FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LDC/2019/0214 P**
Property	**:**	**Olivers Wharf, 64 Wapping High Street, London, E1W 2PJ**
Applicant	**:**	**Olivers Wharf (Management) Limited**
Representative	**:**	**Forsters with Mr Michael Walsh – Counsel;**
Respondent	**:**	**John C Head III**
Representative	**:**	**Pinder Reaux & Associates with Mr John Beresford - Counsel**
Type of application	**:**	**Costs under the provisions of rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**
Tribunal member(s)	**:**	**Tribunal Judge Dutton** **Mr C P Gowman MCIEH MCMI BSc**
Date of determination	**:**	**19th August 2020**
Date of Decision	**:**	**24th August 2020**

DECISION

Decisions of the Tribunal

(1) This has been a remote determination on the papers which has not been objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined on papers before us as was set out in our earlier decision. The documents that we were referred to for this case are the skeleton arguments prepared for the hearing on 3rd February 2020 and the submissions from the parties, together with a costs summary and copies of the invoices issued by Pinder Reaux, the contents of which we have noted.

(2) The tribunal determines that the application under the provisions of rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the Rule) is dismissed for the reasons set out below

The application

1. This application arises from the applicants request for dispensation under s20ZA of the Landlord and Tenant Act 1985. Mr Head objected to the application and requested a hearing, as he was entitled so to do, rather than determination on the papers.

2. The circumstances surrounding the dispensation application are set out in our two decisions, the first dated 14th February 2020, following a hearing on 3rd February 2020 and our final decision granting dispensation for the fire prevention works dated 30th March 2020. The final decision followed Mr Head's confirmation that he was satisfied with the documentation produced and withdrew his objection to the application.

3. Directions in this costs case were issued on 30th May 2020 and have been complied with. The directions provided for a paper determination and we met on 19th August 2020 to consider the matter.

4. We had before us the papers from the original hearing and the reports ordered to be provided to Mr Head thereafter. In addition, we were provided with the respondent's costs submissions sent under cover of a letter from Pinder Reaux dated 12th May 2020, the reply thereto dated 30th June 2020 and the respondent's reply to those submissions dated 16th July 2020. A costs summary was provided showing a claim for £11,823.60 inclusive of Counsel's fees and VAT with supporting invoices from Pinder Reaux covering the period 8th January 2020 to 15th May 2020. A copy of Counsel's fee note was attached showing counsel's fees of £3,050 inclusive of VAT.

5. In the costs submission, made in support of the application, it is the applicant's failure to disclose compartmentalisation and fire door surveys/reports until after the hearing on 3rd February that draws the most criticism. Reference is made to directions issued by the tribunal before the 3rd February hearing and the allegation that the reports/surveys had been provided to the other leaseholders, of which there are in total 23, but not to Mr Head and it would seem his former wife. 21 of the leaseholders consented to the works. The existence of these reports/surveys was unknown to Mr Head until they came to light at the hearing. Reasons were given for their non-production which we commented upon at the time.

6. It is said that had the surveys/reports been disclosed to Mr Head before the hearing he would have avoided the costs of having a hearing and indeed upon production of these reports/surveys he withdrew his objection.

7. In a lengthy reply dated 30th June 2020 the circumstances surrounding the hearing on 3rd February and the subsequent provision of documents leading to Mr Head's withdrawal of his objection are clearly set out. The framework of rule 13 is stated and detailed reference is made to the Upper Tribunal decision of *Willow Court Management Co (1985) v Alexander [2016] UKUT 290 (LC)*, to which we will return in due course.

8. Under the heading 'Background', the chronology relating to the application for dispensation is set out. It is right to say that Olivers Wharf was in need of urgent fire protection works. In October 2019 the London Fire Brigade had served an enforcement notice requiring compliance, initially by 13th January 2020, but extended to 2nd March 2020. This followed a fire at the property. By 20th December 2019 all but the respondent and his former wife, who played no part in the proceedings before us, had consented to the dispensation application. It is asserted that from a review of the Background it is in fact the respondent, Mr Head, which has caused costs to be increased. Indeed, it is alleged that the respondent's conduct throughout has been '*hostile and uncooperative*'. Details of the lack of cooperation are set out together with the respondent's request for an oral hearing, notwithstanding that the tribunal, at the request of the applicant, considered that the case could be dealt with on the papers.

9. It is said that the respondent continues to be obstructive in refusing to attend to the installation of a heat detector in his flat.

10. The submission then turns to the legal tests to be applied to the facts of this case. Although the allegation of unreasonableness centres around the failure to provide copies of the reports/surveys before the hearing on 3rd February 2020, the costs claimed appear to relate to all costs of the proceedings. The respondent says if these report/surveys had been disclosed beforehand the hearing could have been avoided. This is challenged by the applicant as set out in the submission. An explanation is also given as to why information relating to compartmentalisation and doors had not been provided to Mr Head. We are also reminded that dispensation was granted at the 3rd February hearing, as set out in the decision dated 14th February 2020.

11. In the respondent's reply to the applicant's submissions, dated 16th July 2020, the suggestion that Mr Head had been hostile and unreasonable is refuted. We are reminded that it is not unreasonable for a tenant to investigate the landlord's application for dispensation. Further the suggestion that Mr Head continues to be obstructive in refusing access

to his flat is rebutted but is said to be irrelevant. It does not address the level of costs sought.

The law

12. The provisions of the Rule are set out below. We have carefully considered the Upper Tribunal case of Willow Court referred to above and applied that to the facts of this case as we find them.

Findings

13. Both Counsel for the parties have provided us with lengthy submissions, for which we are grateful and have set out at length the provisions of the Willow Court case. We remind ourselves of the provisions of rule 3 and the overriding objectives.

14. At paragraph 24 of the judgment in Willow Court the tribunal said this:

> *24. We do not accept these submissions. 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?*

15. The main plank of the argument for Mr Head is that in failing to provide documents in a timely fashion this caused the hearing to proceed on 3rd February, when had they been disclosed beforehand the hearing 'would' have been avoided.

16. At paragraph 26 of the decision the tribunal said this:

> 26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the

sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship.

17. On 13th January 2020, in a second letter of that date, the tribunal said that the bundle then provided by the applicant appeared to provide the information sought by Mr Head and further that Mr Head should provide evidence to support matters raised in his statement of 8th January 2020. In a second statement by Mr Head dated 27th January 2020 he said that the bundle did not address his concerns. It would seem that those concerns centred on the instruction of Hades Fire Protection and the lack of a sprinkler system which Mr Head considered 'imperative', whilst providing no evidence to support such a contention and accepting that the London Fire Brigade had not required such an installation. There was no evidence to support the allegations made in his earlier statement.

18. The Upper Tribunal decision then moves on to the steps we must follow in considering an application under rule 13. They are set out at paragraphs 27 to 30 where it said as follows:

> 27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only … if a person has acted unreasonably…." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.
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> 28. 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.
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> 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.

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.

19. It is unfortunate that the applicant did not produce all that it had in its possession in respect of compartmentalisation or the doors prior to the hearing. As we said at the time this was misplaced. However, we are not satisfied that if this information had been supplied to Mr Head he would have consented to the application or at the very least withdrawn his request for a hearing. Although he was aware of the application dated 17th December 2019 his response was to object and raise allegations, which when pressed for evidence to support same he failed to produce. Instead in his later statement whilst indicating that the bundle provided by the applicant did not address his concerns, those concerns appeared to be limited to the use of Hades, notwithstanding the analysis in support of employing them provided by the applicant and the lack of a sprinkler system, which appeared to be somewhat of a frolic of his own. It is interesting to note the comment Mr Head made at paragraph 4 of this later statement where he says "*I am conscious about the way the applicant has conducted itself in the past and their ability to properly maintain my safety in the future"* This is a continuance of the allegations about which he was asked to give evidence by the tribunal in the letter dated 13th January 2020.

20. We are satisfied that, contrary to the assertions made on Mr Head's behalf, even if the information available on the compartmentalisation and doors had been provided to him before the hearing on 3rd February 2020 he would not have withdrawn his request for a hearing. It is noted that at the hearing no evidence was called by either side, the case being determined on the legal submissions made by Mr Walsh and Mr Beresford. We are satisfied from all that is before us that there was 'no love lost' between the parties. We find that Mr Head wanted to make matters difficult for the applicant and unfortunately to an extent they helped in that regard by their failure to disclose.

21. Even if we were to find that the first step on the road to unreasonableness had been made by the applicant in failing to disclose, we are satisfied that the second step is not crossed. As to the first step we have noted all that was said by way of explanation for not disclosing that which the applicant had in its possession. The forfeiture point is ill made. The personalities involved has led to something of a breakdown in the relationship. However, this is a tenant owned and controlled company, of which Mr Head was, it seems company secretary and a certain element of 'personality' is not uncommon in these circumstances. As we have found we do not believe that the respondent would have acted differently and would have pressed for the hearing to continue. We accept the contention made by the applicant's counsel, that Mr Head had been somewhat "*hostile and uncooperative*". At that hearing we found that much for which dispensation was sought should be granted.

22. In these circumstances we find that the respondent has not persuaded us that the applicant has acted in an unreasonable manner so that an order can be made under the provisions of Rule 13 and we therefore dismiss his application.

Name: Tribunal Judge Dutton **Date:** 24th August 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).

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

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 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.