FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**MM/LON/00AG/2022/0137** **P: PAPERREMOTE**
Property	**:**	**Embassy House, West End Lane, London NW6 2NA**
Applicant	**:**	**(1) Christopher Ferrier Williams** **(2) Elizabeth Ferrier Toomey** **(3) Paul Anthony Austin**
Representative	**:**	**Fladgate LLP**
Respondent	**:**	**(1) Embassy House Freehold Limited** **(2) The participating leaseholders named in the schedule accompanying the Tribunal application**
Representative	**:**	**Gregory Abrams Davidson Solicitors**
Type of application	**:**	**Costs - rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member	**:**	**Judge Donegan**
Date of paper determination	**:**	**20 March 2023**
Date of decision	**:**	**27 March 2023**

DECISION

This has been a remote determination on the papers which has not been objected to by the parties. The form of remote determination was P: PAPERREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined on paper. The documents that I was referred to are in an electronic determination bundle of 203 pages, the contents of which I have noted.

Decision of the Tribunal

A. The respondents' application to strike out the costs application under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules') is dismissed.

B. The costs application under Rule 13(1)(b) of the 2013 Rules is dismissed.

C. The respondents shall reimburse the Tribunal fee of £100 paid by the applicants on their application to determine section 33 costs, pursuant to Rule 13(2) of the 2013 Rules. The respondents must pay this sum to the applicants by 24 April 2023.

The background

1. These proceedings arise from a collective enfranchisement claim for Embassy House, West End Lane, London NW6 2NA ('the Property'), under the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'). The applicants are the freeholders of the Property, which is a purpose-built block comprising 71 flats and common parts. There are also 11 garages and communal grounds.

2. On or about 26 January 2022 various leaseholders at the Property served a notice pursuant to section 13 of the 1993 Act, claiming the freehold of the Property. The first respondent, Embassy House Freehold Limited, is the nominee purchaser named in the Initial Notice. The other respondents are the participating leaseholders.

3. The s.13 notice proposed £1,428,000 for the freehold interest in the "*specified premises*" and £2,000 for the remainder of the Property, as specified at paragraph 2 of that notice. The applicants served a counter-notice on or about 07 April 2022, admitting the participating leaseholders had the right to collective enfranchisement without prejudice to their primary contention that the s.13 notice was invalid. The counter-notice proposed £3,806,000 for the freehold interest in the Property and £16,000 for the property specified at paragraph 2 of the Initial Notice.

4. On 04 May 2022 the respondents' solicitors wrote to the applicants' solicitors, acknowledging that the s.13 notice was invalid. They have since served further s.13 notices.

5. The applicants' solicitors, Fladgate LLP, wrote to the respondents' solicitors on 05 and 09 May 2022, providing details of the costs claimed under s.33(1) of the 1993 Act. These amounted to £27,646.92, being a

valuation fee of £14,000 plus VAT (£16,800) and legal fees of £10,846.92 (including VAT).

6. These costs relate solely to the original s.13 notice served in January 2022. The Tribunal received an application to determine the costs dated 29 July 2022 ('the S33 Application'). Directions were originally issued on 01 August 2022 and the S33 Application was allocated to the paper track, to be determined without an oral hearing. At the respondents' request some of the deadlines in the directions were extended. Amended directions were issued on 09 September 2022 but the case remained allocated to the paper track. I determined the s.33(1) costs in the sum of £21,600 in a decision dated 15 November 2022 ('the S33 Decision').

7. Fladgate applied for a costs order under r.13(1)(b) of the 2013 Rules in a letter to the Tribunal dated 12 December 2022 ('the R13 Application'). I issued directions on 21 December and allocated the R13 Application to the paper track, to be determined upon the basis of written representations. The paper determination took place on 20 March 2023.

8. In an email dated 28 February 2023, the respondents' solicitors made their own application for a costs order under r.13(1). They also applied for permission to appeal the S33 Decision out of time and a postponement of the paper determination of the R13 Application. I rejected/refused these applications on 07 March 2023.

9. Fladgate filed a determination bundle in accordance with the directions. This runs to 203 pages and includes copies of the S33 Decision and the directions and statements of case from the R13 Application. I considered all the documents in the bundle, when deciding the R13 Application.

10. The relevant legal provisions are set out in the appendix to this decision.

The law

11. The applicants seek a costs order under r.13(1)(b), based on the respondents' conduct before and during the S33 Application.

12. Rule 13(1)(b) is engaged where a party has acted "*…unreasonably in bringing, defending or conducting proceedings…*". The Tribunal's power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007, which provides:

> "*(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."*

It follows that any r.13(1)(b) order must be limited to the costs of and incidental to the proceedings before this Tribunal, namely the S33 Application.

13. Not surprisingly, the parties referred to the decision of the Upper Tribunal ('UT') in ***Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC),*** which outlined a three-stage test for deciding r.13 applications. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order. The second and third stages both involve the exercise of judicial discretion, having regard to all relevant circumstances and there need not be a causal connection between the unreasonable conduct and the costs incurred. Given the requirements of the three stages, r.13 applications are fact sensitive.

14. At paragraph 20 of ***Willow Court***, the UT referred to the leading authority on wasted costs, ***Ridehalgh v Horsefield [1994] Ch***, where Sir Thomas Bingham MR considered the expressions "*improper, unreasonable or negligent*" and said:

""Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalties. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."

"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. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but is not unreasonable."

15. At paragraph 24 of ***Willow Court***, the UT said *"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 in Ridehalgh v Horsefield 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 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?"

16. At paragraph 26, the UT went on to say:

"We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; ***typically*** *those who find themselves before the FTT are* ***inexperienced in formal dispute resolution****; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation and to discourage obstruction, pettiness and gamesmanship."*

17. At paragraph 43 the UT emphasised that Rule 13(1)(b) applications *"…should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right."*

The R13 Application

18. The grounds of the application are detailed in 12-page statement of case dated 19 January 2023 with various supporting documents, including fee notes, invoices, costs statements and FL's terms of engagement.

19. These grounds are summarised below.

    (a) The respondents were legally represented throughout the S33 Application by an experienced enfranchisement solicitor, and their conduct must be judged in this context.

    (b) The respondents unreasonably declined to engage in meaningful pre-action correspondence, necessitating the S33 Application.

(c) The applicants made numerous pre-action attempts to engage with the respondents, including a without prejudice save as to costs ('WPSATC') offer on 13 July 2022 to accept 75% of their legal costs.

(d) The responses to these attempts were unreasonable. No offer or counteroffer was made in respect of the applicants' legal costs, and they only offered £5,000 plus VAT in respect of the valuation fee, being less than half the sum allowed in the R13 Decision (£11,000 plus VAT).

(e) The respondents unreasonably adopted the position that the s.33(1) costs should be 'parked' until terms had been agreed on the second s.13 notice, which subsequently turned out to be invalid. The only movement towards settlement was an email from their solicitors dated 11 August 2022, imposing an unrealistic precondition that the applicants accept two of the participating leaseholders were no longer associated companies.

(f) The correspondence shows the respondents had little or no intention on engaging with the s.33 costs, so the applicants had no choice but to make the S33 Application. There was no reasonable explanation for this failure to engage.

(g) The respondents' adopted an unreasonable position in their written submissions on the S33 Application, including the extraordinary statement that costs should be restricted to a fixed sum as "*most modern litigation is run on a fixed fee basis*". Further, they raised numerous points of dispute, which were largely decided in the applicants' favour. Losing on points of dispute will not ordinarily justify a finding of unreasonable conduct. However, in this case the Tribunal is entitled to find the respondents' conduct was motivated by a desire to be obstructive and was an extension of the respondents' unreasonable conduct that necessitated the S33 Application in the first place.

(h) The respondents' obstructive approach is also evidenced by their approach to the directions in the S13 Application, including a last-minute application for an extension to serve their response and unnecessarily engaging the Tribunal on the contents of the determination bundle and index.

(i) The respondents' conduct resulted in unnecessary delay and expense to the applicants, was obstructive and not capable of reasonable explanation.

20. The applicants contend the Tribunal should exercise its discretion and make a costs order based on the respondents' unreasonable conduct. Had the respondents engaged (or properly engaged) pre-action, the costs of the S33 Application are likely to have been avoided.

21. As to the form of the costs order, the applicants seek £15,990 (including VAT and disbursements) for their costs of the S33 Application. They also seek their costs of the R13 Application (£9,153.60), on the basis these

costs flow from the same (unreasonable) conduct. They also seek an order for reimbursement of Tribunal application fee on the S33 Application, pursuant to r.13(2) of the 2013 Rules.

22. The respondents rely on a 22-page statement in response dated 09 February 2023 and a 35-page bundle of supporting documents. They dispute both liability and quantum and their case can be summarised as follows.

    (a) The applicants' costs were reduced by 24.36%, from £28,556.89 to £21,600, in the R13 Decision. This reduction is substantial and demonstrates the original figure was unreasonable.

    (b) The R13 Application is spurious, an abuse of process and "*has been manufactured out of thin air and without any due consideration to the overriding objective.*" The applicants have spent a total of £25,143.60 on the S33 and R13 Applications, have instructed Kings Counsel (Mr Robert Marven KC), Junior Counsel (Ms Sara Jabbari) and Costs Lawyers (MR Negotiators Limited) and had "*complete disregard for proportionality*".

    (c) The applicants' costs for dealing with the original s.13 notice far exceed the estimate given in Fladgate's terms of engagement dated 02 February 2022, being "*in the region of £3,000-4,000 plus VAT and disbursements.*"

    (d) The R13 Application should be struck out, as the statements of costs supporting that application appear misleading. The work undertaken by Armel Elaudais and Leanne Bowler is claimed at £440 and £430 per hour, respectively. They are both described as "*Senior Associates*" on Fladgate's website. Fladgate's terms of engagement quoted lower rates of £370-420 for Senior Associates.

    (e) The statement of costs supporting the S33 Application, dated 22 August 2022, also appears to be misleading. Ms Bowler's work, as a Grade B fee earner, was claimed at £400 per hour and her work as a Grade A fee earner was claimed at £400 and £430 per hour. Neither the Tribunal nor the respondents have been made aware of any increase in Fladgate's rates.

    (f) The applicants' statements of costs were signed by partners at Fladgate, Janani Puvi and Adam Gross. Their response to the points of dispute in the S33 Application were drafted by Kings Counsel, Mr Robert Marvin KC and stated there was no breach of the indemnity principle. Barring any evidence of an increase in Fladgate's charging rates, the statements of costs were inaccurate, and the applicants' legal representatives misled both the Tribunal and the respondents.

    (g) The respondents believe metadata evidence is necessary to establish any increase in FF's rates.

    (h) In ***Gempride v Jagit Bamrha & Law Lords of London Ltd [2018] EWCA Civ 1367***, the Court of Appeal imposed a penalty for mis-certification of a bill and referred to in Henry LJ's

concurring judgment at pages 575g-576c of ***Bailey v IBC Vehicles Ltd [1998] EWCA Civ 566:***
"*The court can (and should unless there is evidence to the contrary) assume that a solicitor's signature to a bill of costs shows that the indemnity principle has not been offended…*
…[T]he other side of a presumption of trust afforded to the signature of an officer of the court must be that breach of that trust should be treated as a most serious disciplinary offence."

(i) Where there has been misconduct by a legal representative, the Court can disallow all or part of the costs being assessed (CPR rule 44.11). The Court also has the power to make a wasted costs order under section 51(6) of the Senior Courts Act 1981 and CPR rule 46.8.

(j) The R13 Application should be struck out due to the apparent signing of inaccurate costs statements, apparent breach of the indemnity principle and apparent misleading of the Tribunal and respondents. Further, the respondent should be awarded their costs of the S33 Application on an indemnity basis and the applicant should be ordered to return the solicitors' costs paid pursuant to the S33 Decision (£8,401.20 including VAT).

(k) Alternatively, the R13 application should be dismissed for lack of credible evidence and no due consideration of to proportionality or the overriding objective. Ms Puvi of Fladgate acknowledged her clients were determined to seek their costs in a telephone conversation with the respondents' solicitor.

(l) At no point did the respondents fail to engage with the applicants' claim for s.33 costs. A paying party cannot be expected to pay substantial costs without a detailed breakdown. The respondents' solicitors requested this in emails to the applicants' solicitors dated 01 and 22 June 2022. The costs information supplied was inadequate and the detailed breakdown was not supplied until 22 August 2022, when a statement of costs was served pursuant to directions in the S33 Application.

(m) The applicants' solicitors provided a copy of their valuer's invoice (£14,000 plus VAT) on 05 May 2022. The respondents considered this excessive and offered £5,000 plus VAT on 01 and 15 June 2022. The applicants were unwilling to negotiate, and the fee was reduced to £11,000 plus VAT in the S33 Decision, being a reduction of 22%.

(n) The applicants' offer to accept 75% of their legal costs was contingent on the respondents paying the valuation fee in full and equated to £26,992.23. The total sum allowed in the S33 Decision (£21,600) was 20% lower than this figure. The respondents acted in reasonably in rejecting this "*final offer*". They could not make a counteroffer without a detailed breakdown of the applicants' costs.

(o) The first s.13 notice was acknowledged to be invalid as two of the participating leaseholders were associated companies, leaving the respondents' short of qualifying tenants. These companies ceased

to be associated shortly thereafter. The second notice included an incorrect schedule and the respondents' solicitors also accepted this was invalid. The third notice was valid, but Ms Puvi requested more and more information about the companies in question. This explains the precondition in the email dated 11 August 2022. It took several weeks of arguing before Ms Puvi would accept the two companies were no longer associated.

(p) None of the arguments advanced in their points of dispute justify a finding of unreasonable conduct.

(q) They requested an extension for their statement of case in the S33 Application, due to a combination of holiday and illness on the part of their solicitor. This request was made 10 days before the deadline and was granted by the Tribunal.

(r) The correspondence with the Tribunal, regarding the hearing bundle in the S33 Application, arose because the parties were unable to agree the contents. Ms Puvi unilaterally filed a bundle/index with the Tribunal, without reference to the respondents. The parties subsequently agreed a condensed bundle.

(t) The applicants fail on the first stage of the ***Willow Court*** test. The parties were unable to agree the s.33 costs, so these were necessarily determined by the Tribunal. There was a reasonable explanation for the conduct complained of, being the applicants' delay in supplying the detailed costs breakdown. Further, the sum allowed by the Tribunal was 20% lower than the applicants' final offer.

(u) The only unreasonable conduct was on the part of the applicants who failed to provide a detailed breakdown of their costs, despite two requests, and "*manufactured an application without any due consideration to the overriding objective or proportionality*." Provided in August 2022.

(v) If unreasonable conduct is found, then no order for costs should be made given the applicants' unreasonable and disproportionate pursuit of the R13 Application (the second stage of ***Willow Court***).

(w) The applicants' costs of the S33 Application and R13 Application total £25,143.50. These exceed the costs allowed on the S33 Application (£21,600) and "*are not only wholly disproportionate but simply outrageous*." By way of comparison, assessment costs in the Courts are restricted to £1,500 plus VAT and any court fees for bills less than £75,000.

(x) Their statement in response also includes points of dispute to the applicants' costs statements for the R13 Application.

23. The applicants responded in a 7-page reply dated 23 February 2023. In brief, they contend:

(a) The respondents are trying to relitigate the S33 Decision in which I accepted the certificate on the applicants' costs statement and was satisfied there was no breach of the indemnity principle. There has been no application to set aside that decision under r.51(1) of the 2013 Rules.

(b) The Tribunal has no jurisdiction to order payment or repayment of s.33 costs. Rather it can only determine the amount of these costs.

(c) The respondents have not applied for costs order under r.13(1)(b) (the reply pre-dated the application made on 28 February 2023).

(d) There was no breach of the indemnity principle, as

  (i) Fladgate's terms of engagement refer to "*current*" basic hourly rates and it is implicit these rates are subject to change. They go on to state the rates "*will vary from time to time*".

  (ii) Fladgate's hourly rates increased in April 2022. The applicants were informed of the new rates on other matters in which they instructed FF and have confirmed they were aware of these rates and accepted them.

  (ii) The solicitors that signed the costs statements are officer of the court and are/were/would have been fully aware of their obligations.

  (iii) The applicants confirm their claim for s.33 costs did not breach the indemnity principle and the Tribunal were not misled.

  (iv) The same position applies to the costs statements signed in connection with the R13 Application. The Tribunal is invited to find the applicants' solicitor's signature is sufficient proof the indemnity principle has not been breached.

(e) They do not accept they failed to provide a sufficient clear breakdown to enable the applicants to make a sensible offer in respect of the s.33 costs.

(f) The correspondence reveals the respondents were motivated by a desire to 'park' the s.33 costs until further s.13 notices had been served. This is not a case where the parties simply could not agree the level of these costs. The respondents' strategy to defer payment amount to an abuse of the Tribunal's no costs regime and was unreasonable.

(g) The applicants' costs of the S33 Application were not excessive. The involvement of a KC was justified, and the overall level of costs reflects the numerous unreasonable points advanced by the respondents' advisers. If the Tribunal takes any issue with the with the level of costs, this does defeat the R13 Application *per se*. Rather, this can be addressed by an assessment of these costs.

The Tribunal's decision

24. The application to strike out the R13 Application is dismissed.

25. The R13 Application is dismissed save the respondents must reimburse the Tribunal application fee (£100) paid by the applicants on the S33 Application.

Reasons for the Tribunal's decision

26. The respondents seek an order striking out the R13 Application but have not referred to specific provisions in the 2013 Rules. Presumably, they rely on r.9(3)(d). They allege abuse of process based on the certificates on the applicant's costs statements and an apparent breach of the indemnity principle. I accepted the certificate on original costs statement and decided there was no breach of the indemnity principle in the S33 Decision. That decision stands and there is no basis to reopen it. There is no application to set aside that decision and I have already refused the respondents' application to appeal out of time.

27. The respondents also rely on the apparent disparity between the costs estimate in FF's terms of engagement and the costs claimed under s.33(1), but this is not a like for like comparison. The estimate only covered FF's "*charges and expenses for reviewing and considering the validity of the notice served on behalf of the leaseholders of the above property, to include a conference call with your valuation surveyor*". It did not cover the next steps, including consideration of the valuation and then drafting and serving the counter-notice, which all formed part of the s.33(1) costs.

28. The respondents allege the costs statements served in the R13 Application are misleading, as the rates claimed are above those detailed in the terms of engagement. I disagree. It is common practice for solicitors to review their charging rates in April of each year. I accept FF increased their rates in April 2022 and the applicants agreed this increase. There is no need for metadata evidence. I accept the solicitors' certificates on the R13 costs statements am satisfied there is no breach of the indemnity principle.

29. The R13 Application is neither an abuse of process nor spurious and the application to strike out is dismissed.

30. The Tribunal has no jurisdiction to order payment or a refund of s.33 costs. Rather, it can only determine those costs under s.91(2)(e).

31. The issue of proportionality, as raised by the respondents, is only relevant when dealing with the third stage in ***Willow Court***.

32. I turn now to the R13 Application. The threshold for making a Rule 13(1)(b) costs order is a high one. As stated at paragraph 24 of ***Willow Court*** *"…the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level.*"

33. The starting point is whether the respondents acted unreasonably in defending or conducting proceedings. The proceedings in question are the S33 Application. The applicants complain of an unreasonable approach to pre-action correspondence. The first and obvious point is this conduct pre-dated the S33 Application. As such it was not conduct of the proceedings. However, it may be relevant as evidence of the respondents' approach to the proceedings.

34. I have carefully considered the pre-action correspondence. Fladgate originally supplied details of their costs in a letter 09 May 2022, attaching copy invoices. The narrative on each invoice was brief and it was reasonable for the respondents to request a breakdown. Fladgate supplied time printouts on 14 June 2022, but these only included general details of the work carried out. They did not identify individual tasks. Again, it was reasonable for the respondents to request a more detailed breakdown. This was not produced until 22 August 2022, after the S33 Application was submitted.

35. The respondents made a pre-action offer in respect of the valuation fee, albeit very low. There was nothing unreasonable about their failure to make a pre-action offer for legal fees, given the limited information available at that time.

36. It is clear from this correspondence the respondents (or their solicitors) wanted to 'park' the s.33 costs until terms had been agreed on the second s.13 notice. There is nothing unreasonable about this. S.33 costs are normally addressed towards the end of an enfranchisement claim, once terms of acquisition are agreed. They are normally paid on completion of the freehold purchase. In this case, the original s.13 notice was invalid. The respondents suggested that costs on that notice be dealt with once terms were agreed on the second notice. That way, all costs could be addressed at the same time. This was reasonable. As it transpired, the second notice was also invalid. However, this does not alter the merits of the respondents" suggestion.

37. The applicants chose to pursue the s.33 costs on the original notice rather than deal with all costs at the same time, as was their prerogative. They submitted the S33 Application on 29 July 2022 and the costs were determined on 15 November 2022, less than four months later.

38. Fladgate supplied a detailed breakdown of their costs on 22 August 2022. From that point on, the respondents had sufficient information to make an offer. They failed to do so, and this may have been motivated by a desire to delay payment. However, there is nothing in s.33 or the 2013

Rules, which requires a paying party to make an offer. Rather, they can insist on a Tribunal determination as the respondents did. I determined the s.33 costs in the total sum of £21,600. being approximately 78% of the original sum claimed (£27,646.92). The respondents secured a reduction of approximately £6,000 by insisting on the determination and were vindicated in their approach. There was nothing unreasonable about their failure to make an offer between 22 August 2022 and the S33 Decision.

39. Equally, the respondents did not act unreasonably in failing to accept the applicants' WPSATC offer. That offer was made in a letter from Fladgate dated 12 July 2022, which stated the applicants would accept 75% of their legal costs if the valuation fee was paid in full. By my calculations, this equates to £24,935.19, being 75% of £10,846.92 (£8,135.19) and the valuation fee (£16,800). However, the offer letter referred to £8,425.19 plus VAT for legal fees and the valuation fee of £14,000 plus VAT, which makes a total of £26,910.23. The sum allowed in the S33 Decision (£21,600) was significantly less than both figures.

40. Fladgate's letter of 12 July 2022 gave the impression the WPSATC offer was not negotiable. It was stated to be made "*in a final attempt to settle this matter*" and concluded "*This offer is open for acceptance for 7 days from the date of this letter. Should it not be accepted, our clients will be applying to the Tribunal for a determination of costs without further reference to you.*". Given these terms, there was nothing unreasonable in the respondents' failure to make a counteroffer.

41. The respondents' points of dispute were wide ranging, and I rejected most. However, none (including the competitive tendering/fixed fee point) were so hopeless they were bound to fail. Some of the points succeeded and the respondents achieved a total reduction of approximately 22%. Given this outcome, the respondents' approach to the points of dispute was not unreasonable.

42. The respondents did not act unreasonably in seeking an extension for service of their statement of case (in the S33 Application). The application was made to the Tribunal in good time and was granted. Equally, the respondents did not act unreasonably in corresponding with the Tribunal regarding the determination bundle/index. This had not been agreed and they were entitled to object to the contents.

43. The applicants have not established any unreasonable conduct on the part of respondents. They have not satisfied the first stage of the ***Willow Court*** guidance and it is unnecessary for the Tribunal to go on and consider the second and third stages. The R13 Application is dismissed save the Tribunal orders reimbursement of the £100 application fee pursuant to r.13(2). It was reasonable for the applicants to make the S33 Application, given their costs had not been agreed and

should recoup the Tribunal fee. The respondents must reimburse the £100 fee within 28 days of this decision.

Name: Judge Donegan Date: 27 March 2023

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.

Appendix of relevant legislation

The Tribunals, Courts and Enforcement Act 2007

Section 29 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.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Overriding objective and parties' obligation to co-operate with the Tribunal

3. - (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 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) co-operate with the Tribunal generally.

...

Striking out a party's case

9. - (1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal –

   (a) does not have jurisdiction in relation to the proceedings or case or that part of them; and

   (b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.

(3) The Tribunal must strike out the whole or part of the proceedings or case if -

   a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;

   (b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;

   (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;

   (d) the Tribunal considers the proceedings or case (or part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or

   (e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding

(4) The Tribunal may not strike out the whole or a part of the proceedings or case under paragraph (2) or paragraph 3(b) to (e)

without first giving the parties an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings or case, or part of them, have been struck out under paragraph (1) or (3)(a), the applicant may apply for the proceedings or case, or part of it, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.

(7) This rule applies to a respondent as it applies to an applicant except that –

(a) a reference to the striking out of the proceedings or case or part of them is to be read as a reference to the barring of the respondent from taking further part in the proceedings or part of them; and

(b) a reference to an application for the reinstatement of proceedings or case or part of them which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings; or part of them.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent, and may summarily determine any or all issues against that respondent.

…

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 and land 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.

…

(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 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. The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

...