FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KF/LSC/2022/0074**
Property	**:**	**Flat 1, 140 York Road, Southend-on-Sea SS1 2EA**
Applicant	**:**	**Ivana Baltic** **Unrepresented**
Respondent	**:**	**Long Term Reversions (Harrogate) Ltd**
Representative	**:**	**J B Leitch Limited**
Type of application	**:**	**Rule 13 costs application**
Tribunal members	**:**	**Judge K Saward** **Miss M. Krisko BSc (EST MAN) FRICS**
Date of decision	**:**	**1 August 2023**

DECISION AND REASONS

Description of determination

This has been a determination by the Tribunal on the papers. A face-to-face hearing was not held because all issues could be determined on paper and no hearing was requested. The application for costs was made by the Respondent on 14 July 2023. The Applicant submitted a response on 31 July 2023.

DECISION OF THE TRIBUNAL

The application for an order that the Applicant pay the Respondent's costs pursuant to rule 13(1) of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 is dismissed.

REASONS

The application

1. The application for costs is made by the Respondent landlord of the Applicant. It follows the decision of the Tribunal on 16 June 2023 concerning the reasonableness of and the liability to pay service charges in respect of management fees and insurance premiums for the service charge years 2017/18 to 2021/22.

2. In its decision, the Tribunal determined to strike out the Applicant's claim for service charges levied in respect of buildings insurance and management fees for 2020/21 having already been the subject of a County Court judgment. The Applicant's case made in reference to the Building Safety Act 2022 was also struck out as having no reasonable prospects of success. The Tribunal further determined that the sums charged for buildings insurance over the 4 service charge years 2017/18 to 2021/22 (excluding 2020/21) were reasonably incurred and reasonable as were the management fees for the same periods.

3. The Respondent seeks costs totalling £5,100 (inc VAT) made up of £3,000 legal costs and £2,100 for Counsel's fees. In addition, the sum of £1,085 (inc VAT) is sought for costs of this costs application.

The Law

4. Except to the limited extent provided by rule 13, the Tribunal is normally a "no costs" jurisdiction. The basic power of the Tribunal to award costs is found in section 29 of the Tribunals, Courts and Enforcement Act 2007. This provides that costs shall be in the discretion of the Tribunal subject to (in the case of this Tribunal), The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

5. The limited powers of the Tribunal to award costs are contained within Rule 13 of the 2013 Rules. As the Respondent's application was made on 14 July 2023, it fell within the requisite 28-day period of dispatch of the Tribunal decision to be made within time under rule 13(5).

6. The actual wording of rule 13(1)(b) is important. It specifies that the Tribunal *may* make an order in respect of costs *only* "if a person has acted unreasonably in bringing, defending or conducting proceedings". Under the 2013 Rules, the word "proceedings" means acts undertaken in connection with the application itself and steps taken thereafter (rule 26).

7. Thus, unreasonable conduct is a prerequisite of the power to award costs. The exercise of such power, once established, is then within the discretion of the Tribunal.

8. In making the application, the Respondent cites the Upper Tribunal ("UT") decision of *Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC)); Sinclair v 231 Sussex Gardens Right to Manage*

Limited LRX/99/2015; and Stone v 54 Hogarth Road, London SW5 Management Ltd LRX/88/2015 ("the UT Decision"). The Tribunal is invited to note that the parties to these proceedings were the second case in the UT Decision.

9. The UT Decision gave clear guidance on the principles to be applied in respect of rule 13(1)(b). The UT suggested a sequential three-stage approach. It is not of rigid application as each case will be fact sensitive but provides a helpful framework. It may be summarised as:-

(1) applying an objective standard, has the person acted unreasonably?

(2) if so, should the Tribunal exercise its discretion to make an order for costs?

(3) if so, what should the terms of the order be?

10. Stage 1 is essentially a gateway to stages 2 and 3. In deciding what is meant by acting "unreasonably", the UT followed the approach set out in *Ridehalgh v Horsfield [1994] EWCA* 23 *Civ 40, [1994] Ch 205,* and stated (at 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?".*

11. The UT Decision (at 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. The UT did not go so far as to state that rule 13(1)(b) costs should only be awarded in the most exceptional of cases. However, it is made plain that orders under rule 13(1)(b) are to be reserved for the clearest cases and the bar is a high one.

12. The burden is on the party claiming costs to demonstrate that the other party's conduct has been unreasonable.

Findings of fact

13. The Respondent asserts that the Applicant acted unreasonably in bringing the proceedings to meet stage 1. To support this stance, the Respondent relies upon its attempts to negotiate settlement of the claim.

14. The Respondent's first offer to settle was made on 30 March 2023 in a letter marked 'without prejudice save as to costs' sent by its solicitors to the Applicant. The letter pointed out that the insurance and management fees for 2020/21 had already been determined by the County Court. As such,

they were "not eligible to be challenged again as part of the application and the Tribunal has no jurisdiction over the same". The letter expresses confidence that the Respondent will be wholly successful in responding to the application but is mindful of the obligations on parties to try to resolve their disputes and of the ongoing landlord and tenant relationship. In light of this, the letter proceeds "on a purely commercial basis" to offer settlement of the Applicant's claim in its entirety. If the Applicant admitted the payability and reasonableness of the insurance fees (excluding 2020/21), the Respondent would credit the Applicant's service charge account with £440.94 for 4 years of management fees. Each party was to bear their own costs. A deadline of 3 April 2023 was given.

15. There followed a series of emails between the Applicant and Respondent's solicitors on 31 March 2023. The first email from the Appellant said: "We are happy to discuss your offer further but would need more time". The Respondent's solicitors replied explained that the deadline was set to avoid expense being incurred in drafting their Statement of Case to comply with the Tribunal deadlines and they considered 4 days sufficed. The Applicant offered to raise no objection to the Respondent seeking an extension of time. The solicitors responded on 3 April 2023 to say that the Tribunal had been clear that further extensions were unlikely to be given.

16. The Applicant's email to the solicitors on 3 April 2023 did not respond to the Respondent's offer but asked for the carpet/linoleum in the common area to be replaced and the electrical box to be remedied. In reply the same day, the solicitors stated that the Tribunal had no jurisdiction to make an order of specific performance and no sums for these items had been demanded.

17. The Respondent's solicitors alerted the Applicant on 4 April 2023 that it would draw the Tribunal's attention to the correspondence upon consideration of costs. The Applicant replied: "We are not refusing settlement just the opposite" and requested funds to order and oversee a professionally fitted carpet as a "right step in future negotiations". The solicitors' response reiterated previous points and suggested the Applicant may wish to seek independent legal advice.

18. Subsequently, the Applicant emailed the solicitors on 12 April 2023 to say that the buckling carpet had been removed so that "one matter appears to be resolved" and enquired if the previous offer still stands. It was confirmed on 25 April 2023 that the offer was no longer available, but a second offer was made to credit the £440.94 on different terms.

19. The revised terms required an admission of the reasonableness and payablity of the insurance fees over the 5 disputed years (including 2020/21), and an acceptance that the lease contains requirements to pay yearly rents and maintenance charges. In addition, the offer required the Applicant to agree that there would no longer be a limit from 2023/24 on the previously agreed insurance contribution of £350. Instead, her contribution would be a 20% pursuant to the First Schedule of the lease.

20. By way of clarification, the Respondent advises the Applicant's insurance contribution had been agreed as £350.00 as part of a settlement of previous Tribunal proceedings in 2018.

21. On 25 April 2023, the Applicant indicated willingness to accept the sum of £440.94 but no increase in service charges "when the management and service up to date have been deplorable." Exchanges then took place between the parties. These included a comment from the Applicant on 30 April 2023 that it would be unreasonable to change the £350.00 cap previously agreed on settlement for her building insurance contribution.

22. The solicitors responded to clarify that the insurance charge had not been capped indefinitely but for specific years up to year end 2021/22 and the Respondent had continued to bill "only £350" as a gesture of goodwill.

23. This culminated in a revised third offer on 19 May 2023 to settle on the same terms as the second offer but without the clause providing for future building insurance charges. Owing to the proximity of the hearing listed for 5 June 2023, a deadline of 24 May 2023 was imposed for acceptance.

24. When the Applicant responded on 23 May 2023, after being chased up by the Respondent's solicitors, she appeared to misunderstand the terms of offer believing that the Respondent wished "to retreat from the letter of the lease" and removing provision "referring to the possible acceptance of attending to the matter of electric cover". She comments that "it would take a qualified accountant to decipher this offer".

25. The solicitors sought to provide clarification in 2-pages of email text on 24 May 2023. When settlement was not reached, the Respondent's solicitors sent a 5-page letter to the Applicant on 31 May 2023 setting out the background and re-asserting points made before. The letter responds to issues raised over the carpet and electrical cupboard and then makes an "open offer of settlement". The offer was in essentially the same terms as the first offer, waiving the management fees of £440.94 without any acceptance of liability on the Respondent's part. It is emphasised that the offer does not release the Applicant from any other obligation under the Lease. It suggests again that if the Applicant does not understand the offer or terms then she may wish to obtain independent legal advice.

26. The Respondent says that the Applicant's response of 1 June 2023 was received at 16.46 hours, being after the Respondent's 1pm deadline. The last sentence says: "I feel unable to sign any agreement without independent financial advice."

27. The Respondent maintains that the Applicant behaved unreasonably by failing to productively engage with the Respondent's solicitors to resolve issue once the application was issued or throughout the proceedings. At the same time, the Applicant was unreasonable in her requests. In particular, seeking resolution of matters previously determined in the County Court.

Analysis

28. As set out in the UT Decision (paragraph 28), the first stage does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.

29. The Respondent considers the Applicant acted unreasonably in pursuing charges in respect of buildings insurance and management fees for 2020/21. These charges had already been the subject of determination by the County Court. Judgment had been entered against the Applicant for the building insurance charges but no award was made for the management fee for that year. As this matter had been finally disposed of, with the Applicant already succeeding for the management fee for 2020/21, this part of the claim could not succeed. It had to be struck out. When the Applicant was invited during the hearing to respond to the application to strike out her claim she was fixated on her grievances. No clear explanation was given for pursuing an application in the Tribunal for a matter already resolved in the County Court.

30. The fact that a party acts without legal advice is relevant at stage 1, as per paragraph 32 of the UT Decision. The question is whether a reasonable person in the same circumstances would have acted in the same way as the Applicant. In making that assessment the UT considered that it would be wrong to assume a greater degree of legal knowledge or familiarity with Tribunal procedures and the conduct of proceedings before it, than is in fact possessed by the party whose conduct is under consideration.

31. Applying the objective standard as the Tribunal must, it is difficult to see how a reasonable person in the Applicant's position (i.e., without legal knowledge or advice) would still not realise that the same charges for 2020/21 had already been litigated and resolved. It was unreasonable to persist in this part of the application once alerted to the duplication. The stage 1 test is met on this point, but it was only one part of the application with which the Tribunal had to deal. Consideration is required to other aspects of the application.

32. The Tribunal also struck out the Applicant's case in reference to the Building Safety Act 2022. Although raised by the Applicant late in proceedings, a reasonable person in her position would not have appreciated the lack of prospects on this point or the procedural implications. No unreasonable behaviour is found in this regard.

33. The Respondent engaged solicitors to deal with the Tribunal application and authorised offers to be made in an attempt to resolve the proceedings. However, the glaring omission is that the Applicant repeatedly referred to the carpet hallway and electric cover and yet no-one for the Respondent appears to have positively engaged with her on these matters to see if a resolution might be found. Instead, the Respondent entrenched its

position of denying liability. There was no indication that anyone had gone to the premises to better understand the issue with the electric cover, for instance. Even at the Tribunal proceedings the managing agent's representative acknowledged not having personally visited the property. The hall carpet was rectified shortly before the hearing and with better communication on this issue, the Applicant could have been appeased.

34. A failure to deal with both the hall carpet and electric box had formed part of the Applicant's reasoning as to why service charges were disputed in respect of management fees. None of the offers provided any resolution to these complaints and so it was hardly surprising that the Applicant declined to accept.

35. From the Applicant's perspective, she clearly felt that she had a legitimate grievance. She was no doubt fuelled in those beliefs because the 'asset site inspection & general risk assessment' conducted by the new managing agents on 18 October 2022 identified numerous areas in which the property is in poor condition. In the circumstances, it was not unreasonable for the Applicant as a litigant in person to raise concerns through application to the Tribunal.

36. Having done so, the Applicant did attempt to engage with the solicitors albeit after some prompting. It is abundantly clear from her responses that she was struggling to understand the terms in which the offers of settlement were being made and was wary of committing herself without the benefit of advice. An unrepresented party cannot be criticised for treating offers of settlement made by their opponent's lawyers with some caution. That is particularly so when the Applicant was being asked to make admissions. The way that the offers were communicated would not be easily understood by the everyday person without legal training.

37. Indeed, it is unclear to the Tribunal why the terms of the second and third offers required an admission of the reasonableness and payablity of the insurance fees for 2020/21 when the Respondent itself raised this as a matter concluded by the County Court and outside the jurisdiction of the Tribunal proceedings.

38. Ultimately, the application (that was not struck out) failed because the Applicant did not produce evidence to support her claim. She had not understood what was required and that is very typical for litigants in person. It does not make it unreasonable.

39. The Tribunal considers that it was not unreasonable for the Applicant to pursue her claim on matters not already litigated.

40. The issue turns to whether the Tribunal will exercise its discretion and make an award of costs in relation to the unreasonableness of persisting in pursuing the part of her claim already determined by the County Court.

41. Plainly, there would be no justification for a full award when unreasonableness has only been shown with respect to this one element of a far wider application. Even then, this is by no means a clear case

warranting an award of costs. Stepping back and looking at the conduct of the parties as a whole, it would be unduly harsh to make an award of costs against the Applicant. She clearly believed there was a legitimate claim and had found the Respondent's approach to her to be bullish. As described above, communications with the Applicant could have been better.

42. There was a wide imbalance in the position of the parties. The Applicant cannot be criticised for not taking professional legal advice. The Respondent could afford to engage solicitors, but their involvement did not aid early resolution. It was the Respondent's choice to incur legal costs and to instruct Counsel in what was a straightforward dispute. The length of the Respondent's submissions throughout (including the costs application) have been extraordinary. The resultant amount of costs incurred has been disproportionate to the issues involved.

43. Moreover, it was not a resounding win for the Respondent whose wider management of the property prompted the Tribunal to express concern over its condition and to issue a warning.

44. The Tribunal has decided not to exercise its discretion to award costs in all the circumstances of this case. The application will be dismissed.

Name: Judge K. Saward Date: 1 August 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.

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).