



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

Case Reference(s) : BIR/00CN/LAC/2022/0002

Property : 119 George Road, Erdington, Birmingham B23 7SH

Applicant : Owen O'Neill

Respondent : Stratton Oakmont Estates Limited

Representative : J B Leitch Solicitors

Type of Applications : An application for a determination as to the liability to pay an administration charge under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (as amended).

An application for an Order under section 20 (c) of the Landlord and Tenant Act 1985 limiting payment of Landlord's costs.

An application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 to reduce or extinguish the tenant's liability to pay an administration charge in respect of litigation costs.

An application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Tribunal Members : **Judge P Ellis**
V Ward BSc Hons FRICS – Regional Surveyor

Date of Decision : **26 July 2022**

DECISION

The Respondent shall pay the Applicant the sum of £119.00 costs and disbursements pursuant to R13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

Background

1. On 31 January 2022, the Tribunal received an application for a determination as to the liability to pay an administration charge under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (as amended) and an application for an Order under section 20 (c) of the Landlord and Tenant Act 1985 limiting payment of Landlord's costs.
2. On 15 February 2022, the Tribunal issued Directions.
3. The Directions identified the issues to be determined as follows:
 - a) Whether under the terms of the lease of the Property the following sums, charged to the tenant, are payable to the respondent landlord and reasonable in amount:
 - an administration fee of £90.00 invoiced on 3 August 2021.
 - Legal costs of £720.00 demanded from the tenant
 - b) whether an order under section 20C of the 1985 Act should be made that the costs incurred by the landlord in connection with these proceedings shall not be taken into account when determining the amount of any service charge payable by the tenant.

3. The Directions instructed the Applicant to send a statement to the Respondent by 1 March 2022. The Respondent was due to produce a statement in reply by 16 March 2022.

4. On 17 March 2022, the Respondent advised the Tribunal as follows:

We write to confirm that no statement has been provided by/received from the Applicant (contrary to the Tribunal's Directions).

Accordingly, the Respondent has been unable to produce any statement in reply.

Notwithstanding the terms of the lease, our client is concerned about the amount of irrecoverable legal costs that will have to be incurred if this matter is taken through a set of Tribunal proceedings to and including a final hearing (which we note the Applicant has requested).

As such, our client agrees on a commercial basis to waive the administration fee and the JBL legal costs incurred to date, that together, comprise the application to the Tribunal, thereby concluding the matter amicably (in order to avoid our client having to incur legal costs that would otherwise exceed the fees/costs comprised in the application).

5. On 24 March 2022, the Applicant responded as follows (part only):

The applicant (tenant) was directed to send witness statement etc to the respondent (landlord) by 1st March 2022.

This direction was complied with, being sent to the Landlord's representative (and CC'ing landlord) by email on 1st March 2022. No email bounce back messages were received, so the email was successfully received by both recipients' email servers.

See Service of applicant's statement on respondent (page 12)

The respondent (landlord) was directed to send witness statements etc to the tenant by 16th March 2022.

As of 24th March 2022 no communication from the landlord, their agent or representative by any channel has been received by the tenant.

In consequence of this, as per directions, I the applicant (tenant) am requesting the tribunal to bar the respondent (landlord) from taking any further part in the proceedings and to make a summary judgement in my favour.

“If the respondent fails to comply with these directions the tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.”

6. The Applicant submitted a request for summary judgment on 24 March 2022. As the Tribunal Rules do not have such a procedure the matter was referred to the Practice Judge for further Directions. At this point the Tribunal identified four issues for determination.
7. The substantive Directions of Regional Judge Jackson of 28 March 2022 set out the four issues as follows:
 - a) Payability of an administration charge of £90 and legal costs of £720
 - b) Order under section 20c of the Landlord and Tenant Act 1985
 - c) Order under Paragraph 5A of the Commonhold and Leasehold Reform Act 2002
 - d) Costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 against the Respondent.
8. The Respondent had agreed to waive the charges relating to a), b) and c) above. This left issue d), accordingly on 4 May 2022 the Tribunal issued Directions in respect of Rule 13 Costs. The Directions provided that in making their determination, the Tribunal would consider the Upper Tribunal decision in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC) (*Willow Court*) that the parties may wish to address in their submissions.
9. The Tribunal considered that this matter can be dealt with on the basis of written submissions however if either party required an oral hearing, they were to notify the Tribunal. No request was received accordingly the Tribunal determines this matter on the basis of the written statements made.
10. The parties made their respective submissions which were considered by the Tribunal on 23 June 2022.

The Applicant’s Claimed costs

11. The hourly rate requested by the Applicant reflects costs at the litigant in person rate under the “two-thirds” rule of (CPR 465(2)) – assuming a notional solicitor rate of £150 / hr— hence a rate of £100/hr.
12. The work which formed the Applicant’s claim is as follows:

Item	Date	Work	Duration (Hours)	Cost
1	Various	Pre-action correspondence	6	n/a
2	21/11/2021	Tribunal application Application fee	2	£200.00 £100.00
3	01/03/2022	Collating correspondence Case review witness stmt.	4	£400.00
4	21/03/2022	Bham library case law research Travel	4	£400.00 £4.00
5	22/03/2022	Bham library case law research Travel	4	£400.00 £3.10
6	24/03/2022	Case summary prep of summary	10	£1000.00
7	14/04/2022	Review of correspondence	5	£500.00
8	19/05/2022	Creating costs application	6	£600.00
Total				£3,607.10

The Statutory Framework

13. Rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 provides:

“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(1), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(2) and the County Court (Interest on Judgment Debts) Order 1991(3) 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.

14. Section 29 Tribunals Courts and Enforcement Act 2007 provides

Costs or expenses

(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal, shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

- (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.*
- (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—*
- (a) disallow, or*
 - (b) (as the case may be) order the legal or other representative concerned to meet,*
- the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.*
- (5) In subsection (4) “wasted costs” means any costs incurred by a party—*
- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or*
 - (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.*
- (6) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf*

15. The provisions of s29(5) of the 2007 Act are substantially the same as S51(7) Senior Courts Act 1981 which provides:

- (7) In subsection (6), “wasted costs” means any costs incurred by a party—*
- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or*
 - (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.*

16. The Tribunal referred the parties to *Willow Court* in which the Upper Tribunal described the source of the power of the Tribunal under of Rule 13 to award costs which were either wasted or unreasonably incurred. This Tribunal will refer again in this Decision but in accordance with the *Willow Court* decision the Tribunal will also have regard to the provisions of Rule 3 the Overriding Objective:

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
- (2) Dealing with a case fairly and justly includes –*
- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal.*
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*

- (d) using any special expertise of the Tribunal effectively; and*
- (e) avoiding delay, so far as compatible with the proper consideration of the issues.*
- (3) The Tribunal must seek to give effect to the overriding objective when it –*
 - (a) exercises any power under these Rules; or*
 - (b) interprets any rule or practice direction.*
- (4) Parties must –*
 - (a) help the Tribunal to further the overriding objective; and*
 - (b) cooperate with the Tribunal generally.*

The Issue for the Tribunal

17. When these proceedings were issued, the Applicant raised the question of his liability to pay an administration charge of £90.00 and legal costs of £720.00 arising from disputed demands for payment of ground rents. However, after the correspondence referred to in paragraphs 5 & 6, the Applicant now contends he is entitled to an award of r13 costs. It is his case that the majority of the costs fall under paragraph a of R13(1)(a) because the ground rent demands were without foundation so that he was put to costs of resisting the claim and further in the course of proceedings the Respondent's representative failed to comply with Directions or copy him with the email of 17 March 2022.
18. If the Tribunal considers a costs order is appropriate it will determine the responsible paying party, the hourly rate claimed, and whether the items of work are allowable including the issue fee.

The Parties Submissions

The Applicant

19. The Applicant's submissions for an application of this type were voluminous and the Tribunal summarises the same as below.
20. The majority of the costs being applied for would appear to fall firstly under part(a) wasted costs, but if the tribunal is not satisfied they fall under part (a) they can also be considered under part (b) – reasonableness.
21. The Applicant then goes onto consider wasted costs and "reasonableness" at length. He submitted the Tribunal should consider the Respondent's conduct prior to commencement of proceedings. He then recited the history of the ground rent dispute which the Tribunal has reviewed in preparing this Decision but which need not be recorded here.

22. It was the Applicant's submission that the demands were without justification or not properly served so that the costs the subject of the original proceedings were improperly incurred. When considering items 2 & 3 of the costs schedule the Tribunal should consider the behaviour of the parties prior to commencement in its reasonableness assessment, and in particular if the action of the landlord being legally advised was reasonable.
23. The Applicant proposed that after 8 October 2021, when he sent an email to the Respondent's solicitor outlining his case in answer to the claims against him, it was unreasonable to further pursue the case and doing so amounted to harassment giving him no alternative than to issue these proceedings.
24. As far as items 4,5,6,7 & 8 are concerned the Applicant contends they arise from the failure of the Respondent's representative to follow directions which he contends justify a wasted costs order or failing that, unreasonable conduct by the Respondent itself.
25. The Applicant contends the Respondent failed to comply with the Tribunal's directions for the parties' service of evidence by 1 March 2022. He maintained he had complied with the obligations imposed by sending documents by email which did not 'bounce back', therefore he deduced the Respondent had received his evidence but that it had failed to comply by serving its own evidence.
26. He contended there was a further breach of the Respondent's obligations by failing to copy him with the email of 17 March to the Tribunal withdrawing the claims the subject of the proceedings.
27. The Applicant had carefully studied the *Willow Court* decision, the relevant legislation and procedural rules before submitting that the various individual acts of the Respondent or its representative may not fail the reasonableness test but where there are repeated failures a pattern of behaviour was established which in aggregate amounted to either negligence or unreasonable behaviour. The pattern of behaviour alleged was the persistent demands for payment of ground rent as a result of the maladministration of the Respondent's agent, the threats of action by the Respondent itself and through its representative, the alleged failure to comply with Directions and the failure to copy the Applicant with the email of 17 March 2022.

The Respondent

28. In its submissions made in answer both to the claim against the Respondent and its representative, the Respondent asserted the Applicant is not entitled to recover any of the costs claimed save for conceivably the issue fee.

29. The submission reminds the Tribunal broadly is a no cost forum and of the overriding objective. It maintains the costs claimed are unreasonable and disproportionate. Any award would be contrary to the overriding objective. Any unreasonableness on its part is rejected.
30. Referring to *Willow Court*, the Respondent asserts losing a case, poor decisions, mistakes and other failings do not amount to unreasonableness which is concerned with bad faith, acting in a vexatious or otherwise nefarious manner, doing things designed to harass or deliberately deceive or mislead. It denies there is any such behaviour on either of the Respondent or its representative.
31. The Respondent then addresses the items of cost. It points out that a substantial amount of the cost incurred relates to the dispute pertaining to ground rent which is in any event outside the jurisdiction of the Tribunal. The administration charge and the legal costs were connected with the ground rent issue. Therefore, it decided to make a reasonable and commercial decision to cease the pursuit of the administration charge and costs incurred as well as the s20C and Para 5A costs. The Respondent quotes the dicta of Mummery LJ that such circumstances “*should not be stigmatised as an admission of defeat or as unreasonable*”.
32. The Respondent acknowledges that there was a failure to copy the email of 17 March for which it apologises but contends that oversight was not unreasonable.
33. The rate claimed by the Applicant (£100ph) is rejected because that rate applies to fast or multi track cases and is inapplicable to losses that have not been proven. It proposes the rate (if appropriate) is £19ph under CPR 45.39(5)(b) and 46.5(4)(b) where loss is not clearly evidenced or substantially examined.

Decision

34. The unrepresented Applicant has prepared extensive submissions based upon his reading and understanding of the relevant law as directed by the Tribunal. From his reading of the relevant case law he recognises that

“the general principle is laid down by section 29(1) : costs of all proceedings are in the discretion of the FTT, which has full power to determine by whom and to what extent the costs are to be paid, subject to the restrictions imposed by the 2013 Rules. Those restrictions prohibit the making of an order for costs except in the circumstances described in rule 13(1) .”
35. The Tribunal notes that although the Applicant firmly asserts he was not in default of his payments of ground rent, that position is not accepted by the Respondent. It is not a matter the Tribunal can make any ruling on but as the Applicant relies on the dispute in connection with his allegation of misconduct by the Respondent the

Tribunal has reviewed the correspondence when considering the allegation of a course of conduct which justifies an order in his favour under r13(1).

36. When he received a bill for an administration charge and legal costs the Tribunal understands the Applicant felt there was no alternative other than to seek a determination from this Tribunal. As the Respondent has withdrawn the claims, it is appropriate that it should pay the Applicant the issue fee of £100.00 as without these proceedings the Respondent would have continued with its claims.
37. As far as the other claims are concerned the Tribunal has considered whether or not the behaviour complained of can be described as improper, unreasonable or negligent justifying a wasted costs order in respect of items 4,5,6,7 & 8 of the claim, or unreasonable under R13(1)(b) in respect of items 2 & 3 or, as an alternative, in respect of all items of claim.

38. At paragraph 24 of its Decision in Willow Court the Upper Tribunal stated:

“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. We see no reason to depart from the guidance given in Ridehalgh at 232E, despite the slightly different context. “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?”

39. The Applicant has made a worthy case in seeking to apply the general principles to the conduct of the Respondent and deducing that such conduct is unreasonable. However, the Tribunal is satisfied that there was no conduct on the part of the Respondent which could be characterised as vexatious or harassment. In effect from 17 March 2022 the Respondent had conceded its case to the Applicant. It is regrettable that the Applicant was unaware of that concession until 25 March 2022, but the delay did not cause any substantive difficulties in the resolution of the dispute.
40. The Tribunal has been referred to alleged failures of compliance with directions as evidence of misconduct but it is not satisfied that if there were any such failings the consequences amounted to a breach of R3 of the Tribunal Rules. The Applicant referred to other decisions of the First-tier Tribunal when persistent non-compliance with the rules justified a costs order but the shortcomings (if any) in compliance in this case were not of the same order to justify treating them as

unreasonable conduct. In any event the Respondent in its submissions referred to apparent non-compliance by the Applicant.

41. The Applicant's contention that the pursuit of a claim against him after his letter of October 2021 with his explanation of the ground rent account was unreasonable is rejected. No proceedings were issued against him after that letter. It was the administration charge which prompted the commencement of proceedings.
42. As far as a claim for wasted costs is concerned, the Tribunal does not regard the way in which these proceedings were conducted comes remotely close to that which justifies such a claim. The claim in respect of items 4-8 is expressed in the alternative with unreasonable conduct. The Tribunal determines that the conduct of the proceedings was also not so unreasonable as to justify a claim under R13(1)(b) save for the payment of the fee of £100 and one hour of time in preparation of the application at the rate of £19. An explanation of the rate is at paragraph 43.
43. In the circumstances the Tribunal's determination that there is no reason to make an award of costs under R13(1) it is not necessary to make any assessment of the individual items. However, for the avoidance of doubt, had there been reasons to make an award the Tribunal would not have allowed the hourly rate claimed. Applying CPR 45.39(5)(b) and 46.5(4)(b) it would replace it with the rate of £19ph there being no loss proved to have been suffered by the Applicant.
44. Moreover, items 4,& 5 involve research which is not payable by the paying party work. Item 6 relates to the application for summary judgment, which is not possible in the Tribunal, a letter of request for further direction would suffice. Item 6 would not be allowed. Items 7 & 8 are grossly excessive.

Appeal

45. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Tribunal Judge Peter Ellis.