   - The Applicants' comments on the application with exhibited correspondence which post-dates the Decision.

6. We have considered the documents before us in reaching our decision. In addition, we have had particular regard to the Upper Tribunal case of *Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC*), the salient parts of which are set out in the respondent's application.

7. The respondent seeks an order that the applicants pay the sum of £25,984.80 in costs, inclusive of Counsel's fees of £7,400 plus VAT and solicitors costs of £14,254 plus VAT. It is said that the applicant, in particular Mr Renton, a former solicitor, albeit, it would seem not practising in the UK, had acted vexatiously and issued the application for collateral purposes, in effect to achieve a better level of service. It was said that the action should not have commenced and should not have continued after 29th March 2019 when the CCTV survey had been undertaken.

8. The applicants' conduct of the proceedings was criticised suggesting that it was not possible for the applicants to establish a breach of lease by the respondent. We were reminded that this was the third attempt to appoint a

manager since 2014 and the earlier ones were dismissed on the grounds that the initial notices were invalid. In addition, it was pointed out to us that the respondent is a leaseholder owned company and we note from the Decision that seven leaseholders objected, and no one supported the applicants.

9. The applicants' response centres on the original dispute, referring in some detail to the chronology. He does not challenge the quantum of the costs claimed. We note that the application to appoint a manager was made on 11th March 2019, which is something more than 6 months after the applicant notified the respondent of leaks in their flat. It is accepted that the applicants' nominee, Mr Chapman, was agreeable to the respondent as a prospective manager, at least to the extent that he would appear on a shortlist, but he appears to have withdrawn whilst his position as possible tribunal appointee was still to be considered. We could find no reference to the criticism of Mr Chapman to which the applicant alludes at paragraph 10 of their response. In the Decision the tribunal found no breach of the lease (Para 48) and we do not propose to reopen that aspect. It is for the same reason that we do not consider the letter/emails produced by the applicants after the Decision to be relevant to this case.

Findings

10. There is a three stage approach we must follow to determine this matter. The first stage is to determine whether the applicant in this case has acted unreasonably. This is the third time since 2014 that the applicants have sought to appoint a manager and all three have been unsuccessful. The reasons for seeking an appointment have varied but it seems to us it is appropriate to take these matters into account. In this case the tribunal found that there had been no breach of the lease. The tribunal found that the respondent had acted reasonably. In contrast the tribunal found that the applicants had made the application, not based on the leaks but because they were not getting the level of service they wished. Further, no answer seems to have been given to the question why they had not pursued the claim for financial loss through the Court.

11. Paragraph 24 of the judgment in the Willow Court case says this. *"….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 given in Ridehalgh 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 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?"*

12. The judgment goes on to address the three stage approach that should be adopted. At paragraph 28 it says as follows. *"At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.*"

13. Paragraphs 29 and 30 address the other stages – Paragraph *29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely 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. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This 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." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.*

14. *Paragraph 30 - "At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases."*

15. The first question is whether there is a reasonable explanation for the conduct complained of. The answers recorded in the Decision as to the reasoning behind the application show a lack of reasonableness. The applicants, from their previous forays into the world of s24 of the Landlord and Tenant Act 1987 should have appreciated what was required and what was intended by the procedure. Instead, as recorded in the decision the real intent was to achieve an enhanced level of service, which are not required by the lease and would not have been solved by the tribunal appointment of a manager. The

applicants failed to respond to questioning concerning the right to pursue the lost rent through the County Court. The Decision records that there have been no further leaks into the applicants flat since 23rd January 2019 (paras 37). On 22nd May 2019 the applicants were paid £13,000 for remedial works through their insurers, although at the time of the hearing those works had not been carried out.

16. We find that the commencement of the application may have been reasonable but by the time the applicants had been paid the remedial costs it is not possible to discern what benefit the applicants hoped to derive from the application, other than seeking matters which were beyond the jurisdiction of this tribunal. We find therefore that from 22nd May 2019 to continue with the proceedings was unreasonable.

17. We should perhaps address the status of Mr Renton. It would appear that although he was a solicitor, and he practised outside the UK, nonetheless, he is somebody used to the legal setting and has had experience in at least two earlier applications. We do not consider that he is, in the true sense, a litigant in person.

18. Taking these matters into account we find that the respondent has satisfied us that the first stage of the test has been met.

19. Having established that the applicants have acted unreasonably in the conduct of the proceedings we need to consider whether an order for costs should be made. We remind ourselves that the respondent is a tenant owned management company, the majority of whom were not in support of the applicants. It does not seem to us that the fact that the respondent had the benefit of insurance cover should impact on our decision. Dealing with proceedings of this nature imposes a financial strain on a non-commercial party and exposes the members of the respondent company to financial liability. We find that this liability should, in the main, be borne by the applicants. We say in the main because we consider that not all costs sought should be caught by the 'unreasonable' epithet.

20. We then move on to the third stage. We find that the charging rates of the solicitors acting for the respondent, DAC Beachcroft are reasonable. It is not possible to determine from the costs schedule the periods for which the professional work was undertaken. The action was commenced on 11th March 2019 and should have ceased by the end of May 2019. The hearing was 18th July 2019. Taking a rough and ready approach it would seem that the time of withdrawal should have been about half-way through the action. However, we accept that the loading of costs would be towards the hearing time. The schedule of work done on documents records some 27.5 hours, which is not insignificant. Assessing the costs on a standard basis there will inevitably be costs which are not, in any event, recoverable from the applicant.

21. Doing the best we can on the information before us and bearing in mind the Willow Court judgment at paragraph 43 we conclude that the applicant should pay 50% of the solicitors costs, being £7,127 plus VAT of £1,425.40. This is based on our findings that not all the costs incurred fall into the 'unreasonable' bracket and not all would in any event be payable by the applicants on a standard assessment.

22. On the question of counsel's fees, we disallow the fee for the Case management conference of Admas Habteslasie being £900 including VAT as this was before the May 2019 date. As to the fees of Mr Cohen we will allow those save the closing submissions, which we consider should form part of the brief fee. Ordinarily these submissions would take place on the day of the hearing and would be within the brief fee for that day. This gives a total fee for counsel, including VAT of £7,380 and with the solicitors' costs, again inclusive of VAT, amounting to £8,552.40 we find that the liability of the applicants in respect of the costs of these proceedings is £15,932.40.

Tribunal Judge Dutton 16th March 2020

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).