FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/HNA/2022/0015 & 0016P**
Property	**:**	**90 Tewson Road, London SE18 1AY**
Applicants	**:**	**Yarychiv Property Management Limited ("First Applicant") and Goldgate Properties Limited ("Second Applicant")**
Representative	**:**	**Holland Harlesden Law for First Applicant and Ballantyne Grant Solicitors for Second Applicant**
Respondent	**:**	**The Royal Borough of Greenwich**
Representative	**:**	**Mr Ali Dewji of Counsel**
Type of Application	**:**	**Supplemental cost application following an appeal against financial penalties imposed pursuant to section 249A Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn** **Mr S Mason FRICS**
Date of decision	**:**	**20 December 2022**

SUPPLEMENTAL DECISION ON COSTS

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Description of hearing

This has been a decision on the papers (code: **P**) without an oral hearing. An oral hearing was not held because the tribunal considered that it was appropriate to determine the issues on the papers alone and both parties agreed. The decision made is described immediately below under the heading "Decision of the tribunal".

Decision of the tribunal

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

The background

1. These applications are supplemental to appeals (the "**Appeals**") made by the Applicants against financial penalties imposed by the Respondent pursuant to section 249A of the Housing Act 2004.

2. On 10 November 2022 at the start of the hearing to determine the Appeals the Respondent abandoned its opposition to the Appeals and agreed to withdraw the Final Notices issued to the Applicants.

3. The Applicants have both made cost applications under Rule 13(1)(b) of the Tribunal Rules.

First Applicant's written submissions

4. In written submissions the First Applicant notes that the leading case on Rule 13(1)(b) cost applications is the decision of the Upper Tribunal in *Willow Court Management Ltd v Mrs Ratna Alexander [2016] UKUT 290 (LC)*. The First Applicant states that for the tribunal to be able to make a Rule 13(1)(b) cost award there needs to be 'unreasonable conduct' by the party against whom the application is made.

5. The First Applicant states that the conduct that led to these proceedings was the refusal of the Respondent to release an inspection report, the transcript of certain interviews, the pictures of the inspections, and the completed scoring matrix.

6. The First Applicant adds that the consequence of the Respondent's refusal to release the above information was that the First Applicant could only submit a bare denial and a bare ground of appeal. Had the Respondent released the information, the First Applicant would have had an early opportunity to make more detailed representations and then the Respondent in turn would have had an early opportunity to

amend the Improvement Notice and the penalty would have been substantially lower. As a result, the First Applicant might have paid the lower penalty rather than challenging the relevant Notice and incurring costs.

Second Applicant's written submissions

7. The Second Applicant submits that the Respondent acted unreasonably, first in choosing to defend the proceedings and secondly in the manner in which it conducted proceedings.

8. The Second Applicant states that it was apparent to the Respondent very early on that the issue of who was managing the Property was unclear and that there were possibly five separate entities involved in the management and control of the Property. A local authority needs to be able to demonstrate beyond reasonable doubt in proceedings of this nature that a particular person or entity has committed an offence, and it should have been obvious in this case that the required standard of proof could not be met.

9. Instead of withdrawing its opposition to the Appeals at an early stage, the Respondent 'doggedly' defended its position and submitted some 890 pages of detailed evidence, all of which had to be considered by the Applicants and responded to. This resulted in costs which were far higher than would ordinarily be incurred. In the Second Applicant's submission, it was unreasonable for the Respondent to continue contesting the Appeals.

Respondent's written submissions

10. The Respondent submits that it is not unusual or unreasonable for a party to proceedings to change its assessment of the strength of the evidence upon the advice of counsel, including upon the receipt of urgent advice from trial counsel prior to a hearing. By abandoning its opposition to the appeals, even on the day of the hearing, the Respondent saved further time, work and resources for the Applicants and the tribunal, thereby showing good faith, pragmatism, and appropriate regard for the public interest. Aside from the change in position, which in the Respondent's submission was not unreasonable, the Applicants have not identified any conduct on the part of the Respondent which can be described as unreasonable within the meaning of the Tribunal Rules. In particular, there is no basis for suggesting that the Respondent has acted vexatiously or with any desire to harass the other side (rather than advancing the resolution of the case) as per the test in *Willow Court*.

11. In relation to the First Applicant's submissions, the Respondent submits that its complaints about the provision of documentation prior

to the proceedings do not relate to the conduct of the Respondent in bringing, defending or conducting proceedings for the purposes of Rule 13(1)(b) and are therefore not pertinent to the Rule 13(1)(b) cost application. In any event, the documentation required to be provided to recipients of a Notice of Intent and Final Notice is prescribed by statute in section 249A and Schedule 13A of the Housing Act 2004, and the Respondent complied with those requirements.

12. In relation to the Second Applicant's submissions, the Respondent argues that the Second Applicant is just making one point, namely that the Respondent opposed the appeals until the hearing on 10 November 2012. On this point, it notes that the Second Applicant is suggesting that the Respondent's position was so obviously untenable from an early stage of the proceedings that the mere fact that it chose to defend the appeals is itself evidence that it acted unreasonably.

13. In response to that proposition the Respondent submits that the Second Applicant has failed to show any basis for claiming that the Respondent's position was obviously untenable. Furthermore, even if this point could be established in this case the mere fact that a party persists 'against the odds' is not evidence that it has behaved vexatiously, or to harass the other party, or otherwise unreasonably.

14. As to whether the Respondent's position was in fact untenable, the Respondent argues that the fact that 'possibly 5 separate entities' were involved in the management of the Property is not conclusive nor especially salient since the statutory scheme allows for multiple persons to meet the definition of being 'a manager' in relation to specific premises.

The tribunal's analysis

15. 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"*.

16. The First Applicant bases its case on the conduct of the Respondent prior to the commencement of proceedings, which is a misunderstanding of the wording of Rule 13(1)(b). A prerequisite to falling within Rule 13(1)(b) is that the conduct to which the cost application relates must involve "bringing, defending or conducting proceedings" (or in the case of a Respondent must involve "defending or conducting proceedings"). The First Applicant's case must therefore fail. Whilst it is possible that the First Applicant would have wanted, in the alternative, to rely on the Second Applicant's submissions, it has not said so.

17. We turn now to the more relevant submissions on behalf of the Second Applicant. As noted by all 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?

18. 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?".*

19. 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"*, i.e. it rejected the contention that 'unreasonableness' should be given a wider meaning.

20. 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 needs to be such that there is no reasonable explanation for it.

21. In the present case, the basis for the Second Applicant's cost application is that the Respondent should have taken the view at an earlier stage that it had a weak case and should have abandoned its opposition to the appeals at a much earlier stage. On this point, paragraphs 35 and 36 of *Willow Court* are particularly pertinent. Under the heading *'The withdrawal of claims'*, the Upper Tribunal stated as follows:-

35. In one of the appeals with which we are now concerned … costs were awarded under rule 13(1)(b) on the grounds that the applicant had delayed in withdrawing proceedings until after a time when it should have been clear to him that he had achieved as much by concession from the management company as he could realistically expect to obtain from the FTT by proceeding to a hearing. It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and to 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.

36. In this regard our attention was drawn to the decision of the Court of Appeal in McPherson v BNP Paribas [2004] EWCA Civ 569, which concerned rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (permitting the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably). Having noted that in civil litigation under the CPR the discontinuance of claims was treated as a concession of defeat or likely defeat, Mummery LJ went on, at paragraph 28: "In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for Employment Tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. … Withdrawal could lead to a saving of costs. Also, … notice of withdrawal might in some cases be the dawn of sanity and the Tribunal should not adopt a practice on costs which would deter applicants from making sensible litigation decisions."

22. Whilst the present case is not wholly analogous to the appeal being discussed at paragraph 35 of *Willow Court*, it is clearly comparable. The concern expressed by the Upper Tribunal in *Willow Court* and by the Court of Appeal in *McPherson v BNP Paribas*, which concerned a cost provision in the Employment Tribunal similar to Rule 13(1)(b) as interpreted in *Willow Court*, is that a party to tribunal proceedings should not be discouraged from abandoning a point of contention or even its entire claim (or, by analogy, its opposition to an appeal) by the fear that such abandonment will be treated as an admission that its position was unsustainable and that the abandoned issue should never have been raised or the abandoned position should never have been taken.

23. We have some sympathy with the Second Applicant's position in that if the Respondent's position was weak enough for it to abandon its

opposition to the Appeals on the morning of the hearing before any oral submissions had been made it is at least arguable that the same assessment could have been made, and the same conclusion reached, much earlier. However, this in not by itself sufficient to pass the first part of the *Willow Court* test. As the Respondent states, it is not unusual for a party to proceedings to change its assessment of the strength of its case upon the advice of counsel. Furthermore, it does not follow from the fact that the evidential issues on this case were complex that the Respondent should simply have given up at an early stage. As a local housing authority, it has a responsibility to enforce housing standards, and that can often involve unpicking complex chains of ownership and management. Sometimes a chain of ownership and/or management will have been made deliberately complex precisely in order to deter the relevant authority from pursuing the matter, and it would be wrong to signal to local housing authorities that they should only pursue simple cases.

24. It is certainly arguable that the Respondent's early assessment of the strength of its case against the Second Applicant was optimistic and/or that it focused on certain aspects of the case to the detriment of others. However, there is no suggestion and no evidence that the Respondent was acting maliciously or even recklessly in making that assessment. Applying the specific wording of the *Willow Court* test, we are not persuaded that the Respondent's conduct was vexatious or abusive or frivolous or designed to harass the other side. We are also satisfied that there was a reasonable explanation for the Respondent's conduct in that we are persuaded based on the documentation contained in the original hearing bundle that the Respondent genuinely considered that it could win the case until advised at the last moment by counsel that its case was weaker than it had originally thought.

25. The Applicants have therefore failed to demonstrate that the Respondent has acted unreasonably for the purposes of Rule 13(1)(b). As the applications have 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 Applicants' cost applications under Rule 13(1)(b) are refused.

Name: Judge P Korn **Date:** 20 December 2022

RIGHTS OF APPEAL

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.