FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AK/LAT/2021/0001**
Property	**:**	**45c Goring Road, London N11 2BT**
Applicant	**:**	**Mark Anthony Michaelides**
Representative	**:**	**Mr C Brewin of Counsel**
Respondent	**:**	**45 Goring Road RTM Limited**
Representative	**:**	**Mr S Woolf of Counsel**
Interested Party	**:**	**Chancery Lane Investments Limited**
Type of Application	**:**	**Supplemental cost application following an application for an RTM-related Approval under Section 99(1)(b) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge P Korn** **Mrs A Flynn MRICS**
Date of hearing	**:**	**27 June 2022**
Date of decision	**:**	**8 July 2022**

SUPPLEMENTAL DECISION ON COSTS

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Description of hearing

The hearing was a face-to-face hearing.

Decision of the tribunal

The tribunal refuses the Applicant's cost application under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**").

The background

1. This application is supplemental to an application (the "**Main Application**") made by the Applicant for an approval under section 99(1)(b) of the Commonhold and Leasehold Reform Act 2002.

2. On 26 January 2022 the Applicant and the Respondent signed a mediation agreement which recorded certain matters as having been agreed, but the Main Application was stayed at the time (rather than being withdrawn) pending compliance with the agreed terms. The level of compliance envisaged by the mediation agreement was not achieved prior to the date set for the final hearing and therefore that hearing duly went ahead.

3. The final hearing took place on 27 June 2022. At that hearing, the Main Application was withdrawn after an agreement was reached between the parties. It was, though, agreed at the hearing that the withdrawal of the Main Application was without prejudice to the Applicant's right to pursue his existing cost application pursuant to paragraph 13(1)(b) ("**Rule 13(1)(b)**") of the Tribunal Rules.

4. The Applicant's solicitors had already made written submissions in support of his Rule 13(1)(b) cost application, and those submissions were before the tribunal at the hearing. At the hearing, Counsel for the Respondent made oral submissions opposing the cost application, and Counsel for the Applicant then made oral submissions in response.

5. Also present at the hearing, joining remotely via video-link, was Mr L Freilich, a director of the Interested Party. The Interested Party is the freeholder of 45 Goring Road and is the Applicant's landlord.

Applicant's written submissions

6. In written submissions the Applicant's solicitors refer to there having been unreasonable conduct on the part of both the Respondent and the Interested Party. At the hearing, this point was not pursued by Counsel

for the Applicant in respect of the Interested Party, and therefore we will just focus on the conduct of the Respondent.

7. The Applicant states that the Respondent acted unreasonably after the signing of the mediation agreement. Following the mediation, the Applicant's solicitors asked for a recommendation regarding insurers/brokers, and on 17 February 2022 they gave an undertaking to pay the surveyors' fees. A specification of works plus drawings were provided on 21 February 2022 and the Applicant's solicitors chased for an update on 1, 7 and 31 March 2022.

8. The Applicant's solicitors were informed that a licence report and schedules of condition were ready to be issued on 1 April 2022 pending the Applicant paying the requisite fees, and on the same day confirmation was given of an undertaking to pay the fees. On 29 April 2022 the Respondent's solicitors requested payment to allow the licence to be drawn up and the Applicant's solicitors sent confirmation of payment on 11 May 2022. There has been no substantive response from the Respondent since then.

9. On 18 and 26 May 2022 the Applicant's solicitors chased the Respondent's solicitors for an update. The Respondent did not disclose documents by 30 May 2022 as directed to do by the tribunal's directions and nor did it seek an extension or confirm to the Applicant that an updated statement of case was not going to be needed. A further chaser was sent on 8 June 2022.

The hearing

10. At the hearing, Mr Woolf for the Respondent accepted that the Respondent had not engaged properly with the Applicant following the mediation. However, in his submission the Respondent's conduct had not amounted to acting "unreasonably" for the purposes of the test laid down in the decision of the Upper Tribunal in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander (2016) UKUT 290 (LC)*.

11. Mr Woolf said that the reasons for the delays on the part of the Respondent included the fact that the Respondent's managing agent had left his firm of managing agents, the Respondent's surveyor took some time to provide the relevant schedules of condition, the Respondent's solicitor had personal family issues to attend to, and Counsel himself was instructed at a very late stage.

12. Mr Brewin for the Applicant agreed that *Willow Court* was the relevant legal authority but submitted that the explanations for the delays were insufficient. First of all, the explanations amounted to no more than that certain people providing professional support to the Respondent

were unavailable, and secondly the Respondent had not provided full details of the circumstances surrounding these problems. The Respondent was not proactive, and it did not even communicate with the Applicant to explain what was causing the delays. If the Respondent had engaged with the process, the hearing could have been avoided.

The tribunal's analysis

13. Rule 13(1)(b) of the Tribunal Rules ("**Rule 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 both parties, the leading case on this point is the decision of the Upper Tribunal in *Willow Court Management Ltd v Mrs Ratna Alexander [2016] UKUT 290 (LC)*. In *Willow Court*, the Upper Tribunal prescribed a sequential three-stage approach which in essence is as follows: (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?

15. The first part of the test, namely whether the person acted unreasonably, is a gateway to the second and third parts. 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*, albeit adding some commentary of its own, and stated (in paragraph 24) 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. 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" [in Ridehalgh]: is there a reasonable explanation for the conduct complained of?"*.

16. The Upper Tribunal in *Willow Court* (in paragraph 23) also expressly rejected the submission that *"unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous"*.

17. Whilst it is arguable linguistically that the statement in paragraph 24 of *Willow Court* that *"unreasonable conduct* ***includes*** *conduct which is vexatious …"* (our emphasis) could imply that it also includes less culpable conduct, that is not our sense as to what the Upper Tribunal was seeking to convey. Rather, in our view, the Upper Tribunal in its section on *"Unreasonable behaviour"* (when read as a whole) was stating that to meet the first part of its three-part test the behaviour needs to be vexatious and/or abusive and/or frivolous and/or designed

to harass the other side and/or (subject to our later comments) needs to be such that there is no reasonable explanation for it.

18. In the present case, the basis for the Applicant's cost application is not any positive act or series of acts on the part of the Respondent. Instead, it is the Respondent's failure to engage with the process following the mediation or, in other words, its omission to act. Whilst we agree that the facts show that the Respondent failed to engage effectively, and indeed this point is conceded by the Respondent, there is first of all a question as to whether by simply failing to engage the Respondent *"acted unreasonably"* for the purposes of Rule 13(1)(b).

19. The Upper Tribunal's decision in *Willow Court* relates to "conduct", and we are not wholly satisfied in the absence of a direct statement to this effect in *Willow Court* that an omission to act necessarily counts as "conduct". We use the words "wholly satisfied" for a particular reason, namely that we are not seeking to rule out the possibility that omission to act could ever amount to conduct for these purposes.

20. The current circumstances, though, in our view, do not fit the *Willow Court* test of unreasonable conduct. There is no evidence, nor even any suggestion, that the Respondent was deliberately employing a strategy of refusing to engage with the process for some particular purpose, nor is it clear from the circumstances or from the information before the tribunal what that purpose would have been. The evidence indicates that the Respondent's professional advisers – for a variety of reasons – were not responding to the Applicant's professional advisers in a timely manner and that the Respondent itself was either unaware of this or insufficiently concerned.

21. The Respondent's conduct was certainly not vexatious, abusive or designed to harass the other side. We also do not accept that an omission to act in these circumstances could properly be described as frivolous. As to whether there is a reasonable explanation for the Respondent's conduct, or rather for its failure to act, it is arguable that the explanation is simply that the Respondent was failed by its advisers and that it should have been more proactive. However, whilst in a different context – such as certain county court cost applications – a party might not escape a cost order simply on the ground that it was relying on its professional advisers to respond, in our view the first-stage test in *Willow Court* envisages rather more than this. The Upper Tribunal in *Willow Court* first uses the formula *"vexatious, abusive or designed to harass the other side"* and only after this does it use the *Ridehalgh* formula of *"is there a reasonable explanation"* to express the test in a different way. The concept of "reasonable explanation" therefore needs to be seen in the light of the Upper Tribunal's own formula of *"vexatious, abusive or designed to harass the other side"*.

22. Even assuming that omissions can count as conduct for the purposes of Rule 13(1)(b), there is no evidence that the Respondent had the *mens rea* (i.e. the intention) that would be required for that conduct to fall within *"vexatious, abusive or designed to harass the other side"*.

23. We therefore do not accept that the Applicant has demonstrated that the Respondent has acted unreasonably for the purposes of Rule 13(1)(b). 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 Rule 13(1)(b) is refused.

Name: Judge P. Korn **Date:** 8 July 2022

<u>RIGHTS OF APPEAL</u>

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.