FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2018/0449**
Property	**:**	**45 Wilton Crescent and 45 Belgrave Mews, London SW1X 8RX**
Applicant	**:**	**Ms Achara Tripipatkul**
Representative	**:**	**Mr Graeme Kirk of Counsel**
Respondent	**:**	**Mr Dimitris Paraskevas**
Representative	**:**	**Mr Justin Bates of Counsel**
Type of application	**:**	**Costs – Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**
Tribunal members	**:**	**Judge N Hawkes** **Mr W R Shaw** **Mr J Francis QPM**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**7 December 2020**

DECISION

The Decision of the Tribunal

The Respondent's application for an order for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 is dismissed.

The application

1. The substantive dispute between the parties was determined by decisions of the Tribunal dated 16 January 2020 and 3 August 2020 which should be read together with this decision.

2. On 26 August 2020, the Respondent made an application for costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules"). A costs order is sought in the total sum of £258,588.62.

3. Directions were given for the determination of the application for costs on 13 September 2020. These Directions made provision for the Applicant to respond to the application and for the Respondent to reply and to prepare and file an application bundle.

4. Provision was also made in the Directions for a paper determination to take place and this application has been determined on the papers.

The Tribunal's determination

5. The Tribunal's power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which includes provision that:

   29. Costs or expenses

   (1) The costs of and incidental to—

   (a) all proceedings in the First-tier Tribunal …

   shall be in the discretion of the Tribunal in which the proceedings take place.

   (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

   (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules …

6. Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules") provides so far as is material:

13.—(1) 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 residential property case.

7. In determining this application pursuant to rule 13 of the 2013 Rules, the Tribunal has had regard to its overriding objective and, in particular, to *Willow Court Management Ltd v Alexander* [2016] UKUT 290 (LC); [2016] L. & T.R. 34, in which the Upper Tribunal gave guidance concerning the approach that a Tribunal should take when determining a rule 13 application.

8. We have considered in detail the entirety of the judgment in *Willow Court* and note that, at paragraph [43], the Upper Tribunal stated:

"A decision to award costs need not be lengthy and the underlying dispute can be taken as read."

9. In summary, the Tribunal is to apply a three-stage approach. Firstly, applying an objective standard, the Tribunal must consider whether or not the Applicant has acted unreasonably. An unsuccessful outcome is not sufficient on its own to warrant an order under rule 13 and the Tribunal must be careful not to use this power too readily.

10. At [24] of *Willow Court*, the Upper Tribunal stated:

"… 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 v Horsefield 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?"

11. If the Applicant is found to have acted unreasonably, the Tribunal must consider whether or not an order for costs should be made. This involves a consideration of the nature and seriousness of the Applicant's conduct and the Tribunal retains a discretion at this stage.

12. If the Tribunal determines that it will make an order for costs, the terms of the order fall to be considered. There is no need for a causal connection to be established between the conduct and the costs incurred. The Tribunal can make an order for payment of the whole or part of a party's costs. The nature, seriousness and effect of the unreasonable conduct are important factors.

13. The first stage is to consider whether the Applicant has acted unreasonably in the present case applying an objective standard.

14. At paragraph 6 of the application, the Respondent contends that the Applicant has acted unreasonably in the following five respects:

"(a) the entire case as advanced by the applicant was unreasonable; there was ample evidence of disrepair and it was obvious to any reasonable person that the value of the set-off would easily extinguish the potential service charge liability;
(b) moreover, given that the applicant has not collected the service charges from the other flats (which, of course, she owns or controls), there was no practical utility to these proceedings;
(c) indeed, despite the 'in principle' decision being issued in January 2020 (which, of course, held that there was actionable disrepair, both historically and ongoing), no work has been started at this building;
(d) to the contrary the applicant initially instructed her solicitors to challenge the methodology for the calculations of the value of the service charge claim and the setoff, and then dismissed her solicitors and gave no instructions to her experts, further delaying matters;
(e) she instructed new solicitors and counsel shortly before the resumed hearing and they accepted the figures put forward by Mr Paraskevas."

15. The Respondent goes on to state:

"In short, this application could never achieve any practical benefit for the applicant and just served to further delay the long-overdue works. A reasonable person does not behave in such a way. Proceeding in such a manner is: (a) a waste of public time and money, given the impact on the resources of the FTT; (b) totally at odds with the overriding duty on the parties to co-operate with each other and the Tribunal so as to achieve a just and proportionate outcome; and, (c) harmful to Mr Paraskevas and to the proper management of the building. There is no 'reasonable explanation' for this conduct."

16. The Applicant asserts that there is nothing unreasonable about these proceedings or her conduct of them. She disputes the Respondent's contention that the bringing of these proceedings was unreasonable, because "they had no practical utility" and states that the proceedings:

"(a) Resolved that 31.82% of the service charge costs was the 'fair proportion' payable by the Respondent (Decision, Paragraph 27). The Respondent argued that 20% of the relevant costs is the fair proportion. (DP September 2019 witness statement, Paragraph 27);

(b) Determined the lift needed to be replaced, the Respondent had to contribute to the Lift, and the Applicant's expert was preferred on the question of scaffolding (Decision, Paragraphs 28 (i) and (ii), (iv) and (vi) and (vii). It was resolved at Tribunal that the Respondent should be responsible for 10% of costs. The Respondent had contended that he has no responsibility for any of the lift costs (DP September 2019 witness statement, Paragraph 31);

(c) Preferred in a large number of disputed areas in the Scott Schedule Items, the evidence of the Applicant and her experts (Paragraphs 28 (ii), (v), (vi), (vii), (viii), (xi), (xiii), (xv), (xvi), (xviii), (xix), (xxiii), (xxiv).

Further, the judgment records numerous issues which were common ground between the parties, showing that the conduct of the proceedings was not outside of the norm.

To put it another way, the amount the Applicant was due as a service charge had to be resolved, whether by the Applicant bringing these proceedings, as she did, or whether by way of counter-claim to any claim brought by the Respondent (which is yet to be brought). It is quite simply wrong to say these proceedings served no purpose, and were therefore unreasonable. Further, the Respondent does not suggest that he made any admissible offers equal to, or in excess of, the amounts found in the Applicant's favour.

....

In summary, the proceedings were necessary to determine disputed issues and they in fact did so."

17. In response, the Respondent states that the Applicant has failed to address his central complaint. She owns or controls all of the other flats at this building. The vast majority of the service charge costs will therefore fall on her/companies she controls. Before any work can take place, therefore, it is "imperative" that she puts her agents in funds. She has not done so. She has not adduced any evidence of any intention to do so. No progress whatsoever has been made in remedying the disrepair at this building.

18. The Respondent states that proceedings therefore served no practical purpose (or, to put it another way, the proceedings could never have produced any practical benefit to the Applicant) and, because of her control over the building, the Applicant must have known that would be the result.

19. The Respondent submits that it is disingenuous to suggest that the dispute over, e.g. the lift proportion of the costs, represented a significant issue to be resolved.

He states that this might be true if the Applicant had the funds and the intent to do the works, but she does not and has never had the funds and the intent. She is no further forward in complying with her duties as freeholder as a result of these proceedings. That is why they have served no practical purpose and the Applicant is now in a worse position than she was when the proceedings commenced.

20. The Respondent also states that, as regards the Applicant's conduct between the initial January 2020 decision and the final conclusion of the proceedings, the Applicant instructed her solicitors to dispute the calculations produced by the Respondent; she did not instruct her experts to cooperate with the experts instructed by the Respondent; she dismissed her first legal team; and, once a second legal team was instructed, the figures were agreed relatively quickly. She has not explained why she did any of these things and, in the absence of any reason, the Tribunal should determine that she behaved unreasonably (especially for that period of time). The Respondent submits that the Applicant's failure to accept his offers to settle is further evidence of her unreasonable conduct.

21. The Tribunal is not satisfied that the Applicant has acted unreasonably in bringing or conducting these proceedings. After hearing detailed evidence and argument, the Tribunal made determinations in respect of numerous issues which were previously in dispute between the parties, and some of these determinations were made in the Applicant's favour. Whether or not work to the Property has commenced, the proceedings served the purpose of providing clarity in respect of the rights and obligations which formed the subject matter of this application.

22. The Applicant was entitled to seek to challenge the Respondent's case and we do not consider that she acted unreasonably in refusing his offers. She instructed experienced counsel and experts and we are not satisfied that the conduct of these proceedings by the Applicant through her legal representatives was unreasonable. We consider that the unsuccessful arguments which were advanced on the Applicant's behalf were legitimate and that the evidence adduced on her behalf which was not accepted was given in good faith.

23. As stated by the Respondent, the Applicant changed solicitors and counsel and an agreement was reached between the parties after she had instructed a new legal team.

24. Following receipt of the Tribunal's decision dated 16 January 2020, the Applicant applied for permission to appeal. The Tribunal refused the Applicant permission to appeal on 6 March 2020 and the Upper Tribunal refused the Applicant permission to appeal on 5 June 2020. Prior to a further hearing listed before the Tribunal on 30 July 2020, the Applicant instructed new legal representatives.

25. The Tribunal is not satisfied that a change of legal representation is of itself evidence of unreasonable conduct. There are many possible reasonable

explanations for a change of legal representation, for example, relating to convenience, price, alternative recommendations, or dissatisfaction, and we note the privileged nature of communications between solicitors and clients.

26. The Tribunal accepts that the Applicant delayed in instructing her experts to communicate with the Respondent's experts in the period prior to the hearing which took place in July 2020. However, on the facts of this case, we are not satisfied that this was conduct which was vexatious, and designed to harass the other side rather than advance the resolution of the case. The delay occurred at a time when the Applicant was likely to be considering whether or not to retain her former legal team. Following the change of legal representation, a comprehensive agreement was reached which resolved the outstanding issues without the need for a contested hearing.

27. In all the circumstances, we are not satisfied that the conduct of these Tribunal proceedings by the Applicant through the professionals she instructed to represent her and/or on her own account, meets the threshold set by rule 13 of the 2013 Rules. Accordingly, the Respondent's application for costs is dismissed.

Name: Judge N Hawkes **Date:** 7 December 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).