



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

Case Reference : **LON/00BA/LAM/2020/0005**

Property : **1 Finborough Road, London SW17
9HY**

Applicant : **Ms Rosie Pearsall**

Representative : **Mr Jack Webb of Counsel**

Respondent : **Mr Errol Farrier**

Type of Application : **Supplemental cost application
following an application for the
appointment of a manager**

Tribunal Members : **Judge P Korn
Judge A Hamilton-Farey**

Date of Decision : **11th March 2021**

SUPPLEMENTAL DECISION ON COSTS

Decisions of the tribunal

- (1) The tribunal makes an order under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“**the Tribunal Rules**”) that the Respondent is required to reimburse to the Applicant the application fee (£100.00) and the hearing fee (£200.00).
- (2) The tribunal refuses the Applicant’s cost application under paragraph 13(1)(b) of the Tribunal Rules.

The background

1. These applications are supplemental to an application (the “**Main Application**”) made by the Applicant for the appointment of a manager.
2. The Applicant has now made a cost application pursuant to paragraph 13(1)(b) of the Tribunal Rules and a cost application pursuant to paragraph 13(2) of the Tribunal Rules.

Applicant’s written submissions

3. In his submissions, Counsel for the Applicant notes that the tribunal’s power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, and he then goes on to refer to paragraphs 13(1)(b) of 13(2) of the Tribunal Rules.
4. In relation to the cost application under paragraph 13(1)(b) of the Tribunal Rules, Counsel for the Applicant starts by referring to the sequential three-stage approach prescribed by the Upper Tribunal in relation to such cost applications in *Willow Court Management Ltd v Alexander [2016] UKUT 290 (LC)*. He notes that under *Willow Court* the approach to be adopted is in essence: (a) applying an objective standard, has the person acted unreasonably? (b) if so, should an order for costs be made? and (c) if so, what should the terms of the order be?
5. In relation to limb (a) of the test, he notes that under *Willow Court* an unsuccessful outcome is not sufficient on its own to warrant an order and that the tribunal needs be careful not to use this power too readily. This is a value judgment which should not be set at an unrealistic level; the type of conduct includes that which is vexatious and designed to harass the other side rather than to advance the resolution of the case.
6. In his submissions on the question of whether the Respondent in this case has acted unreasonably, Counsel for the Applicant goes on to quote further from the decision in *Willow Court*, stating that the test of unreasonable conduct can also be expressed by asking whether a

reasonable person in the position of the party in question would have conducted themselves in the manner complained of? Or, as per Sir Thomas Bingham’s “acid test” in *Ridehalgh v Horsefield* [1994] EWCA Civ 40, [1994] Ch 205, is there a reasonable explanation for the conduct complained of? 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.

7. Counsel for the Applicant notes the Respondent’s wholesale non-participation in the proceedings relating to the Main Application and submits that such non-participation does not permit of any reasonable explanation. It is ‘unreasonable’ in the most foundational sense of the word and, he submits, has clearly hampered the resolution of proceedings.
8. He goes on to state that there can be no reasonable suggestion that the Respondent did not have notice of these proceedings. Nor can there be any reasonable suggestion that the Respondent’s status as a litigant in person ought to excuse his behaviour. Whilst he notes that in *Willow Court* the Upper Tribunal held that “... for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths of weaknesses of their own or their opponent’s case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable”, he submits that it is clear that the Upper Tribunal was presuming a degree of participation from the notional litigant in person. The present case is not one in which a litigant in person has simply misunderstood the need to respond to proceedings or presented his case poorly. Instead, it is a case in which a property investment consultant, whose eloquence in correspondence demonstrates his capability as a litigant, has repeatedly ignored the clearly worded directions of the tribunal.
9. He adds that it is similarly clear that the Upper Tribunal considers that a party’s behaviour should be judged by the standards of a reasonable person who does not have legal advice, and he submits that a reasonable person would have taken steps to procure legal advice or, at least, to have responded to the tribunal. There is no evidence of either having occurred. He therefore argues that on an objective assessment the Respondent’s failure to participate in these proceedings is more than unusual, it is unreasonable.

Respondent’s position

10. The Respondent has not made any submissions in response to the Applicant’s cost applications.

The tribunal's analysis

Paragraph 13(2) of the Tribunal Rules

11. Dealing first with the application for the reimbursement of the application and hearing fees, paragraph 13(2) states as follows: *“The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of any fee paid by the other party which has not been remitted by the Lord Chancellor”*.
12. The tribunal has a wide discretion under paragraph 13(2). The Applicant was successful in the Main Application, we accept that it was entirely appropriate for her to have made the Main Application, the tribunal made a finding that the Respondent was in breach of his repairing obligations, and the Respondent did not engage at all with the Main Application. In these circumstances, we are satisfied that it is right to order the Respondent to reimburse to the Applicant the application and hearing fees.

Paragraph 13(1)(b) of the Tribunal Rules

13. Turning to the application under paragraph 13(1)(b) of the Tribunal Rules, paragraph 13(1)(b) 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”*.
14. As noted by Counsel for the Applicant, in its decision in *Willow Court* the Upper Tribunal gave some guidance on the application of paragraph 13(1)(b) of the Tribunal Rules and established the three-stage test referred to by him. The first part of the test, which is a gateway to the second part, is whether the party in question acted unreasonably.
15. As to what is meant by acting “unreasonably”, the Upper Tribunal in *Willow Court* followed the approach set out in *Ridehalgh v Horsfield [1994] EWCA Civ 40, [1994] Ch 205* 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”*.
16. 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. Sir Thomas Bingham also said 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.

17. The Upper Tribunal in *Willow Court* also drew a distinction between litigants in person and professional advocates, stating that “*for a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent’s case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable*”. The Upper Tribunal then went on to state that “*these [tribunal] 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*”.
18. It is clear, therefore, from the decision in *Willow Court*, that in making a decision as to whether a party has acted unreasonably for the purposes of Rule 13(1)(b) a relevant factor can be whether the party concerned was legally represented, although this certainly does not mean that a cost award should never be made against an unrepresented party.
19. In the present case, Counsel for the Applicant submits that the Respondent’s failure to participate in the proceedings to which the Main Application related itself amounted to ‘acting unreasonably’ for the purposes of paragraph 13(1)(b) of the Tribunal Rules. We do not accept this. Whilst *Willow Court* did not concern a situation in which a party to proceedings had simply not participated and therefore it did not address this question directly, there is nothing in that decision or in the reasoning contained therein to indicate that mere silence or non-participation would amount to ‘acting unreasonably’ for the purposes of paragraph 13(1)(b).
20. Counsel for the Applicant quotes Sir Thomas Bingham’s test in *Ridehalgh* as to whether there is a reasonable explanation for the conduct complained of. However, he does not explain on what basis he assumes that silence or non-participation amounts to ‘conduct’ at all. It is therefore a non-sequitur to ask whether there is a reasonable explanation for the non-participation in this case. In any event, even if we accepted (which we do not) that non-participation amounts to ‘conduct’, it would be very hard to argue (also as per both *Ridehalgh* and *Willow Court*) that the non-participation constituted “*conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case*”.

21. Counsel for the Applicant submits that it is clear that the Upper Tribunal was presuming a degree of participation from the notional litigant in person, but in our view any such presumption was only in the context of explaining what type of actual participation would amount to unreasonable conduct. It does not at all follow that non-participation would amount to unreasonable conduct for these purposes, and we see no support in *Willow Court* for such an approach.
22. We therefore do not accept that the Applicant has demonstrated 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 under paragraph 13(1)(b) of the Tribunal Rules is refused.

Name: Judge P. Korn

Date: 11th March 2021

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.