FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CQ/OAF/2022/0010**
Property	**:**	**45 Cradley Park Road, Netherton, Dudley, DY2 9SP**
Applicant	**:**	**Donald Chilton and Lesley Sarah Chilton**
Representative	**:**	**Midland Valuations Limited**
Respondent	**:**	**Bush Building Maintenance Limited**
Representative	**:**	**Edell Jones & Lessers Solicitors**
Type of Application	**:**	**Application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Member	**:**	**Judge M K Gandham**
Date of Hearing	**:**	**Paper determination**
Date of Decision	**:**	**19 April 2023**

DECISION

Introduction

1. On 22 August 2022, the Tribunal received two applications from Mr Donald Chilton and Mrs Lesley Sarah Chilton ('the Applicants') under the Leasehold Reform Act 1967 ('the Act'). Those applications related to the determination of the price payable under section 21(1)(a) of the Act and the reasonable costs payable under section 21(1)(ba) of the Act, in respect of the property known as 45 Cradley Park Road, Netherton, Dudley, DY2 9SP ('the Property').

2. Both of those applications were subsequently withdrawn, following agreement between the parties; however, in relation to the application in respect of the determination of the price, the Applicants had also made a submission for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the Rules').

3. Directions in respect of the Rule 13 application were issued by the Tribunal on 10 October 2022 and 31 October 2022. Mr Joylon Moore of Midlands Valuations Limited ('the Applicants' Representative') provided a written submission on behalf of the Applicants on 21 October 2022 and an Additional Submission on 14 November 2022. A Statement in Reply was received from Edell Jones & Lesser's Solicitors ('the Respondent's Representative') on 30 November 2022.

4. Neither party requested an oral hearing. Accordingly, this matter has been decided on the written submissions.

The Law

5. The limited powers for the Tribunal to award costs are contained within Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, as amended. The relevant parts of that rule are set out as follows:

> ***13 Orders for costs, reimbursement of fees and interest on costs***
>
> *(1) Subject to paragraph (1ZA), 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;*
>
> ...
>
> *(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, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 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.

6. Unlike CPR 44.2(2)(a), once a power to make an order for costs is engaged, there is no general rule that an unsuccessful party will be ordered to pay the costs of the successful party. The only general rule is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides that "*the relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid*", subject to the tribunal's procedural rules.

7. The Upper Tribunal in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 0290 (LC), ('*Willow Court*') provided guidance on the correct approach to costs claims under Rule 13 and suggested that a three-stage process should be adopted when dealing with such applications:

- firstly, the tribunal should consider whether the person against whom an order is sought has behaved unreasonably;
- secondly, the tribunal must consider whether, in the light of the unreasonable conduct it has found, it ought to make an order for costs or not; and
- finally, it should decide what the terms of that order should be.

The Upper Tribunal discussed the assessment of unreasonable behaviour and considered that it required a "*value judgement"* and should not be set at an "*unrealistic level*". It saw no reason to depart from guidance given in *Ridehalgh v Horsefield* [1994] Ch 205 ('*Ridehalgh*'), where the expression of "*unreasonable"* conduct was defined as:

> *"… 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 the practitioner's judgement, but it is not unreasonable.*"

The Upper Tribunal also expressed its thought that, alone, it would be improbable that the failure of a party to adequately prepare for a hearing, to adduce proper evidence for their case, to state a case clearly or to seek a wholly unrealistic or unachievable outcome, would justify the making of an order under Rule 13(1)(b).

Submissions

Applicants' submissions

8. Mr Moore confirmed, on behalf of the Applicants, that the Applicants served a notice of claim under the Act to acquire the freehold interest in the Property on 3 February 2022, with applications being made to the Tribunal, on 18 August 2022, for a determination of both the price payable and the extent of the landlord's reasonable costs.

9. Despite the timetable detailed in the directions issued by the Tribunal on 2 September 2022, and those directions confirming that they were formal orders which "*must be complied with*", Mr Moore stated that the Respondent failed to exchange its valuation by 23 September 2022, so was in direct breach of the directions. In addition, Mr Moore submitted that, without the Respondent's

valuation, he was unable to see which parts of his calculation were agreed and which were not.

10. Mr Moore stated that, as he had still not received the Respondent's valuation 10 days later, he submitted his bundle on 5 October 2022, to ensure that it was lodged before 7 October 2022 (the deadline for exchange and lodgement as set out in the directions).

11. On 7 October 2022, Mr Moore stated that he received an email from the Respondent's Representative which stated that Mr Moore's valuation figure of £6,254.00 had been agreed. [A copy of the email was appended to his submission.]

12. Mr Moore submitted that it was wholly unreasonable of the Respondent to have, firstly, ignored the directions regarding the exchange of valuations and, secondly, to have failed to agree terms until the deadline for submitting the bundle. Mr Moore suggested that, in doing so, the Respondent would have been aware that the Applicants would have had to incur professional costs in preparing the bundle. Mr Moore also submitted that, as the only correspondence received from the Respondent's Representative was the email agreeing terms, there was nothing to suggest that there had ever been any fundamental disagreement in the terms of the valuation which could have been the cause of any delay in resolving the matter sooner.

13. In the Additional Submission, Mr Moore stated that the conduct of the Respondent had caused the Applicants to incur unnecessary costs and that it was "*very clear*" that the behaviour of the Respondent did meet the standard of conduct threshold set out under *Willow Court*. Accordingly, he requested that the Tribunal make an award of costs under Rule 13 (1)(b)

14. Mr Moore had detailed the costs of preparing the submission for the Tribunal as £562.50 (plus VAT) with a cost of £30 (plus VAT) for administrative support in collating evidence and producing the bundle.

Respondent's submissions

15. The Respondent's Representative confirmed that the facts detailed in the written submission made by the Applicants was not disputed and that an apology was due to both the Tribunal and the Applicants for the Respondent's valuer's failure to provide the valuation calculation in accordance with the directions.

16. The Respondent's Representative stated that, although this had been an oversight, there was no guarantee that, had the calculation been provided earlier, the price would have been agreed any sooner. They submitted that this was because the Applicants' Representative had made no effort to negotiate their position with the Respondent's valuer either before or after issuing the application to the Tribunal.

17. In relation to the costs application, the Respondent's Representative stated that, by his own admission, the Applicants' Representative did not need to spend any time determining which parts of his valuation were agreed. As such, he was simply able to reissue his original valuation in the bundle. In addition, the Respondent's Representative submitted that any evidence required to produce the Applicants' valuation would have already been paid for – the only additional expense being the time required for any administrative support in producing the bundle.

18. As such, the Respondent's Representative requested that, even if the Tribunal found that the Respondent had acted unreasonably, that the Tribunal should exercise its discretion not to make an order for costs.

The Tribunal's Determination

19. The Tribunal considered all of the evidence submitted and briefly summarised above.

20. The Tribunal was mindful of the guidance of the Upper Tribunal on the correct approach to costs claimed under Rule 13 and, also, that the Tribunal could only make an order in respect of costs under Rule 13(1)(b) if a person had acted "*unreasonably in bringing, defending or conducting proceedings*".

21. In relation to the three stage test set out in Willow Court, the Tribunal, firstly, considered whether the actions of the Respondent in their conduct of the proceedings was unreasonable. These actions related to the Respondent's failure to exchange valuations in accordance with the directions and their agreement to the Applicants' valuation (without explanation) on the day that the hearing bundle needed to be lodged, leading to the withdrawal of that application at a late stage.

22. In relation to the first of these matters, the directions clearly set out the timeline for the exchange of valuations and the Tribunal noted that the Respondent's only explanation for failing to provide a valuation in time was due to an "*oversight*". The Tribunal finds this to be a wholly unsatisfactory response, especially since the email to the Applicant's Representative on 7 October 2022 did not refer to such an oversight and, had the failure simply been an oversight, the Respondent could have contacted the Tribunal to obtain an extension of time. In addition, although the Statement in Reply from the Respondent's Representative referenced that an apology was due to both the Tribunal and the Applicants for this error, no such apology was actually contained within the statement.

23. With regard to the agreement of the Applicants' valuation on the day the bundle needed to be lodged and subsequent withdrawal of the application, the Tribunal, again, took into account the view of the Upper Tribunal in the *Willow Court* decision.

24. In relation to the general withdrawal of claims, at paragraph 143, the Upper Tribunal stated:

> "*It is legally erroneous to take the view that it is unreasonable conduct for claimants in the Property Chamber to withdraw claims or that, if they do, they should be made liable to pay the costs of the proceedings. Claimants ought not to be deterred from dropping claims by the prospect of an order for costs on withdrawal, when such an order might well not be made against them if they fight on to a full hearing and fail.*"

25. In making this comment, the Upper Tribunal noted the observation of Mummery LJ in the decision of the Court of Appeal in *McPherson v BNP Paribas* [2004] EWCA Civ 569, which concerned Rule 14 of the Employment Tribunal (Constitutional and Rules of Procedure) Regulations 2001. In the last line of paragraph 28 of that decision (which was set out in *Willow Court*) Mummery LJ stated:

> "*… 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*."

26. As such, the Tribunal considers that, generally, late concessions and withdrawal of claims should not, without something more, be a marker of unreasonableness, opening a party up to the possibility of being subject to a costs order.

27. In this application, however, the Tribunal considered that the Respondent's behaviour was *something more*. The Respondent had failed to provide any reason as to why the Applicants' valuation was initially disputed in either its correspondence to the Applicants' Representative or in its Statement of Reply to the Tribunal, nor was any explanation provided as to why the valuation was only agreed on the day the bundle was to be lodged with the Tribunal.

28. The Tribunal finds that the failure to provide any reason for the late agreement of the valuation, together with the Respondent's earlier failure to comply with the Tribunal's directions without a satisfactory explanation, does amount to "*unreasonable*" conduct, as it fails the "*acid test*" set out in *Ridehalgh*.

29. Having found the Respondent's conduct to be unreasonable, the next question for the Tribunal was to consider whether, in light of that unreasonable conduct, it ought to make an order for costs. In making that decision, the Upper Tribunal confirmed that there did not need to be a causal link between the unreasonable behaviour and the order for costs, and that the matters to be taken into account included the nature, extent and consequences of the unreasonable conduct.

30. With regard to the general nature and extent of the unreasonable conduct, this related to a complete disregard of the Tribunal's directions. The consequence of this conduct resulted in the Applicants' Representative being unable to determine which parts of his calculation were agreed and which were not and him producing a bundle which may not have been required if the valuation had been agreed earlier.

31. In deciding whether those factors should have resulted in an award for costs, the Tribunal noted the following:

    (i) the Applicants had made the application to the Tribunal and the Applicants' Representative, in accordance with the Tribunal's directions, would have needed to produce a valuation based on his own research and evidence;
    (ii) no issues in respect of the valuation had been raised by the Respondent's Representative, so the Applicants' Representative had not been required to amend his previous valuation when lodging the bundle;
    (iii) the only additional costs in relation to the bundle related to administrative support in the collation of the bundle, which are not generally recoverable when assessing costs; and
    (iv) rather than lodging the bundle, the Applicants' Representative could have contacted the Tribunal to extend the deadline for the production of the same and requested the enforcement of the directions upon the Respondent.

32. Having considered these factors, the Tribunal does not consider that the nature, extent and the consequences of the unreasonable conduct are such that it ought to make an order for costs under Rule 13(1)(b).

33. The Tribunal may, however, under Rule 13(2) make an order (on an application or on its own initiative –Rule 13(3)) requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party.

34. In this matter, the Applicants' valuation had been accepted without challenge by the Respondents, leading to the eventual withdrawal of the application. In those circumstances, the Tribunal considers that an order under Rule 13(2) is appropriate in respect of that application and **hereby orders** that the Respondent reimburse to the Applicants the sum of £100, being the relevant application fee.

Appeal Provisions

35. 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).

M. K. GANDHAM
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Judge M. K. Gandham