



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **CAM/12UD/LBC/2020/0004**

HMCTS code (paper, video, audio) : **P: PAPERREMOTE**

Property : **Flat 6, St.Andrews Court, Badgeney Road, March, Cambs PE15 9GE**

Applicant : **Ground Rent Trading Limited**

Respondent : **Ms Lorna Rose Larham**

Representative : **Bowers solicitors**

Type of application : **Costs under the provisions of rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**

Tribunal member : **Tribunal Judge Dutton**

Venue : **Remote paper determination**

Date of Decision : **12 February 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote paper determination, which has not been objected to by the parties. The form of remote hearing was P:Paperremote. A face-to-face hearing was not held because it was not practicable, and all issues could be determined on the papers. The documents that I was referred to are in a bundle of approximately 24 pages, the contents of which I have noted.

Decisions of the Tribunal

The tribunal determines that the applicant has acted unreasonably in bringing and conducting the proceedings in this case under the provisions of rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the Rule) and the total sum awarded as costs against the applicant is £9,290.70, to be paid within 28 days.

The application

1. On 1 December 2020 I issued a decision (the Decision) that the applicant's claim for forfeiture of the respondent's lease should be dismissed for the reasons set out in the Decision.
2. The respondent has applied under the provisions of rule 13 for an order that the applicant should pay her costs on the grounds that the applicant had acted unreasonably in bringing and or conducting the proceedings leading to the Decision. The grounds are set out in a Notice of Application dated 23 December 2020.
3. Directions in this case were issued on 6 January 2021 and have been complied with by the respondent. The applicant has, for reasons unknown to me, chosen not to participate. The directions provided for a paper determination and I considered this matter on 12 February 2021.
4. In the bundle provided by the respondent's solicitors I had the Decision, the directions, the Notice of Application and correspondence in support of the application, including a letter from Bowers to the applicant dated 12 November 2020 and the costs summary.
5. The Notice of Application lists seven allegations of unreasonable conduct. These include a failure to ascertain the history and layout of the property and not visiting the property at any time before or during the proceedings to verify the applicant's case. There is an allegation that the applicants did not clarify the position with the respondent before starting the proceedings and ignored a letter from the solicitors acting for the respondent drawing the deficiencies in the applicant's case with a warning of costs consequences. Mr Freilich, the property manager for the respondent, who had made a witness statement, did not attend the hearing and gave no reason for such non-attendance. Finally, it is said that during the hearing admissions were made by the applicant that the respondent had not made changes to her flat which required the consent of the applicant or planning permission.
6. The schedule of costs shows the work done by Mr John Fellows, said to be a grade A solicitor charging an hourly rate of £201. The total solicitors' costs are £5,326.50, with Counsel's fees of £3,200 and

disbursements of £18 for Land Registry copies. With VAT the total sum claimed is £10,249.80.

7. As I indicated above the applicant has not participated in these proceedings.

The law

8. The provisions of the Rule are set out below. I have carefully considered the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC)

Findings

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

24. 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?

10. 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.

11. The Upper Tribunal decision then moves on to the steps I 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.

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.

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.

12. I have considered the Notice of Application and the seven grounds advanced, all of which are, in my finding valid. The applicant undertook no meaningful research before embarking on the application seeking an order for forfeiture of Miss Larham’s flat. That is an aggressive move and very worrying for Miss Larham. Having started the proceedings it would seem that no research was undertaken to establish the historic

position and indeed the applicant did not even undertake an inspection of the property, either before or during the proceedings.

13. I do accept that the lease appears to be defective and it is surprising that no party picked up the anomaly in the description of the property in the lease and the actual layout. Nonetheless the applicant, as the party bringing the proceedings could and should have investigated the matter more fully instead of allowing the case to run its full course.
14. Accordingly, I find that the applicant has acted unreasonably in failing to both investigate the facts before commencing proceedings and indeed responding to matters highlighted to it by the solicitors for Miss Larham in November 2020. Further the failure to ensure that a witness with knowledge was called to the hearing is, in my finding, also unreasonable. No explanation was given for the non-attendance of Mr Freilich. That attitude, I am afraid, has permeated into these proceedings as evidenced by the lack of involvement on the part of the applicant.
15. I agree with the final point in the Notice of Application namely that the *“applicant brought and conducted proceedings they knew or should have known had, and never had, any or any reasonable prospects of success”*. Notwithstanding the problem with the description of the property in the lease an inspection would have provided assistance to the applicant, as would the enquiries that the respondent made of the local authority to check planning matters.
16. Instead, they undertook aggressive litigation, threatening Miss Larham’s home. I find that the second stage is made and it is appropriate for me to make an order under Rule 13.
17. The fact that I have concluded that the first two stages have been established enables me to move on to the assessment of the costs. I bear in mind the Upper Tribunal’s guidance on this element at paragraph 29 of the decision. The importance to Miss Larham of this case is immense, not so I think for the applicant, who is a large property-owning company, presumably with resources.
18. On the assessment of costs I find that the hourly charging rate for a Grade A fee earner of £201 is not excessive. Indeed, the latest recommendations as to hourly rates would show that a Grade A fee earner in the area of Wisbech would be in the region of £255, if the recommendations are followed.
19. I am a bit hamstrung on Counsel’s fees as there is no fee note and I do not know Mr Varnam’s hourly rate. I see he was called in 2007 and is therefore experienced. The fee for the hearing seems wholly reasonable.
20. Doing the best I can on the information provided I find as follows:

- The solicitors fees of £5,326.50 are quite high for a case of this nature. I am dealing with this assessment on a summary basis and on a standard costs basis. I suspect that not all letters written were necessary for the conduct of the case and included correspondence with the tribunal which would not normally be included in party/party costs. I propose to reduce the solicitors costs by admittedly a somewhat arbitrary 15% but I consider that would reflect the solicitor and own client element, which I do not consider the applicant should be required to pay. This would include, for example, the attendance at the hearing, which could have been covered by a lower grade fee earner, as might the preparation of the hearing bundle. Accordingly, the solicitors costs I allow are £4,527.25. Vat thereon is £905.45 – ((total £5,432.70)
- As to Counsel’s fees without the fee note I am somewhat in the dark as to what was done to justify the fee of £2,200. The brief fee for the hearing is, I consider, perfectly reasonable. A review of the respondent’s hearing bundle and the costs schedule show there are instructions to Counsel to advise and settle and in the bundle was a 7 page statement of case prepared by Mr Varnam, together with a document headed Respondent’s legal submissions, which Mr Varnam had also prepared. Accordingly, notwithstanding the lack of fee note I am prepared to accept the fees claimed by Counsel in this case or £3,200, with VAT of £640. (total £3,840)
- The only disbursement appears to be the Land Registry copy documents at a fee of £18.

21. The total costs I allow are therefore £9,290.70, to be paid within 28 days.

Tribunal Judge Dutton

12 February 2021

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.*