



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

Case Reference : **LON/00BG/LBC/2021/0064**

HMCTS code : **V: VIDEO**

Property : **Flat 80 and Flat 113 OceanWharf,
60 Westferry Road, London E14
8JS**

Applicant : **Ocean Wharf 2000 Freehold
Company Limited**

Representative : **Ms N Muir of counsel**

Respondent : **Daniel John Cunliffe**

Representative : **No appearance**

Type of Application : **Determination that a breach of
covenant has occurred
(Commonhold and Leasehold
Reform Act 2002, s 168(4))**

Tribunal Members : **Tribunal Judge Prof R Percival
Ms E Flint DMS FRICS**

**Date of Paper
determination** : **15 December 2021**

COSTS DECISION

The application

1. On 12 November 2021, the Tribunal heard the Applicant's application for a determination under the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), section 168(4) that the Respondent has breached covenants in the leases of the two properties. In a decision of the same date, we determined that the Respondent had breached covenants in his leases in respect of both flats.
2. At the hearing, the Applicant made an application under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 for costs, on the basis that the conduct of the Respondent in defending the proceedings had been unreasonable.
3. The Respondent did not appear at the hearing. We gave directions allowing him to make written submissions in respect of the Rule 13 application, and for the Applicant to make a reply. The Respondent did not make any such submissions.

Determination

4. The proper approach that the Tribunal should adopt on an application under Rule 13(1)(b) was set out by the Upper Tribunal in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), [2016] L & TR 34 at paragraph [28] and following.
5. It is a requirement of Rule 13(1)(b) that the party against whom an order may be made must act "unreasonably" in (in this case) defending the proceedings. Determining whether the conduct of the party against whom the application made is unreasonable is the first stage set down in *Willow Court*.
6. In *Willow Court*, the Upper Tribunal explained what, in this context, "unreasonable" meant, by reference to the judgment of Bingham LJ in *Ridehalgh v Horsefield* [1994] Ch 205:

"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?"
7. The Respondent has failed to engage at all with the Applicant, save for one email of one sentence (see paragraph [18] of our section 168(4)

decision). He has also failed to engage with the Tribunal, completely ignoring the Tribunal's directions given on 24 September 2021, and those that we gave in respect of this costs application. He must have been aware of the proceedings, and has ignored repeated communications from both the Applicant and the Tribunal.

8. There is, in our judgement, no reasonable explanation for this conduct. We are satisfied that his conduct passes the threshold of unreasonableness as set down in *Willow Court*.
9. At the second stage, the Upper Tribunal in *Willow Court* emphasises that the power under Rule 13(1)(b) requires the exercise of a discretion. We conclude that we should exercise our discretion in favour of making an order. In our decision on breach, we said that the noise nuisance breaches were "in both cases, egregious and serious breaches". The breaches in respect of the letting of flat 113 through short-stay websites were inseparable from those relating to noise nuisance, in that the one gave rise to the other. The leaseholder-owned Applicant has been put to considerable trouble and expense (as have the individual leaseholders who gave evidence) to bring the section 168(4) application to the Tribunal in circumstances that may not have been necessary if the Respondent had engaged responsibly with the Applicant's well-founded complaints at an earlier stage. It is just and equitable that he should meet those costs.
10. The final stage in our consideration, again as set down in *Willow Court*, is to determine how much of the costs to which the Applicant has been put we should award. Again, in doing so, we exercise a discretion (see paragraphs [29] and [30]).
11. The Applicant has produced a short form schedule of costs. A consideration of the calculation of those costs gives us some assistance in exercising the broad discretion required of us at this stage. We emphasise that in considering the schedule, we are using it as a tool to test our exercise of discretion rather than undertaking a more formal exercise.
12. Mr Raby, a partner, and at grade A in the terminology of the official guidelines for hourly rates, charges £310 an hour. The new guideline rate for his location (National 1) is £261 per hour. We accept that it was a reasonable decision for the application to be largely undertaken by a grade A solicitor, but we doubt that it required a level of experience and expertise over and above the standard rate. We have therefore recalculated his fee at the guideline rate, giving a total of £6,134.
13. We accept the justification given for counsel drafting the application. However, given the elements of preparation covered by the fee for drafting of the application, and the charging of a separate fee for legal

submissions, a brief fee of £5,000 would be appropriate, giving an overall fee for counsel of £7,500.

14. In the result, we make an order for costs in the sum of £14,384 plus VAT, giving a total of £17,260.
15. In accordance with the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 rule 13(1)(b), the Tribunal hereby orders that the Respondent shall pay the Applicant the sum of £17,260 within 14 days of the date of this decision.

Name: Tribunal Judge Professor Richard Percival **Date:** 15 December 2021