FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**BIR/00AK/LIS/2023/0003**
Property	:	**Flat 44 Pevensey Ave, Enfield, EN1 3HT**
Applicant	:	**London Borough of Enfield**
Representative	:	**Mr Jared Norman (counsel) instructed by London Borough of Enfield Legal Dept**
Respondent	:	**Mr Neil Anthony Martindale**
Representative	:	**None**
Type of application	:	**(1) Application by the Respondent for orders under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002** **(2) Applications by both parties for costs orders under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member(s)	:	**Judge C Goodall & Mr G Freckelton FRICS**
Venue	:	**Determination on written representations**
Date of decision	:	**17 November 2023**

DECISION ON COSTS APPLICATIONS

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BACKGROUND

1. This determination is made following the substantive combined decision of the First-tier Tribunal and the County Court on the question of liability to pay service charges, dated 9 June 2023.

2. Following the substantive determination, the only issues still to be determined were issues regarding costs.

3. On 28 September 2023, Judge Goodall determined all remaining costs issues in the county court. There therefore only remain the costs matters arising in the tribunal set out on the front-sheet of this decision.

4. The Tribunal has determined the remaining costs applications on the basis of the written representations made by the parties. We have considered:

   (a) The Respondent's letters dated 19 and 28 June 2023;

   (b) The Applicant's submissions, drafted by counsel, and dated 16 June and 30 August 2023;

   (c) Forms N260 submitted by both parties.

RULE 13 APPLICATIONS

Law

5. The First-tier Tribunal is not a jurisdiction, unlike the courts, where the unsuccessful party is normally ordered to pay the costs of the successful party. An order for costs is exceptional, and can only come about through the application of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). The relevant parts of that rule are:

"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 land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

6. A service charge dispute is a leasehold case.

7. In *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), ("*Willow Court*") the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13.

8. Firstly, the Tribunal should adopt a three-stage process:

   (a) Consider whether the person against whom an order is sought has conducted itself unreasonably:

   (b) If so, ask whether the Tribunal should exercise its discretion to award costs;

   (c) If so, determine how much should be paid.

9. Secondly, "unreasonable" conduct is discussed in some detail. The distillation of that discussion in this section is not a substitute for a careful reading of the *Willow Court* decision itself. Nevertheless, it seems clear to the Tribunal that:

   (a) The Upper Tribunal approved the following passage (from *Ridehalgh v Horsefield* [1994] Ch 2015) as encompassing "unreasonable" conduct:

   > "... 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."

   (b) It is improbable that the following conduct would constitute unreasonable conduct (without more): a party who fails adequately to prepare for a hearing; a party who fails to adduce proper evidence for their case; failure to state a case clearly, or the seeking of a wholly unrealistic or unachievable outcome.

   (c) Tribunals should not be over-zealous in detecting unreasonable conduct.

   (d) Lay people who are unfamiliar with the substantive law or tribunal procedure, or who fail to appreciate the strengths and weaknesses of theirs or their opponent's cases, or who lack skills in presentation, or who perform poorly in the tribunal room should not therefore be regarded as acting unreasonably.

(e) The Tribunal must exercise its own value judgement on behaviours under consideration in the application.

The Applicant's case

10. As is apparent from the preceding paragraphs, it is necessary for a party claiming Rule 13 costs to establish unreasonable conduct. The Applicant relies on the Respondent conducting his case unreasonably by:

    (a) Raising and persisting with the argument that he had not received section 21B notices of statutory rights when the Tribunal found that he had;

    (b) Raising and persisting with a challenge to the consultation process by claiming a technical point, which put the Applicant to significant and unnecessary expense;

    (c) Refusing to accept his obligation to pay service charges on the erroneous basis that he did not have to pay until he was supplied with specific documents;

    (d) Raising matters very late in the day;

    (e) Making unjustifiable criticism of the Applicant, such as that it deliberately withheld facts;

    (f) Not making any part payment or offer to pay and maintaining that he had a complete defence all the way until the end of the case.

The Respondent's case

11. The matters relied on by the Respondent as evidence of the Applicant's unreasonable conduct are:

    (a) Breaching an agreement not to commence proceedings in the county court but instead to commence an application in the Tribunal to determine what sums were reasonably incurred;

    (b) Incorrectly asserting in 2016 that the Respondent had not challenged or objected to the carrying out of major works, and had only raised objections in 2020, when correspondence showed this not to be the case;

    (c) Adding a considerable amount of additional material to the trial bundle at a late stage, much of which was duplicated;

    (d) Refusing to comment on the Applicant's Scott Schedule;

    (e) Offering as a witness a person who knew nothing about the real issues under consideration in the case;

    (f) Refusing to supply certain documents that the Respondent wished to see;

(g) Accusing the Respondent's expert of not being independent.

Discussion

12. We are able to deal shortly with both applications. In our view, the conduct complained about by both parties does not cross the line into conduct that should be categorised as unreasonable in the sense identified in *Willow Court*.

13. Both parties can properly level some criticisms of the way in which the case has been conducted by the other party. We do not see any purpose or value in reaching micro-judgements on the relative merits of the criticisms each party has levelled at the other. Litigation is often accompanied by a desire to take every point and refusal to concede anything. It is undoubtedly true that this case was hard fought, but that does not always equate to unreasonable conduct. The question for us is whether, looking at everything in the round, either party has conducted him or itself so egregiously that they meet the test set out in *Willow Court*. We do not consider that either have done so.

14. The Respondent was entitled to take the technical points he did. The Applicant was entitled to take a stance that the Respondent did not agree with. We cannot detect any deliberate intention to harass or improper motive in the conduct of either party.

15. We dismiss both applications for orders under Rule 13 of the Rules.

SECTION 20C APPLICATION

16. Section 20C of the Landlord and Tenant Act 1985 ("the Act") allows the Tribunal to make a determination that all the costs incurred by a landlord are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant. Thus the section allows the Tribunal to prevent a landlord from including its costs in a service charge demand made to the beneficiary of a section 20C order.

17. In paragraph 113 of the Decision, the Tribunal said that it could not see any provision in the lease allowing the Applicants costs of this case to be added to the service charge and invited the parties to explain their reasoning if they disagreed. Neither have specifically addressed this question.

18. It remains our view that the service charge does not include legal costs incurred in a contested service charge dispute; the service charge is for common repairs and services to the block as set out in the Fourth Schedule. That Schedule contains no reference to legal costs.

19. However, we are not willing to make an order under section 20C of the Act. If we are right on the question of interpretation of the lease, the Respondent will be able to successfully challenge a demand for a proportion of the costs as there will be no contractual liability to pay them.

However, if we are wrong, we would not have prevented the Applicant from adding its costs to the service charge payable in part by the Respondent as it has succeeded in large measure in its claim. We therefore reject the application for a section 20C order.

PARAGRAPH 5A APPLICATION

20. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides:

“Limitation of administration charges: costs of proceedings

5A (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) “litigation costs” means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) “the relevant court or tribunal” means the court or tribunal mentioned in the table in relation to those proceedings.”

21. The table referred to in sub-paragraph 3(b) confirms that if the proceedings to which the costs relate were proceedings in the first-tier tribunal, then the first-tier tribunal is the relevant court or tribunal.

22. We therefore have jurisdiction to make an order reducing or extinguishing the Respondent’s liability to pay the litigation costs of this case incurred in the first-tier tribunal if they are claimed from him as an administration charge under the lease.

23. As for the section 20C application, the Tribunal could not find clear provisions in the lease allowing the Applicant to claim its costs directly from the Respondent. There is a clause requiring the payment of all expenses incurred incidental to the preparation and service of a s146 or s147 notice, but it must be doubted whether that wording is adequate to justify a claim against the Respondent for the costs of these proceedings (see *Tower Hamlets v Khan* [2022] EWCA Civ 831).

24. The Applicant did not engage with this issue. We therefore have to determine whether to grant the Respondent’s application for a Paragraph 5A order, in circumstances where the Applicant establishes (contrary to the view we have taken) that it is entitled to succeed in a contractual claim from the Respondent directly for those costs. The Applicant’s costs in the Tribunal were stated to be £7,915.76. We regard that as somewhat

excessive and take the view that a part of that cost should not be paid by the Respondent in the event that the Applicant is contractually obliged to pay the costs. We do take account of the quality of the trial bundle, which was poorly organised, and contained a substantial amount of duplicated material.

25. We therefore make an order under Paragraph 5A extinguishing fifty per cent (50%) of any costs of this litigation for which the Applicant pursues the Respondent.

APPEAL

26. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)