FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00MR/LLC/2020/0002
Property	**:**	Flat 1, 75 Victoria Road North, Southsea, Hants. P05 1PP
Applicant	**:**	Angharad J Lewis
Representative	**:**	Christopher Davidson Solicitors
Respondent	**:**	Timothy G H Taylor & Susan S Taylor
Representative	**:**	Timothy G H Taylor
Type of Application	**:**	Rule 13 Costs
Tribunal Members	**:**	Judge C A Rai
Date of Determination	**:**	12 November 2020 Paper Determination without a hearing
Date of Decision	**:**	20 November 2020

DECISION

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1. This was a paper hearing decided on the papers to which the parties agreed. A face to face hearing was not held because no-one requested the same and all issues could be determined on paper.

2. The documents which were referred to the Tribunal are in a bundle of 152 pages, the contents of which were set out in the index on pages 1 – 2 and were:-
   - The s.146 Application the directions and order issued by the First-tier Tribunal
   - The Costs Application directions and submissions together with the supporting documents referred to
   - A copy of the decision in Willow Court Management Company (1985) Limited v. Alexander LRX/90/2015 (Willow Court)

Background

3. The Applicant (Miss Lewis) applied to the Tribunal for Costs under Rule 13(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 [SI 2013 No.1169] (the "Rules").

4. She has also applied for Orders under:-

- Section 20C of The Landlord and Tenant Act 1985 that all or any of the costs incurred by the Respondent (Mr & Mrs Taylor) as freeholder of the Property in connection with the proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of service charge payable by her under her Lease of the Property ; and
- Paragraph 5A of Schedule 11 of The Commonhold and Leasehold Reform Act 2002 (CLARA) extinguishing any liability for her to pay a particular administration charge in respect of the litigation costs of the proceedings.

5. Miss Lewis was represented by Christopher Davidson Solicitors. An application for costs was submitted by Christopher Davidson on or about 25 August 2020 with a separate application form dated 25 August 2020 for an order under Section 20C. The Application, headed Cost Submissions, is not signed, or dated. Paragraph 1 of the Application stated that it has been made for an order for costs pursuant to Rule 13(5)(b) in connection with the earlier proceedings for breach of lease withdrawn with the consent of the Tribunal on 15 July 2020. The Tribunal's case reference in respect of the withdrawn proceedings, an application made by Mr and Mrs Taylor (the Freeholder), is on the front page of the submission.

6. There is some confusion in the way the parties are described because the Respondent in this case, who is the Freeholder and who is represented by Mr Taylor, was the applicant in the earlier proceedings. The Applicant in these proceedings is Miss Lewis who was the respondent in the earlier proceedings. For those reasons, The Tribunal has referred to the Applicant as Miss Lewis and the Respondent as the Freeholder. Where it refers to Mr Taylor it is as the representative of the Freeholder.

7. The Applicant seeks Orders:-

- Under Rule 13(1)(b) that the Freeholder pay Miss Lewis costs of £9,379.08
- Under section 20C of The Landlord and Tenant Act 1985 that costs incurred by the Freeholder in connection with the (withdrawn) proceedings are not to be treated as relevant costs to be taken into account when determining service charges payable by Miss Lewis under her lease
- Under Paragraph 5 of Schedule 12 to The Commonhold and Leasehold Reform Act 2002 (CLARA) extinguishing Miss Lewis's

liability in to pay a particular administration charge in respect of the litigation costs of the same proceedings.

8. Directions dated 9 September 2020 were issued by Judge P J Barber in which the Tribunal directed that: -

- The application would be determined on paper within four weeks from 30 October 2020
- The Application and Costs Submission document would stand as at Miss Lewis's case.

9. The Freeholder was directed to submit a written statement to Miss Lewis with submissions on the costs claimed under Rule 13 and the applications under section 20C and paragraph 5A, referring to each item disputed the grounds of his challenge and the determination sought.

10. Miss Lewis was charged with responsibility for preparing an electronic bundle of relevant documents agreed with the Freeholder and for sending it to the Tribunal and Freeholder electronically.

11. The Hearing Bundle used by the Tribunal was received by the Tribunal office on 16 October 2020. All references to documents in the bundle in this decision are to pages in that bundle.

12. Miss Lewis is the current leaseholder of the Property which is Flat 1, the basement flat at 75 Victoria Road North Southsea Hants PO5 1PP. 75 Victoria Road is a four storey Victorian building converted into five flats in or about 1996. Miss Lewis bought the Property in 2013 at which time there was some dampness in Flat 1 but within two years the dampness got worse which prompted the Freeholder, represented by Mr Taylor a chartered surveyor and the building manger, to commission an expert professional survey which identified the cause of the problem as the breakdown in the original damp-proof barrier installed when the building was converted into flats. That report stated that substantial remedial works would be necessary to rectify the problem.

13. Miss Lewis and the leaseholders of the other four flats were unable to agree who should pay for the necessary remedial works. Miss Lewis believed that the costs of the works should be a joint expense paid for out of the maintenance fund and contributed towards by all the leaseholders whilst the other four leaseholders contended that the works were her sole responsibility, as leaseholder of Flat 1.

14. The leaseholders collectively agreed to appoint and pay for a report by an Independent Expert. In so doing they were acting in accordance with paragraph 3 of the Seventh Schedule to the lease, part of which is extracted and reproduced in the Report written by Kevin Theodore Wouldman (Mr Wouldman). Paragraph 7 stated that if the lessee objects to any item of the Maintenance Expenses as being unreasonable

the matter in dispute shall be determined by an independent expert appointed by the RICS, whose decision shall bind both parties [page 19].

15. Mr Wouldman was appointed by all the leaseholders as an independent expert in December 2018. The leaseholders agreed that his report would be limited to establishing who was liable under the lease of Flat 1 for the costs of undertaking two specified remedies.

16. The brief given to Mr Wouldman was extremely limited. He did not visit the Property. He relied solely on the information provided to him by the parties and the wording of the Lease of the Property. In paragraph 30 of his determination [Pages 97 – 114] Mr Wouldman stated that he would base his determination solely on a consideration of the parties' representations, counter-representations, together with supporting documentation [page 101].

17. All five leaseholders were invited to make representations and submit documents.

18. Mr Wouldman sets out the parameters of his appointment in his report and stated in paragraph 26 that in addition to determining liability for damp-proofing works required to her flat, the lessee of Flat 1 has asked me to determine (i) whether the lessor is liable to remedy damage to the interior of Flat 1 caused by alleged external defects in the Building including the drainage installation and (ii) whether the lessee is entitled to damages for loss of amenity. He continued "However, the parties have subsequently agreed that this determination is to deal solely with liability for (a) the installation of a chemical-injected damp-proof course and associated plastering/drylining and (b) the provision of a Type-C cavity drainage system. I have also been asked to provide my own opinion as to the likely success or otherwise of each of the two systems" [Page 100]. A footnote to sub paragraph (a) stated "as put forward as an appropriate remedy by Gary Woods MRICS, the surveyor acting on behalf of the lessee of Flat 1". In paragraph 28 he stated, "As to whether there are external defects in the Building which are giving rise to internal damage to Flat 1, this would need to be the subject of a separate determination".

19. Mr Wouldman's report dated 18 June 2019, did not resolve the dispute. The parties disagreed on its interpretation. Further written questions were addressed to Mr Wouldman seeking clarification of his recommendations and findings. No repairs to the Property were subsequently undertaken by Miss Lewis.

20. Mr Taylor emailed Miss Lewis on 27 January 2020 and advised her that since she had not carried out the necessary repairs to the Property she was in breach of her lease. Mr Taylor stated that he had instructed solicitors to start forfeiture proceedings and that they would be serving a notice on her under section 146 of the Law of Property Act 1925. He acknowledged that before that, in order to comply with section 168 of CLARA, " we must obtain confirmation from the First Tier Tribunal of

Mr Wouldman's determination to show that you are in breach of covenant" [page 42].

21. The Freeholder made an application to the Tribunal dated 30 January 2020, (the section 168 Application). In Section 5 - Details of the covenant or condition in lease alleged to have been breached - he quoted from a repairing covenant in the Lease and stated that "the property suffers from damp penetration which is the Respondent's responsibility to repair but she has not done so". Mr Taylor amplified the details by quoting from Mr Wouldman's report.

22. The Tribunal directed the parties that its jurisdiction was limited to a determination of breach and would not address the merits of competing remedies. Whilst it may be necessary to consider whether the landlord or the tenant was responsible to remedy the defect it would not consider reports prepared for an unconnected purpose as expert reports.

23. Subsequently Mr Taylor withdrew the section 168 Application and the Tribunal notified Miss Lewis.

The Issues

24. This application has been made in relation to the costs which Miss Lewis claims to have incurred in defending the section 168 application. She seeks to recover the sum of £9,379.08 from the Freeholder.

25. Under Rule 13(b) the Tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending, or conducting proceedings in three types of cases including a leasehold case. The section 168 proceedings fall within the definition of a leasehold case.

26. Multiple submissions have been made by Miss Lewis why the Tribunal should find that the Freeholder acted unreasonably in relation to the earlier proceedings. These are summarised below:-

- He had the benefit of legal advice and he was both sophisticated and familiar with the potential consequences of an application for breach
- The nature of the application is fundamental to an assessment of his conduct because behaviour which might be judged to be reasonable in the context of a service charge dispute might be considered unreasonable in the context of an application for the forfeiture of a valuable lease
- the section 168 application was fundamentally flawed from the start and it was either fanciful, or was bound to fail, because it interpreted the expert report incorrectly
- Miss Lewis's solicitor had told him that he was relying upon and interpreting the Wouldman Report incorrectly but he continued with the application.

- Miss Lewis had told Mr Taylor that the section 168 application was without merit but he had refused to withdraw it
- He made a further application to the Tribunal on the day he should have complied with Directions which is further evidence of his unreasonable behaviour, compounded by his subsequent application for a determination of a preliminary issue before the Tribunal considered the section 168 application.

27. These submissions underlie Miss Lewis's assertion that "first stage test" referred to in **Willow Court** is satisfied. Willow Court is the leading Upper Tribunal Case on Rule 13 costs and provides definitive guidance about the jurisdiction of this Tribunal to award costs.

28. She submitted that this Tribunal should take account of the fact that the section 168 application is a matter of more profound consequence to a respondent than a service charge dispute and that the parties should conduct themselves accordingly (although no explanation was offered as to what that might mean?).

29. It was submitted that no reasonable party would have conducted proceedings as the Freeholder had done, so it is just and fair that this Tribunal order costs against him and those costs are set out in the schedule and are more than proportionate to what was in issue. This was because he brought the earlier proceedings because of his misplaced belief that the Wouldman Report was conclusive evidence of breach and he should have known that it was not.

30. It was also submitted that that all her submissions collectively justify the Tribunal making orders under section 20C of the LTA 1985 and para 5A of Schedule 11 of CLARA.

31. The Freeholder submitted that the basic principle of Tribunal proceedings is that the parties pay their own costs which is why Rule 13 costs are limited.

32. Mr Taylor asked the Tribunal to consider the the decision in Willow Court and the particular definitions of "unreasonable" referred to and relied upon by the Upper Tribunal.

33. He said that both the disrepair and the continuing dispute have impacted upon the Freeholder's ability to insure the property and the uncertainty as to who is liable to pay for the repairs to Flat 1 is interfering with the ability of at least one other leaseholder to sell his flat.

34. He believed that Miss Lewis had reneged on her agreement to be bound by the Wouldman Report. He wanted to force her to comply with it and was advised that it was not possible and to instead consider serving a section 168 notice. He was advised that this would enable him to set a finite timescale for Miss Lewis to undertake the repairs bolstered by the threat of forfeiture. That advice prompted him to make the section 168 application to the Tribunal.

35. Whilst he said he had understood that the Tribunal would only determine whether or not the leaseholder was in breach of covenant he assumed that the determination would require the Tribunal to decide on the merits of the recommended repairs and the interpretation (although he does not use that word) of Mr Wouldman's report.

36. The Freeholder's submissions highlight the differences in the parties' interpretation of the Report.

37. The fundamental issue remains whether the costs of the remedial works should be paid entirely by Miss Lewis or be shared between all the leaseholders.

38. The Freeholder interpreted the Wouldman Report as deciding that leaseholder is and remains obliged to carry out the necessary repairs at her expense. Mr Taylor submitted that because he recognised the required work was significant, he did not press Miss Lewis to take immediate action [Paragraph 6.6 Page 68]. He said he considered it "telling that in the costs submission" the correspondence between Mr Wouldman and Miss Lewis's solicitor had not been disclosed to the Tribunal [Paragraph 6.9 page 69].

39. He also stated that he received a letter from Miss Lewis in November proposing a new expert survey and adjudication and confirming that she would not do the repair work. No copy of that letter has been disclosed but he has said that he informed her that could not agree to her proposal.

40. The Freeholders response to the application for the Section 20C Order and paragraph 5A Order is that all costs incurred and recoverable under the Lease should be charged to the building funds but that since Miss Lewis made the section 168 application necessary she is not entitled to the benefit of an Order made under paragraph 5A of Schedule 12 of CLARA.

Reasons for the Decision

41. Both parties have acknowledged that the jurisdiction of the Tribunal is essentially a "no costs" jurisdiction. Both are aware of the jurisdiction to award costs under Rule 13(1)(b) is only if a person has acted unreasonably in bringing, defending, or conducting proceedings in, amongst other cases, a leasehold case.

42. Both parties have referred to Willow Court in which the Upper Tribunal gave guidance on the about the Tribunal's power under Rule 13. Martin Rodger QC also said that whenever the Tribunal exercises any power conferred by its rules or interprets those rules it is required to give effect to the overriding objective.

43. The overriding objective, in Rule 3, requires that the Tribunal must deal with cases fairly and justly which includes, amongst other things dealing with a case in ways proportionate to the importance of the case, complexity of the issues and the anticipated costs and resources of the parties

44. The dispute which has prompted this application and the section 168 application is essentially about money. It is an acknowledged and agreed fact that Flat 1 is damp and that the costs of remedying this defect are substantial. The parties are in dispute as to whether all the costs should be paid by the Applicant or shared between the Applicant and the four other leaseholders.

45. The Respondent (freeholder) has suggested that his only involvement is on behalf of the other leaseholders.

46. In terms of contractual liability, the only contractual relationship enabling enforcement of leasehold covenants is between leaseholder and freeholder. Most leases will contain a provision enabling leaseholders to require the freeholder to enforce covenants, albeit at their expense, against a leaseholder. It is not directly relevant to this application whether the Lease of Flat 1 contains such a covenant but the Tribunal suspect it likely that it does.

47. Both parties have recited their own versions of the background to the dispute and whilst these are broadly similar, each interpret the steps which were taken by each in a way which support their own submissions.

48. For the application to succeed Miss Lewis needs to first establish is that the Freeholder acted unreasonably in bringing and then subsequently withdrawing the section 168 Application. That is the essential element of the "stage one" test in Willow Court to which the Applicant has referred.

49. Martin Rodger QC recently clarified the guidance in Willow Court stating that whilst Willow Court encouraged Tribunals to work through a logical sequence of steps in evaluating a claim of unreasonable behaviour the framework of a three stage test is an aid not a straightjacket. [Paragraph 34 of Laskar v Prescot Man Co [2020]UKUT 241 LC. The Rule requires that for costs to be considered the Tribunal must first be satisfied that a person has acted unreasonably. It must take all relevant factors into account and reach its conclusions in a way which the parties can understand.

50. In Willow Court the Upper Tribunal advocated the Tribunal consider whether a reasonable person would have conducted themselves differently. It also considered some of the many other authorities to which the parties had referred it and in particular mentioned Cancino v. Secretary of State for the Home Department [2014] UKFTT 00059 (IAC) a decision made by McLoskey chamber president of the Upper Tribunal (Immigration and Asylum Chamber) in which that tribunal provided guidance and emphasises the fact-sensitive nature of the enquiry in every case.

51. Applying those principles Tribunal has considered the facts in this case. Both parties are clearly aware of the serious nature of the dispute and the fact that it has continued for a long time and continues to impact

adversely on all the leaseholders and potentially the value of all their flats.

52. When the Wouldman Report failed to provide any resolution as to who should pay for the repairs to Flat 1, the Freeholder sought and obtained legal advice. The Tribunal finds that was reasonable. It is unlikely that any Tribunal would consider it unreasonable that a party, when unsure how to proceed, obtained legal advice.

53. It may have been the case that Mr Taylor honestly believed that a determination of the section 168 application would provide a definitive interpretation of the Wouldman Report. This does not mean it was unreasonable for him to make that application and subsequently withdraw it when he became aware that the Tribunal was unlikely to do what he had anticipated and/ or expected.

54. Miss Lewis suggested, that by taking legal advice, the Freeholder is required to behave more reasonably because the advice and guidance received made him a "sophisticated" party. Tribunal does not accept that this is true or find it to be evidence of unreasonable behaviour.

55. An application to the Tribunal to establish breach of lease does not demonstrate unreasonable conduct on the part of the Freeholder. There are many reasons for a landlord or tenant to make a section 168 application to the Tribunal. The submission of that application, in the context of this dispute cannot be interpreted as unreasonable.

56. The Tribunal rejects Miss Lewis's suggestion that it should consider the Respondent's behaviour differently because the application was for a breach of lease and the consequences were potentially more serious. The subject matter of an application cannot ever, in isolation, impute unreasonableness on the part of a participating party.

57. The Tribunal also finds no merit in Miss Lewis's suggestion that no reasonable party would have conducted himself in the way in which Mr Taylor has. On the contrary it understands why the Freeholder took the steps it did.

58. Objective analysis of the conduct of both parties might reveal undesirable traits in both. Both have reacted to some aspects of the proceedings in an uncompromising way but the Tribunal does not accept that any conduct of the Freeholder was so unreasonable as to enable it to prompt it to consider whether to exercise its discretion in relation to costs. An uncompromising reaction should rarely be interpreted as unreasonable because other parties in similar circumstances dealing with a similar dispute over a long period of time may well have acted in the same way.

59. The Applicant has suggested that the section 168 application was questionable because it was fanciful, bound to fail and founded on an incorrect interpretation of the expert's report. Factually neither party could accurately anticipate the outcome of the application so the statement is not correct.

60. If Miss Lewis believed that the section 168 application was bound to fail the Tribunal questions why she incurred such substantial costs as those she now seeks to recover, in opposing it.

61. Both parties have evaluated the Wouldman Report. The Tribunal does not accept that their respective disagreement about the conclusions of that report evidence unreasonable behaviour on the part of the Respondent. No explanation has been provided for the use of the words fanciful, meaning over imaginative or unrealistic, and even if such behaviour was substantiated, which it has not been, it is not the equivalent of unreasonable behaviour.

62. The Applicant's representative submitted that it sent letters to the Respondent questioning his interpretation of the Wouldman report, presumably implying that Miss Lewis's interpretation was correct and the Respondent's was not. Whilst that may evidence the parties' disagreement it is not evidence that the Respondent was unreasonable not to agree.

63. Finally it was suggested that the Respondent was advised that the section 168 application was fundamentally flawed because it was solely based on the assumptions that the Wouldman Report established that the leaseholder is in breach of the tenant repairing obligation in her lease of Flat 1, and that the Tribunal would not reconsider the issue because of the determination by Mr Wouldman and was certain to determine that the failure to repair was a breach of lease. Even if the Applicant had unequivocally demonstrated that was the Respondent's belief, which she has not, the Tribunal does not find that such a belief, whether correct or not, demonstrates unreasonable behaviour.

64. As stated very clearly in Willow Court by the Upper Tribunal withdrawal of an application is not an indication of unreasonable behaviour. In many cases it may properly be interpreted as the opposite. The Upper Tribunal stated that: - "It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised and as a justification for a claim for costs." [Para 35 Page 127].

65. For all the reasons referred to above the Tribunal finds that the Applicant has not established that Respondent acted unreasonably in making and subsequently withdrawing the section 168 application. There is therefore no need for it to consider anything further in relation to the Applicant's Costs Submission.

The Section 20C application

66. The Applicant has applied for an order that any costs incurred in relation to the section 168 application shall not to be relevant costs for the purpose of service charges. It is not clear what costs may have been incurred by the Freeholder. Mr Taylor stated that he took legal advice as to how to enforce the findings in the Wouldman Report and has suggested that all the other leaseholders agreed that he should obtain legal advice. No factual evidence of this statement has been provided to this Tribunal. The Tribunal accepts, as is recorded in the Wouldman Report, that the leaseholders commissioned it to find a solution to the dispute. When that failed it is understandable and even predictable that the freeholder wanted to protect all the leaseholders' interests. Therefore, it is appropriate that his costs should be added to the building maintenance costs and then shared equally between the leaseholders including Miss Lewis.

67. The Tribunal finds that Miss Lewis has not put forward any substantive argument why she should not contribute towards those costs.

68. The Tribunal has not seen a copy of the Lease of the Property so does not know whether the lease would enable the Respondent to recover his legal costs. Although the Tribunal has declined to make an order under section 20C of the Landlord and Tenant Act 1985 whether or not costs incurred by the Respondent can be recovered as service charges will depend upon the provisions contained in the leases of the five flats within the Building.

The application for an order under paragraph 5 of Schedule 11 of CLARA

69. The Freeholder suggested that Miss Lewis is to blame reason for him incurring legal costs. It is impossible for the Tribunal to evaluate that statement in reliance on the submissions and evidence in the Bundle.

70. Whilst it has not found that that the Freeholder has acted unreasonably it is reluctant for the ongoing dispute to be compounded by being fuelled by further arguments about whether or not costs should have been incurred and who is at fault. For that reason, it makes an order under paragraph 5 of Schedule 11 to CLARA extinguishing the Applicant's liability to pay an administration charge in respect of the Respondent's litigation costs of the section 168 application. Whilst the dispute is ongoing all parties should bear their share of the jointly incurred costs.

Judge C. A. Rai

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing

with the case. Where possible you should send your application for permission to appeal by email to rpsouthern@justice.gov.uk as this will enable the First-tier Tribunal Regional office to deal with it more efficiently.

2. The application must arrive at the First-tier Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the First-Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.