FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/HNA/2020/0023 & 0025 & 0026 & 0027**
Property	**:**	**35 Priolo Road, 26 Inverine Road, 9 Fairfield Grove and 15 Priolo Road, London SE7**
Applicant	**:**	**Mr Dayu Shang**
Respondent	**:**	**Royal Borough of Greenwich**
Type of Application	**:**	**Supplemental cost application following appeal against financial penalties**
Tribunal Members	**:**	**Judge P Korn** **Mr P Roberts DipArch RIBA**
Date of Decision	**:**	**11th December 2020**

SUPPLEMENTAL DECISION ON COSTS

Decision of the Tribunal

The Tribunal makes no cost order.

The background

1. This application is supplemental to an appeal (the "**Appeal**") made by the Applicant against a combination of four financial penalties imposed on him by the Respondent under section 249A of the Housing Act 2004.

2. The Appeal was partially successful in that the tribunal reduced the aggregate penalty from £100,000 to £60,000.

3. The Applicant has now made a cost application pursuant to paragraph 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**").

Applicant's written submissions

4. In his submissions, the Applicant states that under paragraph 13(1)(b) of the Tribunal Rules costs may be awarded against a party who has acted unreasonably in defending or conducting proceedings in a residential property case. He then refers the tribunal to the Upper Tribunal's decision in *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)* where the Upper Tribunal gave some guidance on the application of paragraph 13(1)(b) of the Tribunal Rules. He notes that *Willow Court* establishes a three-stage test: (a) has the party acted unreasonably, (b) should an order for costs be made and (c) if so, what should the order be.

5. He also makes reference to paragraph 3(1) of the Tribunal Rules, which states that the overriding objective of the Tribunal Rules is to enable the tribunal to deal with cases fairly and justly, and to paragraph 3(4) of the Tribunal Rules, which states that the parties should help the tribunal to further that overriding objective.

6. The Applicant argues that his case was strongly based on the Respondent's incorrect application of its own matrix. On reviewing the Applicant's written submissions, the Respondent should have realised that the Applicant had a good prospect of success and should not have continued to defend the Appeal. He then proceeds to quote from the tribunal's determination in respect of the Appeal in support of his contention that the Respondent's case in relation to the matrix was weak and that the Applicant's case was strong. He also refers to the rejection by the Respondent of an offer of mediation, the late service of the Respondent's bundle and the incorrect way in which the Respondent sought to introduce new witness evidence.

7. Although mainly referring to paragraph 13(1**)(b)** of the Tribunal Rules in his costs submissions the Applicant also refers to paragraph 13(1**)(a)** of the Tribunal Rules – coupled with section 29(4) of the Tribunals, Courts and Enforcement Act 2007 – as authority for the proposition that the tribunal has a discretion to award costs in respect of this application. He adds that an offer to settle the amount of costs was made by him but that this offer was refused without explanation or any counter-offer.

8. In addition, the Applicant states that he has always accepted his wrongdoing and has not sought to avoid a financial penalty altogether. He argues that the Respondent, by contrast, has not engaged with him, has disregarded his mitigating circumstances, has incorrectly applied its own matrix and – by its own admission – has applied its policy in a manner whereby its own financial benefit was forefront in its mind. The tribunal reduced the financial penalty by 40%, indicating that the amount was excessive and therefore that the Respondent's approach was unreasonable.

9. As regards the amount of the Applicant's costs, his representatives had used a junior member of staff wherever possible to keep costs to a minimum. The amount of costs sought is £16,051.60 in respect of both hearings and a further £1,836.00 for bringing the cost application itself.

Respondent's written submissions

10. The Respondent notes that the Applicant refers to the tribunal's powers to award costs under Rule 13 (1)(a) of the Tribunal Rules and section 29(4) of the Tribunals, Courts and Enforcement Act 2007. That provision concerns a court's or a tribunal's powers to order a party's representative to pay wasted costs, or to disallow all or part of an award of costs on the basis of the conduct of the legal representative. They then go on to argue that the Applicant's submissions do not make any allegation against the Respondent's legal representatives in relation to the conduct of the proceedings. Nor do they refer to the applicable test in *Ridehalgh v Horsefield [1994] Ch. 205* or engage with the considerable body of law in relation to how and when a wasted costs order against a legal representative can be made. The Respondent therefore assumes that wasted costs under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 are not in issue.

11. The Respondent accepts that under paragraph 13(1)(b)(ii) of the Tribunal Rules the tribunal can make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case. The Respondent agrees with the Applicant that the meaning of 'acted unreasonably' for the purposes of paragraph 13(1)(b) was laid down by the Upper Tribunal in *Willow Court.*

12. The Upper Tribunal in *Willow Court* specifically rejected submissions that the meaning of 'unreasonable' for the purposes of paragraph 13(1)(b) should be interpreted any more widely or loosely than it is for the purposes of paragraph 13(1)(a), stating at paragraph 24 (and referencing *Ridehalgh v Horsefield*: *"We*

see no reason to depart from the guidance given in Ridehalgh … 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?"

13. The Respondent goes on to submit that in all cases, in order to make a cost award under paragraph 13(1)(b), the tribunal must first reach a finding of unreasonable conduct and that this is the point of the first part of the test. The point of the second part of the test is that even if the tribunal does find unreasonable conduct, it retains a discretion not to make an award of costs. As stated in paragraph 27 of *Willow Court*: *"When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: … 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."*

14. The Respondent notes that in paragraph 28 of *Willow Court* the Upper Tribunal added the following: *"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."*

15. The Respondent understands the Applicant to be arguing that by choosing to contest the Appeal despite the Applicant's 'good prospects of success', the Respondent acted unreasonably. The Respondent opposes this for three main reasons: (i) 'good prospect of success' does not meet the test in *Willow Court*; (ii) the fact that some of the Applicant's submissions were successful also does not meet the test in *Willow Court*; and (iii) the fact that the matter was not resolved by agreement is neither here nor there, since that the Applicant made no offer to pay a lesser penalty.

16. The Respondent submits that in the majority of cases brought before the tribunal one or other party will have 'good prospects of success'. If the Applicant's analysis is correct it would follow that in every case in which the

party with 'good prospects' succeeds the other party has acted unreasonably in contesting the appeal.

17. The Respondent notes that the Applicant lists points advanced at the Appeal that were accepted by the tribunal but argues that the relevance of listing these points is predicated on the incorrect assumption that conduct leading to an unsuccessful outcome, such as contesting a case that contains some good points for the other side, is unreasonable conduct for the purposes of paragraph 13(1)(b). Alternatively, the Respondent submits that the Applicant's approach is too granular. The issue for the tribunal was whether the overall size of the four financial penalties imposed was correct or not, and given the number of steps in the point-based matrix process and the subjective elements of discretion involved in choosing a category at each stage, it was always unlikely that the tribunal would reach identical conclusions as the Respondent for each stage. Inevitably, the Respondent would have a stronger case on some points and a weaker case on others. Taking matters in the round, the Respondent had a perfectly arguable case and it was in no way unreasonable to argue it.

18. As regards the suggestion that the Respondent acted unreasonably in not agreeing to mediation, the Respondent submits that again this fails to meet the test in *Willow Court*, since in all contested cases resolved by a hearing the matter could have been resolved by agreement instead, and *Willow Court* is authority for the proposition that paragraph 13(1)(b) should be used exceptionally, not routinely. Also, although there were informal discussions between the parties prior to the hearing the Respondent states that the Applicant has never made any offer for the Respondent to consider (whether of £60,000, the amount upheld by the tribunal, or any other amount). Whatever the position in relation to mediation, in the absence of any real offer to settle, the Respondent feels that the Applicant is as responsible for the matter proceeding to a hearing as the Respondent.

19. The Respondent also rejects the Applicant's suggestion that he 'has never sought to avoid a financial penalty altogether'. Although the Applicant accepted committing the offences, at the hearing he argued that he should pay no penalty at all. This, says the Respondent, was specifically clarified with him by Judge Korn at the start of the hearing, whereupon the Applicant's counsel stated that he was 'inviting consideration of no penalty at all' and that, in the alternative, he would seek a reduced penalty within the matrix process.

20. The Respondent states that it assumes that the purpose of paragraphs 12 – 20 of the Applicant's submissions is to argue that issues linked to the preparation of the Appeal amount to unreasonable conduct. This submission is resisted by the Respondent inter alia on the following grounds.

    (a) Although regrettable, late service of bundles and late applications to introduce evidence, are not uncommon in cases before the tribunal. To hold that they amount to unreasonable conduct would bring a great many cases within the scope of paragraph 13(1)(b) which, per *Willow Court*, is not its purpose.

(b) The late service of the bundle in this case was due to the COVID emergency which has caused unprecedented disruption to all sectors of business and government activity.

(c) The Applicant has not demonstrated any actual prejudice to his case suffered as a result of any of the grievances listed and did not raise any concerns with the tribunal at the start of the hearing.

21. The Respondent goes on to argue that if, notwithstanding its submissions, the tribunal does make a finding of unreasonable conduct, the tribunal should nevertheless use its discretion in the second part of the test to decline to make an order in the Applicant's favour. The length, scope and complexity of the Appeal was driven by the Applicant who submitted that the Respondent's overall approach to the Applicant was wrong. This was a far wider challenge than simply whether the matrix had been correctly applied and raised issues such as whether the Respondent has correctly interpreted the statute or whether it has improperly acted for its own financial gain. This ground was pursued extensively but none of the Applicant's submissions in relation to this first ground were successful and the Respondent's approach was largely vindicated.

22. Similarly, argues the Respondent, the Applicant raised a number of other issues that were implicitly rejected by the tribunal. In relation to the matrix itself, of the nine aspects of the matrix process put in issue the Applicant was successful in reducing the categorisation of his financial penalty in relation to two aspects only. It follows that the majority of the time and cost of the Appeal was consumed by the Applicant's pursuit of points ultimately rejected by the tribunal. As for the two points where the Applicant was successful, the Respondent submits that the matrix process is not an exact science and is open to multiple interpretations.

The tribunal's analysis

23. As noted by the Respondent, the reference by the Applicant to paragraph 13(1)(a) of the Tribunal Rules and to section 29(4) of the Tribunals, Courts and Enforcement Act 2007 is misconceived, as these deal with wasted costs order. Wasted costs orders can only be made against a party's representative and not only has the Applicant offered no arguments in support of such an order being made but in written submissions he does not even claim to be seeking a cost order against the Respondent's representative.

24. As regards paragraph 13(1)(b) of the Tribunal Rules, this states as follows: *"The Tribunal may make an order in respect of costs … if a person has acted unreasonably in bringing, defending or conducting proceedings in … a residential property case, or … a leasehold case"*.

25. The Respondent has quoted extensively from the decision in *Willow Court*, and no useful purpose would be served by the tribunal also doing so. It suffices to

state that we are satisfied that the Respondent has quoted accurately and relevantly from that decision.

26. It is clear from *Willow Court* that in order to make a cost award under paragraph 13(1)(b) the tribunal must first reach a finding that the party concerned has acted unreasonably.

27. As to what is meant by "unreasonably", the Upper Tribunal in *Willow Court* followed the approach set out in the case of *Ridehalgh v Horsfield* and stated that *"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"*.

28. In *Ridehalgh*, Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. One principle which emerges from both *Ridehalgh* and *Willow Court* is that costs are not to be routinely awarded pursuant to a provision such as paragraph 13(1)(b) of the Tribunal Rules merely because there is some evidence of imperfect conduct at some stage of the proceedings.

29. Sir Thomas Bingham also said that unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case, but that conduct could not be described as unreasonable simply because it led to an unsuccessful result. The Upper Tribunal in *Willow Court* added that tribunals should also not be over-zealous in detecting unreasonable conduct after the event.

30. In our view, the Applicant's case on the issue of whether the Respondent has acted unreasonably for the purposes of paragraph 13(1)(b) of the Tribunal Rules is very weak. It is true that there was some non-compliance with the directions, but the non-compliance has to be seen in the context of the effects of the current pandemic and in any event it is clear from *Willow Court* that this level of non-compliance does not constitute unreasonable conduct for these purposes. There is also no evidence that the non-compliance in question was remotely vexatious and nor is there any real evidence that the Applicant was in practice prejudiced thereby.

31. We agree with the Respondent that even if it should have been apparent to the Respondent that the Applicant had 'good prospects of success' in getting the penalty reduced this is not the relevant test for whether the Respondent has acted unreasonably in defending the Appeal, and we simply do not accept that it was unreasonable of the Respondent to contest the appeal. In addition, the penalty was not overturned but reduced, and the penalty remained very high at £60,000 to reflect the severity of the Applicant's offences. As regards the Applicant's submission that the Respondent applied the matrix incorrectly, whilst it is true that the tribunal did not agree with the Respondent's conclusion in two of the categories it did agree with its conclusion in all of the other categories, and the mere fact that the Respondent's analysis was not upheld

100% is clearly not evidence of unreasonable conduct on its part in defending the Appeal.

32. The Applicant argues that the Respondent has disregarded his 'mitigating circumstances', but this tribunal has already determined that the Respondent was correct to do so.

33. The Applicant states in written submissions that he always accepted his wrongdoing, but we do not accept that this is the case. For the purposes of the Appeal the Applicant had very little choice but to accept that he had committed a series of criminal offences, but his conduct in dealing with the Respondent itself when the Respondent was investigating these offences was extremely obstructive, and he acted dishonestly on a number of separate occasions in order – it would seem – to hide his wrongdoing.

34. The Applicant also tries to suggest that he made real attempts to negotiate a fair compromise with the Respondent who then did not respond constructively, but we do not accept this either. There is no evidence before us that the Applicant made a reasonable offer of compromise prior to the hearing, and indeed the Applicant continued to argue even at the hearing that he should pay no financial penalty at all.

35. As regards the Applicant's reference to paragraph 3 of the Tribunal Rules and the overriding objective of the Tribunal Rules, the Applicant makes no coherent connection between that overriding objective and the Respondent's conduct.

36. As regards the extracts from the tribunal's decision on the Appeal quoted by the Applicant, as noted by the Respondent most of the extracts quoted simply state what the Applicant's case was on the relevant issue; they do not endorse the Applicant's arguments.

37. As regards the Applicant's claim that by its own admission the Respondent applied its policy in a manner whereby its own financial benefit was forefront in its mind, we did not accept this insinuation at the time of the Appeal – in the absence of better evidence – and it is improper for the Applicant to try to use it now as part of his costs submissions.

38. We therefore do not accept that the Applicant has come even close to demonstrating that the Respondent has acted unreasonably for the purposes of paragraph 13(1)(b) of the Tribunal Rules. As the application has failed to pass the first stage of the test set out in *Willow Court*, it follows that it is unnecessary to go on to consider stages two and three. Accordingly, the Applicant's cost application is refused.

Name: Judge P. Korn **Date:** 11th December 2020

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.