



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

Case reference : **LON/00AH/LSC/2020/0137**

HMCTS code : **P:PAPER**

Property : **55A and 55B Penge Road, London SE25
4EJ**

Applicant : **Ms Fadila Asif**

Representative : **Laura Morgan**

Respondent : **Assethold Ltd**

Representative : **Scott Cohen, solicitors.**

Type of application : **Costs - rule 13(1)(b) of the Tribunal
Procedure (First-tier Tribunal)
(Property Chamber) Rules 2013**

Tribunal member : **Judge Pittaway**

Date of decision : **2 December 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers. The form of remote hearing was P:PAPERREMOTE, A face-to-face hearing was not held because the tribunal considered that the application might be determined by summary assessment, pursuant to rule 13(7)(a), without a hearing, on the basis of the written submissions from the parties unless any party requested a hearing and neither party did. Submissions were received by e mail from both parties,

The documents that the tribunal referred to are in a bundle of 44 pages provided by the respondent, the contents of which the tribunal has noted. The tribunal have also referred to the Directions dated 28 July 2020, issued in relation to the section 27A application of 12 March 2020 referred to below, and other correspondence by the parties between themselves (copied to the tribunal) and with the tribunal, not contained in the respondent's bundle, and the other applications in respect of the property that are currently with the tribunal. The tribunal have also had regard to the decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC) (**'Willow'**), referred to by the respondent.

The tribunal have not had regard to the submissions of the applicant, received by the tribunal on 2 December, for the reason given below.

The decision made and reasons are set out below.

Decision of the tribunal

The tribunal make no order for costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The costs application

- (1) The Respondent seeks an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the **'Rules'**). Rule 13(1)(b) provides that 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 (**"Rule 13"**).
- (2) Rule 13(6) provides that 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.
- (3) Accordingly, by directions dated 1 October 2020, the respondent was directed to provide a statement of case to the applicant by 19 October 2020, with legal submissions and full details of the costs being sought. In particular, the respondent was asked to specify why it alleged that the applicant had acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule, dealing with the issues identified in the Upper Tribunal decision in

Willow, with particular reference to the three stages that the tribunal will need to go through before making an order under Rule 13.

- (4) The directions provided for the applicant to provide a statement in response by 2 November 2020 and for the respondent to provide a statement in reply to the points raised by the applicant.
- (5) The directions also stated that the tribunal considered that the application may be determined by summary assessment, pursuant to rule 13(7)(a), on the basis of written submissions from the parties.

Background

1. The costs claim arises out of an application dated 12 March 2020 for a determination of liability to pay and reasonableness of service charges under section 27A Landlord and Tenant Act 1985 (the “**service charge application**”) The service charge application went to reasonableness of service charge, but also referred to a variation of the lease as to the percentage of service charge paid by the applicant.
2. Following an oral case management hearing which took place by telephone conferencing attended by Laura Morgan (a property manager) on behalf of the applicant and Mr Granby of counsel on behalf of the respondent, directions were issued on 28 July 2020. In these the tribunal judge referred to the possibility that the applicant might wish to make an application under section 35(4) Landlord and Tenant Act 1987 to vary the leases. The timetable set out in the directions was subsequently varied.
3. On 17 September the tribunal wrote to Lorna Morgan, as the applicant’s representative, directing that she provide an explanation as to why she had not complied with the tribunal’s directions, and warning her that the tribunal might strike out the applicant’s case and/or bar the applicant from taking further part in the proceedings.
4. On 24 September Lorna Morgan responded to the tribunal that she was waiting for further information from the leaseholders, all of whom do not reside at the property, and that she was reluctant to proceed without the relevant information. She requested that the application should not be struck out.
5. On 28 September 2020 the applicant, acting by Lorna Morgan, requested permission to withdraw the service charge application as she did not consider she was in receipt of all necessary information and she wished to avoid ‘time and costs’.
6. On 30 September 2020 the respondent emailed the tribunal stating, ‘our client in fact would seek an order striking out the S.27 application but if the Tribunal would not agree to the same, then for the avoidance of doubt, our client does not object to a withdrawal.’

7. On 1 October 2020 the tribunal consented to the withdrawal of the service charge application.
8. On 1 October 2020 the tribunal also issued directions in connection with the present costs application and advised the parties that the matter would be determined in the week commencing 30 November 2020.

The respondent's case

9. The respondent referred the tribunal to the three stages identified in *Willow* that the tribunal must go through before making an order under Rule 13.
10. In relation to the first of the three stages, the respondent submits that the applicant has acted unreasonably and vexatiously. The respondent submits that the applicant's representative has failed to comply with directions and respond to communications regarding the same. She failed to comply with directions of 12 August requiring the submission of her statement of case by 2 September, leading to the tribunal's letter of 17 September that her application might be struck out. The respondent submits that the applicant acting unreasonably and vexatiously is not solely by reason of the issues of delays and failure to correspond. It is a culmination of the applicant's representative's delays in correspondence, late withdrawal of the claim, claims on behalf of a non-participating tenant and resistance to cooperation in providing evidence of authority
11. In relation to the second stage identified in *Willow*, as to whether an order should be made, the respondent submits that because of the above and 'the frivolous accusations' that have been raised by the applicant's representative, the order for costs should be made.
12. In relation to the third stage identified in *Willow*, the level of costs, the respondent seeks the whole of its legal (including counsel's costs in attending the case management hearing) and management fees incurred in the conduct of the service charge application and this application for costs.

The applicant's case

13. On 2 December the tribunal received submissions from the applicant on the costs application.

Reasons for the tribunal's decision

14. The tribunal has focused on the facts of this case, and the Upper Tribunal decision in *Willow*, by which it is bound, in reaching its decision.
15. In *Willow* the upper tribunal held (paragraph H8) that applications under rule 13(1)(b) should not be regarded as routine. They should be made in light of the tribunal's substantive decision rather than in anticipation of it. The tribunal consented to the withdrawal of the service charge application (it was not struck out). The applicant's e mail of 28 September states that she considered it unwise to proceed with the service charge application without

full documents suggesting the possibility of a further section 27A application in due course. There are a number of other applications in relation to the property outstanding, in which Assethold Limited is the respondent. The tribunal accordingly finds this costs application to be premature.

16. Even if the application were not premature the tribunal do not find that the applicant's conduct of the service charge application was such that it met the high threshold of what amounts to unreasonable behaviour, the first part of the test set out in the decision in *Willow*.
17. The decision in *Willow* (at paragraph 20) considered the definition of 'unreasonable' from the leading authority on wasted costs, *Ridehalgh v Horsefield [1994] Ch 205* where it was said to describe conduct which is 'vexatious, designed to harass the other side rather than advance the resolution of the case.'
18. The tribunal finds that the applicant's representative has been dilatory in complying with the tribunal's directions. In particular, the tribunal notes the tribunal's notice of 17 September that the service charge application might be struck out. It also notes the applicant's failure to comply with the tribunal's directions of 1 October, until 2 December, one month later than directed. The applicant's case in relation to the costs application was only submitted on a date after that upon which the parties might have expected the tribunal to reach its decision. It afforded the respondent no time to make the reply contemplated by the directions. In reaching this decision the tribunal has therefore had no regard to the applicant's submissions of 2 December.

However the tribunal do not find on the evidence before it, that the conduct referred to above, and the other conduct complained of by the respondent was designed to harass the respondent rather than advance the resolution of the case.

19. The service charge application was withdrawn but an application to vary the terms of the leases was made. The tribunal finds these to be the actions of a person seeking make the correct application for what she wanted to achieve. *Willow* (at paragraph 25) distinguished between behaviour that might be unreasonable for a professional advocate and that which might be unreasonable for a lay person. The actions of the respondent's representative (described as a 'property manager' not a lawyer) are consistent with the actions that a lay person might take when advised to consider an alternative course of action. The directions of 28 July 2020 referred the applicant to the possibility that she might wish to make an application under section 35(4) Landlord and Tenant Act 1987 to vary the leases, and she has made this application.
20. As the tribunal do not find that the applicant has acted unreasonably it is unnecessary for the tribunal to consider the second and third parts of the *Willow* test.

Name: Judge Pittaway

Date: 2 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).