FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LAC/2020/0015** **CVP Remote**
Property	**:**	**Flat 338, Whitehouse Apartments, 9 Belvedere Road, London SE1 8YS**
Applicant	**:**	**Mr James Essery Gilpin and Ms Sinead Ni Mhuircheartaigh**
Representative	**:**	**Mr W E Gilpin in person**
Respondent	**:**	**Whitehouse Apartments Freehold Limited**
Representative	**:**	**Graham Eklund QC**
Type of application	**:**	**For the determination of the liability to pay an administration charge pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002) – Rule 13 Costs application**
Tribunal member	**:**	**Judge Professor Robert M Abbey**
Video Based Hearing date	**:**	**26 April 2021**
Date of Costs Decision	**:**	**21 June 2021**

COSTS DECISION

© CROWN COPYRIGHT 2021

Application for costs

1. An application was made by the Respondent under Rule 13 of the Tribunal Rules, (The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8)), in respect of the Respondent's legal costs. The Tribunal subsequently received a schedule of costs totalling £13275. This is the amount listed by the Respondent and consists of legal costs, Counsel's fees, disbursements and VAT. The details of the provisions of Rule 13 are set out in the appendix to these Directions and rights of appeal made available to parties to this dispute are set out in an Annex.

2. Before a costs decision can be made, the Tribunal needs to be satisfied that there has been unreasonableness. At a second stage it is essential for the Tribunal to consider whether, in the light of unreasonable conduct (if the Tribunal has found it 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.

3. The Respondent filed with the Tribunal the Respondent's written costs application dated 28 May 2021 and comments/observations thereon were requested of the Applicant and these were forthcoming on the 11 June 2021.

4. It now falls to me to consider the costs application in the light of the written submissions before the Tribunal. I do this but in the context of the circumstances of the original decision and also in the light of Upper Tribunal decision affecting costs applications.

DECISION

1. This Tribunal's powers to order a party to pay costs may only be exercised where a party has acted "unreasonably". Taking into account the guidance in that regard given by HH Judge Huskinson in *Halliard Property Company Limited v Belmont Hall & Elm Court RTM, City and Country Properties Limited v Brickman LRX/130/2007, LRA/85/2008,* (where he followed the definition of unreasonableness *in Ridehalgh v Horsefield* [1994] Ch 205 CA), the Tribunal was not satisfied that there had been unreasonable conduct so as to prompt a possible order for costs.

2. The Tribunal was also mindful of a fairly recent decision in the case of *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander* [2016] UKUT 0290 (LC) which is a detailed survey and review of the question of costs in a case of this type. At paragraph 24 of the decision the Upper Tribunal could see no reason to depart from the views expressed in *Ridehalgh*. Therefore, following the views expressed in this case at a first stage the Tribunal needs to be satisfied that there has been unreasonableness.

3. At a second stage it is essential for the Tribunal to consider whether, in the light of any 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.

4. In *Ridehalgh* it was said that ""*Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently*".

5. The *Willow Court* decision is of paramount importance in deciding what conduct might be unreasonable. I have mentioned the approach of the Upper Tribunal in this decision but I think it appropriate to quote the relevant section of the decision in full: -

   "*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.....“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?”*

6. , in *Laskar v Prescot Management Company Ltd* [2020] UKUT 241 (LC) the Upper Tribunal clarified the decision in Willow Court as follows:

   “in Willow Court the Tribunal suggested an approach to decision making in claims under rule 13(1)(b) which encouraged tribunals to work through a logical sequence of steps, it does not follow that a tribunal will be in error if it does not do so. ***The only "test" is laid down by the rule itself, namely that the FTT may make an order if is satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings.*** *The rule requires that there must first have been unreasonable conduct before the discretion to make an order for costs is engaged, and that the relevant tribunal must then exercise that discretion. Whether the discretion has been properly exercised, and adequately explained, is to be determined on an appeal by asking whether everything has been taken into account which ought to have been, and nothing which ought not, and whether the tribunal has explained its reasons and*

dealt with the main issues in such a way that its conclusion can be understood, rather than by considering whether the Willow Court framework has been adhered to. That framework is an aid, not a straightjacket." [emphasis added]

7. It seems to Tribunal that therefore the bar to unreasonableness is set quite high in that what amounts to unreasonableness must be quite significant and of serious consequence. This being so the Tribunal must now consider the conduct of the parties in this dispute given the nature of the judicial guidance outlined above.

8. The respondents made six points as to why they believe that the Applicants' conduct from 6 October 2020 was objectively unreasonable. These will be considered in turn. At the beginning I have set out below extracts from the application and from the applicant's responses. I do this to highlight the considerable effort made by the parties to demonstrate their positions with regard to the costs claim. I also seek to emphasis the significant issues that existed between the parties and that underlined the original application. It also demonstrates the seriousness with which both parties addressed the original dispute. I think this also shows that both sides took up understandable and serious stances that were not to my mind vexatious. Indeed, it seems to me that the work both sides have obviously done to deal with this application shows the helpful and detailed approach that has greatly assisted the Tribunal in making this decision. It also shows that there is no unreasonable conduct necessary for a Rule 13 costs award.

9. Points 1 and 2 raised by the respondent were:

10. *"The landlord's solicitors fee for the licence to alter was £1,000 plus VAT. In the Applicants' response of 14 October 2020 to the Respondent landlord's first statement of case, the Applicants offered by way of solicitor's costs: a base fee of £250; an additional fee £500 if the Tribunal determined that a licence to alter was required; an additional £100 if the Tribunal determined that it would be reasonable for the landlord to instruct a surveyor. Although the second and third elements of the Applicants' offer were expressed to be conditional upon Tribunal findings, the Applicants were essentially offering a total of £850, leaving just £150 in dispute.*

11. *By any objective standard, the Applicants' offer of £850 was sufficiently close to the actual fee of £1,000 as to make it unreasonable to continue the application. Furthermore, in the Applicants' response dated 19 March 2021 to the landlord's second statement of case, the Applicants stated that a 'licence for alterations may be desirable for both parties' (although the Applicants qualified this statement by inviting the Tribunal to determine that written approval did not have to be formalised by way of a licence.)"*

12. In reply the applicant said:

13. *"The Applicants offer of £850 in their first statement of case included £500 in respect of the licence to alter. The Applicants believed, however, that the respondent's model licence was unreasonable and unnecessary and therefore requested that the tribunal "determine as to whether a licence to alter is required in order to obtain written approval of the internal alterations" and that if a licence was required, then to also determine "which clauses within the model licence (i) are reasonable and may be included, and (ii) are unreasonable and should be amended or removed.". Consequently, the Applicants were essentially offering a total of £350 (ex. VAT, and assuming a surveyor was instructed) vs. £1,200 (inc. VAT) in their first statement of case, leaving a dispute of £850.*

14. *In their second statement of case issued on 5 March 2021 (Appendix D), the respondent confirmed that: 1. The fees that were stated in the 'model' licence were not in fact be applicable; and 2. They did not in fact seek to recover VAT from the Applicants but wished to reserve the right to do so if the limit of the amount which the respondent could recover from HMRC was exceeded. WAFL, however, has not exceeded the £7,500 limit for many years.*

15. *Following this disclosure, in their second statement of case of 19 March (Appendix E), the Applicants acknowledged that a licence may be desirable for both parties, however, they believed that if written consent is required by way of a licence, they would have no power to negotiate terms that are fair and reasonable to both parties. Consequently, they requested the tribunal to declare that "although a licence for alterations may be desirable to both parties, written approval is not required to be formalised by way of a licence". Consequently, assuming that both parties were able to agree fair and reasonable terms, the Applicants were essentially offering a total of £850 (ex. VAT) vs. (1,000 ex. VAT) in their second statement of case, leaving a dispute of £150. In their second statement of case on 5 March 2021 (Appendix D), the respondent: • Accused the applicants of wasting time and incurring unnecessary expense in raising new issues in their first statement of case. Made a series of false and misleading statements in order to discredit the applicants' first statement of case Made new requests to the Tribunal (in para 47) which the applicants believed were unreasonable*

16. *Consequently, after reviewing the respondent's second statement of case, the Applicants believed that a reasonable course of action was to submit a second statement of case on 19 March (Appendix E) Defending themselves against the accusations, Highlighting and correcting the false and misleading statements made against them Requesting the tribunal to make determinations as set out in para 66".*

17. As to the points themselves the Tribunal accepted the Applicants response as it showed to the Tribunal the serious and thoughtful approach of the respondent that the Tribunal considered to be a long way away from being vexatious.

18. The Tribunal took the same view of the other four points. They were carefully set out by the respondent and carefully addressed by the applicant. For example, point 3 made by the respondent was:

19. "*After making the concession on its own charges in the Respondent landlord's statement of case of 1st October 2020, the landlord's solicitor wrote to the Applicants on 6 October 2020 inviting the Applicants to discontinue the claim. The Applicants declined to do so*."

20. Applicants' Response to this point was:

21. "*The Applicants' acknowledged and responded to the landlord's solicitor email of 6 October, by sending an email two days later on 8 October 2020 (appendix A). Given the nature and scope of disclosures made by the respondent in their first statement of case, the Applicants believed that a reasonable course of action was to provide a response to the respondent's first statement of case and seek a determination from the tribunal. They nevertheless pro-actively sought clarification of two issues from the Respondent in their email as follows: 1. Whether VAT should be added to the fees 2. Justification of the fees stated in Clause 2.8 of the 'model' licence, and specifically a fee to SBMC (the managing agent) of £750 plus VAT and surveyors' fees of 16-18hrs at £135/hour (amounting to between £2,160 and £2,430)*

22. *The applicants reasonably expected that any fee clause in the respondent's 'model' licence should be consistent with the fees prescribed within the respondent's application form for a licence for alterations. The applicants could therefore not understand why the model licence to alter contained a clause requiring the following fees to be paid: • A fee to SBMC of £750 plus VAT • Surveyors fees of 16-18hrs at £135/hour (amounting to between £2,160 and £2,430)*

23. *The respondent did not reply to the Applicants email of 8 October. Consequently, the Applicants were concerned that if they were required by the respondent to enter into a licence to alter in order to formalise written consent, there was a risk that they would be charged unreasonable and improper fees which were not previously disclosed to them in the application form for a licence for alterations.*

24. *With regard to VAT, the Applicants believed that since the landlord is VAT registered, it would be able to recover input tax on professional fees incurred and therefore would only incur the net cost of these services. Consequently, the applicants reasonably believed that adding VAT to the fee estimates was unreasonable and unnecessary and if the VAT was removed it would result in a significant reduction in cost to the Applicants.*

25. *Since the Respondent did not respond to the Applicants' email, the Applicants therefore concluded that a reasonable course of action was to refer these issues to the Tribunal as part of their first statement of case and seek a determination on these issues as well. In their first statement of case (Appendix B) the Applicants therefore stated that they believed that the model licence to alter was unreasonable and unnecessary and requested the Tribunal "determine as to whether a licence to alter is required in order to obtain written approval of the internal alterations." Furthermore, the Applicants requested that if the Tribunal determines that it is reasonable for the landlord to require the tenant to enter into a licence, then the Tribunal also "determines which clauses within the model licence (I) are reasonable and may be included, and (ii) are unreasonable and should be amended or removed."*

26. *In respect of VAT, the Applicants requested the Tribunal determine whether VAT should be applied to the amount of the professional fees that are reimbursed by the tenant. The Applicants expected that the Tribunal would be able to make a final written determination in the week commencing 9 November 2020 as originally intended. The Tribunal, however, were unable to do so and in para 2 of the Further Directions issued on 9 February 2020 (Appendix C) the respondent was requested to "send to the tenants a statement setting out its father submissions, which shall include submissions in connection with its requirement for a Licence to Alter, and the extent to which it is seeking to recover VAT on its fees from*

27. *the applicants." In their second statement of case issued on 5 March 2021 (Appendix D), the respondent confirmed that: 1. The fees that were stated in the 'model' licence were not in fact be applicable; and 2. They did not in fact seek to recover VAT from the Applicants but wished to reserve the right to do so if the limit of the amount which the respondent could recover from HMRC was exceeded. WAFL, however, has not exceeded the £7,500 limit for many years.*

28. *Consequently, the Applicants believe that if the Respondent had replied to their email of 8 October 2020 and confirmed the above, they would not have had to raise these issues within their first statement of case on 14 October 2020, and the Tribunal would then have been able to make a determination when it was originally expected to do so in the week commencing 9 November 2020."*

29. The Tribunal again believes that the points raised by the applicant are detailed and thorough but not in anyway vexatious. It seems to the Tribunal that a diligent and careful litigant would take the actions set out above. This is also true of the remaining three points made by the "respondent. For example, point 6 made by the respondent stated:

30. *With regard to the issue of VAT on the administration charges, the Tribunal noted at paragraph 26 of its decision that the Respondent did*

not seek to recover VAT from the Applicants but wished to reserve the right to do so if the limit of the amount which the Respondent could recover from HMRC was exceeded. The Tribunal stated that this seemed to resolve the issue of VAT without the need for the Tribunal to make a determination."

31. The Applicants' Response was as follows:

32. *As previously stated in their response to Point 3, the Applicants sought clarification of the issue of VAT on administration charges from the Respondent in their email dated 8 October 2020 (Appendix A). Since the Applicants received no response to this email from the Respondent, they referred the matter to the Tribunal in their first statement of case on 14 October 2020 (Appendix B). In their second statement of case issued on 5 March 2021 (Appendix D), the respondent confirmed that they did not in fact seek to recover VAT from the Applicants but wished to reserve the right to do so if the limit of the amount which the respondent could recover from HMRC was exceeded. WAFL, however, has not exceeded the £7,500 limit for many years. Consequently, the Respondent acknowledged that it is unlikely that the Respondent will exercise its right to recover VAT in this case, resulting in the Applicants' costs being £400 less than the Respondent originally indicated.*

33. *The Applicants therefore believe they acted reasonably in seeking clarification of the issue of VAT on the administration charges in their email to the respondent dated 8 October (Appendix A). Since the respondent did not respond to their email, the Applicants believed they acted reasonably in raising this issue in their first statement of case on 14 October (Appendix B). After the VAT issue was clarified on 5 March 2021 (Appendix D), the Applicants believed that it was reasonable to request that the tribunal make a declaration to acknowledge the respondent's position. The Applicants believe that if the Respondent had replied to their email of 8 October 2020 and confirmed the above, they would not have had to raise this issue within their first statement of case on 14 October 2020. Consequently, the tribunal would not have had to issue a further direction on 9 February 2021 instructing the respondent to provide a submission in connection with "the extent to which it is seeking to recover VAT on its fees from the applicants.""*

34. It is apparent from the above exchange that there were serious differences that existed between the parties and that this plainly necessitated careful review. It seems to the Tribunal that the applicant's conduct in this regard therefore cannot be considered vexations such that it could give rise to a successful Rule 13 application.

35. Taking into account all that the parties have said about the case and the actions of the parties involved, the Tribunal cannot find evidence to match the high bar of unreasonable conduct set out above. The Tribunal was therefore not satisfied that stage one of the process had been fulfilled in

that it had not found there has been unreasonableness for the purposes of a costs decision under Rule 13 on the part of the applicant. The conduct may have been mistaken but it was not vexatious or such that following the legal tests the tribunal might consider such conduct unreasonable.

36. In the circumstances the Tribunal determines that there be no order for costs payable by the Applicant pursuant to Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8).

Name:	Judge Professor Robert Abbey	**Date:**	21 June 2021

Appendix

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8)

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(**a**), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(**b**) and the County Court (Interest on

Judgment Debts) Order 1991(**c**) 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.

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.