



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

Case reference : **LON/00AY/LSC/2023/0261**

HMCTS code : **P:PAPER**

Property : **The Cellar, GFF & First & Second Floor
Flat 363 Milkwood Road London SE24
0HA**

Applicants : **First: D.C.N. Desouza
Second: A.C. Desouza
Third: A.M. Desouza
Fourth: 363 Milkwood Road
Management Company Limited**

Representative : **Kirklands Solicitors LLP**

Respondent : **Assethold Limited**

Representative : **Eagerstates Limited (Mr R Gurvits)**

Type of application : **Request for leave to appeal out of time
and
Application for costs under Rule 13 of
the Tribunal Procedure (First-tier
Tribunal)(Property Chamber) Rules
2013, following the determination of the
liability to pay service charges under
section 27A of the Landlord and Tenant
Act 1985**

Tribunal members : **Judge Pittaway
Ms S Phillips MRICS**

Date of decision : **27 February 2024**

DECISION

The Hearing

This has been a remote hearing on the papers. The form of remote hearing was P:PAPERREMOTE, A face-to-face hearing was not held because the tribunal considered that the application might be determined by summary assessment, pursuant to rule 13(7)(a), without a hearing, on the basis of the written submissions from the parties unless any party requested a hearing and neither party did.

In reaching its decision the tribunal had before it a bundle of 84 pages from the applicant.

By an e mail dated 16 January 2024 the respondent requested that the Rule 13 costs application be placed on hold pending determination of its request for permission to appeal.

Judge Pittaway advised the parties that the Tribunal would consider the respondent's request to appeal out of time at the hearing but that it should nonetheless comply with the directions regarding the Rule 13 Costs application.

Decisions of the tribunal

The Tribunal does not give the Respondent leave to appeal out of time.

The Tribunal makes an order for costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in the sum of £9,750 exclusive of VAT and disbursements. It orders the payment of disbursements in the sum of £221.60. The Tribunal makes an order under Rule 13(2) for the repayment of the application and hearing fees in the sum of £300.

The reasons for the Tribunal's decisions are set out below.

Background to the Rule 13 application

- (1) The applicants seek an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the '**Rules**'). Rule 13(1)(b) provides that the tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case or a leasehold case ("**Rule 13**").

- (2) The applicants also seek the reimbursement of fees under Rule 13(2) in the sum of £300.
- (1) The costs claim arises following the decision of 4 December 2023 in relation to 363 Milkwood Road London SE24 0HA (the ‘**Property**’) in which the Tribunal made determinations on various service charge and administration charges, made an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord’s costs of the tribunal proceedings may be passed to the lessees through any service charge and issued directions in respect of the application for costs and fees made by the applicants under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
- (3) The application for the order under Rule 13, was accordingly made within the time limits prescribed by Rule 13(5).
- (4) Rule 13(6) provides that 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.
- (5) The directions directed the applicants to send to the respondent by 15 December 2023 a statement setting out the reasons why it is said the respondent has acted unreasonably, why the behaviour is sufficient to invoke Rule 13, dealing with the issues identified in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC) (‘**Willow**’), and also setting out legal submissions and full details of the costs being sought. The applicants complied with this direction.
- (6) The directions provided for the respondent to send a statement in response by 5 January 2024, setting out the reasons for opposing the application, with legal submissions, any challenge as to the amount of the costs claimed and any relevant documentation relied. The respondent did not comply with this direction.
- (7) The directions provided for the applicant to make a statement in reply to the points raised by the respondent, and for the provision of a bundle to the Tribunal, which they did.
- (8) The directions stated that the tribunal considered that the application may be determined by summary assessment, pursuant to rule 13(7)(a), on the basis of written submissions from the parties, unless either party requested a hearing. Neither did.

The applicants’ case

1. In an e mail dated 29 January 2024 the applicants submitted that the respondent should not be allowed to appeal out of time (it would appear that they were unaware that Mr Gurvits had applied for permission to extend the period during which the respondent might appeal). They did not give any reason for this.

2. The applicants submitted their bundle in connection with the application for costs on 29 January 2024. They stated that Mr Gurvits (of Eagerstates Limited) had not engaged with the costs directions nor provided any documents for inclusion in the bundle. They stated that they were submitting their bundle then to give Mr Gurvits time to make submissions before the Tribunal considered the application.
3. In its statement of case the applicants submitted that the respondent should pay the applicants' costs under Rule 13(b)(iii) in that it had acted unreasonably in defending or conducting proceedings in a leasehold case.
4. The applicants set out a timetable of events referring to the Respondent's failure to comply with the original directions and Mr Gurvits failure to attend the hearing on 28 November.
5. The applicants submitted that Mr Gurvits' behaviour on the day of the hearing fell short of that expected from either a property professional or an officer of the court, Mr Gurvits being a solicitor. The applicants referred the Tribunal to *Assethold Limited v The Lessees of 1-14 Corben Mews* [UKUT] 71 (LC) where costs awarded under Rule 13 against Assethold Limited by the First-tier Tribunal were upheld by the Upper Tribunal.
6. The applicants submitted that the respondent adopted a strategy in this case to be vexatious, to deliberately and repeatedly ignore directions and to fail to appear at the hearing without apology or excuse.
7. The applicants' bundle contained a bill of costs. This identified two persons involved in the application, Mr Cottrell, a partner and Chartered Legal Executive, and Mr Duncan, a solicitor. The charge out rate of both was given as £261 per hour. The bill referred to a costs draftsman charged at £126 per hour. The bill also gave a rate of £26.10 for each telephone call made and letters out and e mails.
8. The bundle did not contain an invoice showing the amount claimed but the bill of costs showed total profit costs of £14,452.20 (exclusive of VAT). The bill of costs showed £332,40 as a disbursement, for three train tickets charged at a rate of £110.80 each. It also included the application and hearing fees of £300.

The respondent's case

9. The respondent applied on 2 January 2024 for leave to appeal out of time, and on 16 January for the Rule 13 application to be put on hold.
10. On 23 February Judge Pittaway advised the respondent that, in the interests of dealing with the case fairly and justly, which includes dealing with the case in a way proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and the tribunal, the tribunal would not postpone the Rule 13

costs application which would proceed after the Tribunal had considered the application for leave to appeal out of time.

11. The tribunal received no submissions from the respondent despite the e mail of 23 February 2024 advising it that the Tribunal would be reconvening on 27 February to consider the respondent's application for leave to appeal out of time and the Rule 13 application. The e mail noted that the respondent had not provided the applicants with a statement in response to the Rule 13 application by 5 January 2024, as directed by the directions of 4 December.

Applicants' reply to respondent's case

12. The bundle contained a second statement from the applicants, entitled 'Statement in Reply' in which they drew attention to the failure of the respondent to comply with the Rule 13 directions 'in time or at all'. They submitted that the respondent's failure to address their statement was either tacit agreement with the points raised or a continuation of its failure to engage with the proceedings.

Reasons for the tribunal's decisions

Leave to appeal out of time

13. The respondent applied for leave to appeal out of time on 2 January 2024. The reason given for the request was, 'the appeal period ran into the Christmas break and it has been difficult to obtain professional advice.'
14. The Tribunal decision is dated 4 December 2023. The Tribunal is not satisfied that the reason for the request given by the respondent is adequate. It finds that the respondent had sufficient time before the Christmas break to obtain professional advice should it have wished to do so.

Rule 13 costs application

15. Rule 13 (1) (b) provides,
13.—(1) The Tribunal may make an order in respect of costs only—
(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;
16. The tests to be considered by the tribunal when considering whether a costs order should be made under Rule 13 are set out in the Upper Tribunal decision in *Willow Court Management Company*

(1985) Ltd v Mrs Ratna Alexander [2016] UKUT (LC) (*'Willow'*), at Paragraphs 27 and 28 which are set are below.

'27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only ... if a person has acted unreasonably...." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28 At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable 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. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.'

17. On the facts of this case the Tribunal finds that the respondent acted unreasonably in failing to engage with the applicants or the Tribunal, without any reasonable explanation for its conduct. Rule 3(4) of the Rules requires the parties to co-operate with the Tribunal generally and the Tribunal finds that the respondent did not do so. The respondent did not comply with the original directions and had to be warned of the consequences of failing to do so. Mr Gurvits did not advise the Tribunal that he did not intend to attend the hearing and the Tribunal only learnt that he did not intend to appear when they telephoned his office half an hour after the hearing was due to start. Mr Gurvits offered to attend by telephone at 11.01 knowing that the hearing was listed to start at 10 a.m. The respondent has not complied with the directions of 4 December in relation to the Rule 13 costs application.
18. Turning to the second stage of the test in *Willow*, the Tribunal has had regard to Paragraph 28 of that decision which provides, *'At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not'*.
19. The Tribunal is mindful, as stated in Paragraph 62 of *Willow*, that *'The residential property division of the First-tier Tribunal is a costs shifting*

jurisdiction by exception only and parties must usually expect to bear their own costs....'

20. However the Tribunal finds on the evidence before it that the facts here are such that in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs.
21. Paragraph 29 of *Willow* states

'Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely 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. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes 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." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.'
22. The Tribunal has considered the costs in light of the sums claimed by the respondent by way of service charge and administration charges and the extent to which the tribunal did not find the applicants to be liable for these. It finds that had the respondent made no attempt to engage with the applicants and the Tribunal. If it had the costs might have been less. It has also considered that the decision in *Assethold Limited v The Lessees of 1-14 Corben Mews*, referred to by the applicants in their submissions, might point to a pattern of behaviour by the respondent.
23. The Tribunal has received no information from the respondent as to its resources, and therefore has not taken these into account in determining the amount of costs.
24. The Tribunal is concerned that there is an element of double counting in the bill of costs provided by the applicants. The applicants' solicitors make an administrative charge of £26.10 for each telephone call and e mail in addition to the charge for the time spent on the call or drafting the e mail. The Tribunal has also considered whether it is appropriate that all of the work should have been undertaken by lawyers of the seniority of Mr Cottrell and Mr Duncan.
25. The Tribunal is mindful of the statement in *Willow* at paragraph 29 that it does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

26. Taking the above into account and standing back and looking at the overall figure sought by the applicants the Tribunal finds £9,250 exclusive of VAT to be a reasonable figure for the applicants' legal costs.
27. The Tribunal considers it reasonable for the applicants to have incurred train fares for the solicitor and witness to attend the hearing, but not the fares of other attendees. It therefore orders the payment of disbursements in the sum of £221.60.
28. It was necessary for the applicants to apply to the Tribunal to determine the service charges and administration charges that they were challenging. The Tribunal therefore orders the reimbursement by the respondent of the applicants' application and hearing fees in the sum of £300.

Name: Judge Pittaway

Date: 27 February 2024

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).