



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

**Case reference** : **LON/00BK/LSC/2023/0220**

**Property** : **14 Thanet House, 29 Westbourne  
Terrace, London, W2 3UN**

**Applicant** : **Elena Koutrouchi**

**Representative** : **Jonathan Upton of Counsel**

**Respondent** : **Westbourne Property Management  
Limited**

**Representative** : **James Sandham of Counsel**

**Type of application** : **For the determination of the liability to  
pay costs under Rule 13(1)(b) of the  
Tribunal Procedure (First-tier Tribunal)  
(Property Chamber) Rules 2013**

**Tribunal members** : **Mr A Harris LL.M FRICS FCI Arb  
Mrs A Flynn MRICS  
Mr J Francis QPM**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **11 March 2024**

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**DECISION**

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## **Decisions of the tribunal**

1. The tribunal makes the determinations as set out under the various headings in this Decision

## **The application**

2. The Respondent seeks an order for costs against the Applicant under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 following a decision of this tribunal on 4 December 2023.
3. The initial application to the tribunal requested an order under section 20C of the Landlord and Tenant Act 1985. At the hearing it was agreed that any application under section 20C would be dealt with in writing. No submissions have been received in support of an application and the tribunal will not be making an order under section 20C.
4. In an email dated 18 December 2023 a correction to paragraph 87 of the decision was requested. This was supported by evidence which was not before the tribunal at the hearing. The issue discussed in paragraph 87 was considered fully at the hearing and the decision was based on the evidence heard. The tribunal therefore declines to alter paragraph 87.

## **The hearing**

5. The tribunal issued directions for written submissions and these were received from both parties. The Applicant was represented by Mr Jonathan Upton of counsel and the Respondent was represented by Mr James Sandham of counsel.

## **The background**

6. In order to put some context on this decision it is worth repeating the background to the dispute recorded in the initial decision. Thanet House is a purpose-built block of 21 flats and one commercial unit set behind a private roadway in Westbourne Terrace. The Respondent freeholder of the building is a lessee owned company Westbourne Property Management Ltd (Westbourne). The company owns a number of buildings fronting onto Westbourne Terrace and the board is made up of directors with each building voting for a director to represent it on the board. The Applicant was a director for a number of years up to December 2020.

7. This is an unhappy dispute which appears to have its origins in events which took place that while acting as a director, the Applicant was embroiled in an acrimonious dispute with another leaseholder which resulted in the Applicant obtaining an injunction and damages. The Applicant believes that the directors of Westbourne supported the other leaseholder and are now waging a vendetta against her. She believes she is treated less favourably than other leaseholders in the building and that issues she raises are ignored. She requires a determination from the tribunal to ensure that Westbourne respect statutory rights.

### **The Respondents submissions**

8. The Respondent seeks an order for costs amounting to £20,700 representing counsel's fees for the initial hearing and these submissions. Unless the Applicant is required to meet these costs the other lessees in the building must do so.
9. The application is made under rule 13(1)(b)(ii) which provides that a Tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case. The burden is on the claiming party to establish unreasonable conduct.
10. The Upper Tribunal gave guidance on the approach to be adopted by a tribunal when considering rule 13 applications in *Willow Court Management Co (1985) Ltd v Alexander* [2016] L. & T.R. 34. A 3 stage approach was set out being (1) whether the person has acted unreasonably, (2) whether in the light of unreasonable conduct the tribunal ought to make an order for costs and (3) if so what the terms of the order should be.
11. The approach is restrictive and costs orders are the exception not the rule.
12. The first question is whether the Applicant has acted unreasonably. This does not depend on the outcome of the case but includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It makes no difference that the conduct is the product of excessive zeal and not improper motive.
13. While the tribunal may not penalise the Applicant in costs for pre-application behaviour, pre-litigation conduct may still be considered in order to put the application into its proper context.
14. The Respondent considers that the extraordinary level of legal expenditure prior to this case and while the Applicant was a director of the Respondent shows that the present application is part of a long-standing pattern of confrontation born of extremely aggressive

dogmatic and obtuse approach. This was plain during the course of the hearing including the brief appearance of the Applicant in the witness box. It was that conduct which led shareholders to take action to remove the applicant as a director.

15. The evidence of Mr Conway is that since ceasing to be a director, the Applicant has communicated with the board and managing agent through solicitors and taken various actions which have increased the workload of the agents and board members. Examples of the FTT application which took a substantial amount of effort to respond to, a subject access request, failing to pay service charges and raising a section 22 information request.
16. The tribunal's jurisdiction has been abused to advance utterly groundless and irrelevant allegations she had been purposely ignored or penalised by the directors of the Respondent. The Applicant was motivated by a sense of grievance most likely in retribution for the shame and embarrassment caused by the rejection of her at the ballot box by her fellow leaseholders and the subsequent expulsion from the board.
17. The tactic appears to have been to force the current board to incur significant legal fees as vindication and justification of her own mismanagement the Applicant has presented frivolous, false, misleading or irrelevant claims some of which are targeted at neighbours with whom she was in dispute.
18. The particular feature that puts the Applicant was her attempt to challenge her own decisions by taking points of construction which she had not adopted during her time as a director. No evidence was presented as to why the Applicant had reversed her approach to construction of the lease.
19. The Applicant sought to challenge various heads of expenditure which had occurred previously while she was a director of the company.
20. The Applicant's case has been predicated on disingenuous allegations made in bad faith. It is not reasonable to advance a case the Applicant had no belief in, never implemented herself, and based on assertions she knew to be false.
21. The second question is whether an order for costs should be made which involves a consideration of the nature and seriousness of the conduct. While it does not necessarily follow that just because unreasonable conduct has been established that an order should be made. It is plainly the case that to leave the respondent with the costs incurred would be to reward the Applicant.

22. The third question is on what terms should an order be. There is no need for a causal connection to be established between the Applicant's conduct and the costs incurred. The tribunal is entitled to make an order for payment of the whole or part of the parties costs. But for the applicant's vengeful and dishonest behaviour the Respondents directors would not have needed to engage counsel. It was only because of the extraordinary attempt by the Applicant to challenge her own decisions that counsel was engaged.

### **The Applicant's submissions**

23. The Applicant's conduct in these proceedings comes nowhere close to establishing the threshold for making an order for costs under rule 13 and the application should be dismissed.
24. The Applicant also refers to Willow Court and to the reference in that decision to *Ridehalgh v Horsefield* [1994] Ch. 205; [1994] 3 W.L.R. 462, a case on wasted costs. Sir Thomas Bingham MR giving the judgement of the Court of Appeal considered the expression "unreasonable conduct"

*"Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes 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 a practitioner's judgment, but it is not unreasonable."*

25. In Willow Court the Upper Tribunal went on to state that

*"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 v Horsefield..."*

26. At stage one of the 3 stage test referred to above 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. When considering objectivity 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 the party acted. In

making that assessment, the degree of legal knowledge or familiarity with the proceedings of the tribunal and the conduct of proceedings before it possessed by a party whose conduct is under consideration is a relevant consideration. Thus a higher standard of conduct is expected from a party legally represented by reputable firm of solicitors and highly experienced counsel than a party who is not legally represented. The crucial question is always whether in all the circumstances of the case, the party has acted reasonably in the conduct of the proceedings.

27. Only behaviour related to the conduct of the proceedings themselves may be relied upon at the 1<sup>st</sup> stage (Willow Court at paragraph 95) the behaviour of a party which occurred before the application to the FTT was made cannot constitute unreasonable behaviour which engages the power to award costs.
28. Stages 2 and 3 are the exercise of a judicial discretion which is required having regard to all the relevant circumstances.
29. The Applicant denies that its application is part of a “long-standing pattern of confrontation borne of an extremely aggressive dogmatic and obtuse approach” regardless of the FTT’s decision on the substantive issues in dispute it is unarguable that the Applicant has been the victim of harassment or that other leaseholders (who have since been elected to the board) formed an action group who are agitating against.
30. The Applicant accepts that it has communicated with the board and managing agents and taken various actions which have increased the workload of the agents and board members. This is not unreasonable conduct. Indeed the Respondent did not respond to any of the applicants letters and requests for information or respond to a notice under section 22 of the 1987 Act. The Applicant is perfectly entitled to make such enquiries and to receive a satisfactory response in a reasonable timeframe. In any event such behaviour predates the section 27 a application and is not relevant.
31. The tribunal’s jurisdiction has not been abused to advance groundless and irrelevant applications, the points in dispute were all squarely matters within the tribunal’s jurisdiction. Any historical evidence provided was to provide context. The FTT was not invited to make findings on matters not within its jurisdiction.
32. The Respondent relies on the allegation that the Applicant’s conduct was unreasonable due to her attempt to challenge her own decisions. The Applicant was one director on the board, she did not have power or authority to make decisions unilaterally. Rather, the board made decisions collectively and decisions were made by majority vote often following custom and practice in other words what had been done in the past and before the Applicant had been a director. The period in dispute covered service charges ending 24 December 2020, 2021, 2022

and 2023. The Applicant resigned as a director on 8 December 2020 and could not therefore have authorised any expenditure after that date.

33. The Respondent alleges the Applicant has acted in bad faith which has a specific meaning in law. In *Cannock Chase DC v Kelly* (1977) 36 P.&C.R. 219 Megaw LJ said

*“I would stress — for it seems to me that an unfortunate tendency has developed of looseness of language in this respect — that bad faith, or, as it is sometimes put, “lack of good faith,” means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge.”*

34. The Respondent is alleging that the Applicant’s behaviour is vengeful and dishonest and refers to the applicant’s indicative and malevolent intent. These are extraordinary allegations and there is no evidence of any findings in the tribunal’s decision which would justify such a slur on the Applicant’s character.

35. At all times the Applicant was seeking to vindicate and enforce her strict legal rights under the lease and statute. The Respondent did not respond to any of the Applicants letters and requests for information or respond to a notice given under section 22 of the 1987 Act.

36. Having taken legal advice from solicitors and counsel (without in any way waving legal professional privilege) the Applicant generally believed that the points being taken were likely to succeed (not just merely arguable).

## **The Law**

37. The FTT’s power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides (so far as relevant) as follows:

### **29. Costs or expenses**

(1) The costs of and incidental to—

- (a) all proceedings in the First-tier Tribunal, and
- (b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) “wasted costs” means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

By section 29(3) the power to determine by whom and to what extent costs are to be paid, which is conferred by section 29(2), has effect subject to the FTT’s procedural rules. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which came into force on 1 July 2013, makes the following relevant provisions:

### **13. Orders for costs, reimbursement of fees and interest on costs**

(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.

(2) The Tribunal may make an order requiring a party to reimburse 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 the person (the “paying person”) without first giving that person an opportunity to make representations.

(7) – (8) [Assessment and interest on costs]

(9) The Tribunal may order an amount to be paid on account before the costs of expenses are assessed.

38. In Willow Court the UT also said

24. “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?

The UT also said at para 95

95. ...Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis. We qualify that statement in two respects. We do not intend to draw this limitation too strictly (it may, for example, sometimes be relevant to consider a party’s motive in bringing proceedings, and not just their conduct after the commencement of the proceedings) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct. Secondly, once unreasonable conduct has been established, and the threshold condition for making an order has been satisfied, we consider that it will be relevant in an appropriate case to consider the wider conduct of the respondent, including a course of conduct prior to the proceedings, when the tribunal considers how to exercise the discretion vested in it. ...

### **The tribunal’s decision**

39. The tribunal does not find that the allegations of unreasonable conduct have been made out and will not be making an order for costs under rule 13.

### **Reasons for the tribunal’s decision**

40. This case concerns an unfortunate breakdown in relations between parties in a leaseholder owned and controlled management company.
41. The evidence appears to indicate a failure of corporate governance within the company in that at one stage it was said there were 2 directors but now there are 5, one each from the 5 blocks owned by the company. If there had been 5 directors throughout exercising proper corporate governance it is questionable whether the events which have occurred within this building would have happened at all, or at least not in the manner in which they did. However that is not a matter for this tribunal.
42. Part of the case of the Respondent is that the Applicant was vexatious in seeking information from the directors and managing agents. The

Applicant was entitled to that information under section 22 and a subject access request is open to anyone under the data protection legislation. In the view of the tribunal it cannot be unreasonable to request information to which you are entitled and which even at the hearing still had not been provided. It appears to have been necessary to bring the proceedings in order to obtain that information. The conduct of the parties prior to the reference to the tribunal is not relevant to this decision. (WillowCourt para 95).

43. At paragraph 3 of its original decision the tribunal said

*At the start of the hearing the tribunal pointed out there had been significant non-compliance with directions in that bundles had been submitted late and were incomplete when submitted. There appears to have been a failure to disclose all relevant invoices and the 2020 accounts were not in the tribunal papers even though these ran to over 1400 pages. The tribunal will not be referring to every document submitted in what amounted to 3 separate bundles.*

44. The accounts for 2020 and preceding years and also the board minutes for those years were not in front of the tribunal so it was not able to form a view as to the Applicant's views on various matters other than to look at the 2021 accounts which also included the 2020 figures. The accounts are those of the company, approved by its directors and presumably by shareholders at an annual meeting although the evidence is not clear on that point. It is presumed that service charge budgets and accounts were provided to all leaseholders.
45. On the evidence before it and having seen the Applicant in the witness box, the tribunal does not find that the allegation of an "extremely aggressive, dogmatic and obtuse approach" is made out.
46. For all of these reasons the tribunal is not satisfied that the case has been made out of unreasonable conduct on behalf of the Applicant and the application for a costs order under rule 13 fails.

**Name:** A Harris

**Date:** 11 March 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).