



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

Case References : **LON/00BK/LSC/2022/0215**

Property : **11 Albert Hall Mansions, Kensington
Gore London SW7 2AL**

Applicant : **Blocks 1-3 Albert Hall Mansions RTM
Company Limited**

Representative : **Mr Adam Rosenthal KC instructed by
Comptons**

Respondent : **Hendaya Al Taybe
Sayed Omar Othman Almurdhi**

Representative : **Charles Russell Speechlys LLP**

**Type of
Application** : **Transfer from County Court
Reasonableness and payability of
Service charges under s27A of the
Landlord and Tenant Act 1985**

Tribunal Members : **Tribunal Judge Roger Cohen
Tribunal Member Anthony Harris LLM
FRICS FCI Arb**

Date of hearing : **Decision of Tribunal Members on the
papers**

Date of Decision : **5 April 2023**

DECISION

The Application

- 1 This decision is concerned with an application by the Applicant for an order for costs under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“**the Rules**”).
- 2 The Applicant applies for its costs of the proceedings before the tribunal. The application therefore relates to the period from the referral of the dispute by the County Court up to and including the decision of the tribunal. The costs of the proceedings in the County Court are a matter for the County Court to decide.
- 3 The Applicant seeks an order that the Respondents do pay to the Applicant its costs to be assessed on the standard basis. Leading counsel for the Applicant provided a written submission of 24 paragraphs in support of the application. There is a suggestion in the final sentence of that submission that an order for assessment on the indemnity basis would be appropriate.
- 4 As the Applicant’s submission recognises, the power of the tribunal to award costs is found in Rule 13 which provides that this tribunal may make an order in respect of costs in a leasehold case only if a person has acted unreasonably in bringing, defending or conducting proceedings. This case is a leasehold case.
- 5 The Applicant’s submission in support was met by a submission in writing of behalf of the Respondents, to which the Applicant replied. New documents were produced by the parties.
- 6 Having received these detailed written submissions the tribunal reached a case management decision to proceed to determine the costs application without hearing oral submissions. Thus, this decision was determined on the papers but at a face - to - face hearing attended only by the members of the tribunal who conducted the substantive hearing.

Case law

- 7 The Applicant helpfully refers the tribunal to the leading case in relation to Rule 13 which is *Willow Court Management Co (1985) Limited v Alexander* [2016] L&TR 34. This was a decision of a the Upper Tribunal Lands Chamber (constituted by Martin Rodger QC , Deputy Chamber President and Siobhan McGrath, Chamber President, First-tier Tribunal (Property Chamber).
- 8 At paragraph 24 of its decision 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?”

9 At paragraph 32 the Upper Tribunal stated:

“In the context of [Rule 13\(1\)\(b\)](#) we consider that the fact that a party acts without legal advice is relevant at the first stage of the inquiry. When considering objectively whether a party has acted reasonably or not, the question is whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way in which that party acted. In making that assessment it would be wrong, we consider, to assume a greater degree of legal knowledge or familiarity with the procedures of the tribunal and the conduct of proceedings before it, than is in fact possessed by the party whose conduct is under consideration. The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings.”

Finally, at paragraph 35 the Upper Tribunal dealt with circumstances where 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. The Upper Tribunal stated

“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.”

The tribunal has had in mind the guidance in *Willow Court* together with the written submissions of counsel for both parties and the supporting documentation.

10 The principal issue raised by the application for costs is whether the Respondents acted unreasonably in defending or conducting the proceedings brought by the Applicant referred to the tribunal by the County Court.

The substantive issues

- 11 The substantive issues for this tribunal to decide were as follows:
- (a) what, on the construction of the lease, was the proper *apportionment* of service charge expenses incurred by the Applicant payable by the Respondents;
 - (b) if the Respondents succeeded on that first issue, were the Respondents estopped by convention from relying on that construction;
 - (c) were the charges for electricity recoverable? and
 - (d) were charges raised for a number of other items each reasonable?
- 12 At the outset of the hearing, the Respondents, through their Counsel, withdrew their case concerning item 11(d), the challenge to specific items of service charge.
- 13 There was also a counterclaim that was not referred by the County Court to the tribunal.
- 14 The amount in issue was £30,855 plus interest.
- 15 The hearing was listed for two days. No doubt in part because of the withdrawal of the issues grouped together as item 11(d) meant that time was saved the hearing finished in one day.

The outcome

- 16 The outcome, issue by issue, was as follows:
- (a) the Applicant succeeded on the construction issue; and
 - (b) therefore, the estoppel by convention issue did not have to be decided.
 - (c) The tribunal found that the electricity charges were recoverable.
- 17 In support of its contention that the Respondents acted unreasonably in defending and conducting the proceedings, the Applicant made the following points. First that the claim was issued after lengthy pre-action correspondence, including requests on behalf of the Respondents for documents. Secondly, the Applicant supplied the documents requested. Thirdly, the defence served by the Respondents whilst the case was being progressed in the County Court read as if none of that correspondence had taken place. Fourthly, at the outset of the hearing the Respondents' Counsel abandoned all challenges

apart from the apportionment issue and the failure to consult about the electricity supply agreement.

18 The Applicant complains that whilst the Respondents said that they abandoned issues in the light of recent evidence and the Applicant's skeleton, that reason did not stand up to scrutiny.

19 In this regard the Applicant says that:

- (a) the Respondents were provided with everything they needed to assess whether the changes were payable before service of the Claim;
- (b) the disclosure showed that the changes were due;
- (c) the Respondents were legally represented;
- (d) the Second Respondent chose to wait until the hearing was about to begin to withdraw the defence except for the issues left to be determined; and
- (e) The defence was vague and unparticularised.

20 That is not the end of the matter. The Applicant refers to the following evidence given by the Second Respondent at the hearing. The Second Respondent said that he was concerned about the integrity of the people who ran the Applicant. The Second Respondent referred to a "conflict of interest" which has not been explained.

21 The Applicant says that the obvious interference is that the Second Respondent was taking this course to cause inconvenience and expense to the Applicant because of ulterior grievances.

22 The Applicant accepts that the apportionment issue raised an arguable case. However, it says that the motive for contesting the issue was improper. The Applicant relies also on the Respondents failure to accept a Part 36 offer by the Applicant to settle the case including the counterclaim.

23 The Applicant submits that a reasonable person would not have pursued the case to a final hearing as the Respondents did. The reason stated by the Second Respondent was not reasonable.

24 The tribunal has considered the Respondents' submissions in answer and the Applicant's submissions in reply.

25 The Applicant's criticisms of the Respondents' actions fall into two categories. First, there are complaints concerning the engagement by the Respondents with the claim process; seeking disclosure, apparently disregarding the documents disclosed, abandonment of issues on the day of the hearing and a vague account of their case.

These are objective matters which can be assessed if it is relevant to do so. Secondly, the Applicant complains about the Respondents' motive. That is a subjective matter.

- 26 The tribunal's assessment, based on the documents it read in coming to its substantive decision is that the complaints made by the Applicant as to the objective actions of the Respondents do not amount to unreasonableness. The specific items of service charge challenged by the Respondents were typical of disputes of this kind which come to this tribunal. The fact that the dispute arose only to be abandoned by the tenant is neither exceptional nor unreasonable in itself.
- 27 The tribunal is mindful that parties in tribunal proceedings should not be discouraged in abandoning unsustainable issues. That is not to say that the late abandonment of a case or a part of a case is to be preferred. It is always helpful where the true issues in a case are identified at an early stage. However, it does not follow that the late withdrawal of an issue from the tribunal is unreasonable such that costs should be awarded. The tribunal's impression is that if the only matters in dispute had been the specific service charge items that were ultimately withdrawn, the parties would not have retained leading counsel and experienced junior counsel. It would have been an unremarkable service charge dispute.
- 28 Whilst the specific charge complaints were typical of service charge disputes determined by this tribunal, the apportionment issue was of a different character. This involved a dispute as to the true construction of the lease where the contentions of both parties (as the Applicant accepts) were arguable, albeit that the tribunal came to a clear view in favour of the Applicant.
- 29 The apportionment issue did not require a review of detail as to the service charge costs incurred. It turned on the language of the lease and legal submissions as to the correct approach to the construction of the lease as a matter of law. The tribunal also heard submissions as to any estoppel by convention. The issue of estoppel by convention was part and parcel of the apportionment issue. The complaints made by the Applicant as to the objective engagement by the Respondents with the process did not have any bearing on the conduct of the apportionment issue. The electricity supply point was a relatively short issue which took up little time.
- 30 The tribunal's assessment is that, apart from any question of the Respondents' motive, had the specific service charge items been withdrawn at an earlier stage, the hearing as to the apportionment and electricity supply issues would have gone ahead with the parties represented as they were at the substantive hearing. In other words had the withdrawn issues never been pursued at all, the scope of the proceedings before the tribunal would not have been much different from the proceedings as they were.

- 31 The effect of the late withdrawal fell short of being vexatious behaviour or conduct designed to harass the Applicant.
- 32 The Respondents it seems did take account of the documents disclosed to them, albeit late in the day.
- 33 The extra ingredient on which the Applicant relies is the alleged improper motive of the Respondents, based on the evidence of the Second Respondent. In his evidence, the Second Respondent said he was legally qualified (not in the UK) and had a legal practice. English was not his first language, nor is he permanently resident in the UK. There was a wider dispute between the parties. There was a counterclaim which was not before the tribunal to decide. The tribunal also notes that the motive for seeking a judicial decision on an issue may be other than a need or desire to have the issue decided for its own sake. The tribunal rejects the Applicant's submission that the Respondents sought to cause expense and inconvenience to the Applicant for an ulterior (and improper) purpose.
- 34 The motive for raising an issue may be principled or pragmatic; proper or improper. The tribunal's assessment is that, in this case, there was a dispute between the parties as the amounts payable by the Respondents for service charges. The Second Respondent in particular was concerned that he was being charged too much. That was the practical issue for the tribunal. Although specific items were not left with the tribunal for decision, the underlying basis of apportionment remained in dispute. The Second Respondent used strong language in calling into question the "integrity" of people concerned with the Applicant. What the Second Respondent was saying was that he believed he was being overcharged.
- 35 The tribunal is here to determine just such issues. In the tribunal's judgment, the Respondents were not motivated by an improper motive and the approach by the Respondents to the apportionment issue was not "infected" to quote the Applicant's costs submission by an improper motive.
- 36 The Applicant relied also on the Respondents' failure to accept a Part 36 offer. The impact if any on the costs in the County Court of that matter is for the County Court to determine. This tribunal cannot deal with an offer including the counterclaim.
- 37 Accordingly, the tribunal finds that the Applicant's application for costs fails.

Name: Tribunal Judge Roger Cohen
Tribunal Member Anthony Harris

Date: 5 April 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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. Under present Covid 19 restrictions applications must be made by email to rplondon@justice.gov.uk.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).