FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AB/HNA/2023/0026**
Property	:	**30, Sterry Gardens, London, RM10 8PH**
Applicant	:	**Lakhvinder Singh**
Representative	:	**Mr M Loveday (Counsel)**
Respondent	:	**London Borough of Barking and Dagenham**
Representative	:	**Mr G Neophytou (Solicitor)**
Type of application	:	**Appeal against a financial penalty – Costs application**
Tribunal	:	**Judge Martyński**
Date of hearing	:	**24 January 2024**
Date of decision	:	**07 February 2024**

DECISION

Decision Summary

1. The Applicant's application for costs is dismissed.

2. The Respondent must, by **no later than 29 February 2024** pay to the Applicant the sum of £300.00 those being the fees that he has paid in these proceedings to the tribunal.

The application

3. By an application dated 14 July 2023, the Applicant applied for;
   (a) A costs order pursuant to Rule 13 of the tribunal's rules
   (b) An order for transfer of the application to the Upper Tribunal pursuant to Rule 25

   The costs application was in two parts. The first being costs claimed under Rule 13(1)(b) (unreasonable behaviour), the second being claimed under Rule 13(2) (re-imbursement of fees.

4. The actual costs claimed break down as follows:
   (a) Costs of the appeal against a financial penalty - £21,102.06
   (b) Costs of the application for costs - £7,277.12
   (c) Re-imbursement of tribunal fees - £300.00

5. The application for costs follows the Applicant's appeal against a Financial Penalty imposed by the Respondent for failure to comply with an Improvement Notice. The Financial Penalty was withdrawn during the course of the appeal proceedings leaving the Applicant with no option but to withdraw his appeal. The Applicant now claims his costs of the appeal proceedings.

Background

6. The Applicant owns a large property portfolio, a significant amount of it is within the borough of Barking and Dagenham.

7. Below is a chronology of relevant events:

01.07.22	R serves an Improvement Notice upon A in respect of the property
15.08.22	Deadline for compliance with the Improvement Notice
15.08.22	R serves a Notice of Intention to impose a civil penalty of £20,000 in respect of the failure to comply with the Improvement Notice
20.09.22	There is a meeting at the subject property between the Applicant and the Respondent's officers
20.09.22	Email from Applicant to the Respondent's officers following the meeting: "*We have collectively come to a conclusion to move forward with this property is to move the tenant out and then address the improvement notice. So, the improvement notice is on hold till the tenant has been moved out. Angela has pushed for the tenant to view a 2-bed flat on green lane and is getting her a viewing this week.* *The tenant has also agreed that she hasn't allowed the landlord (myself) access to the property for the past 6 months and also added that she doesn't to intend on giving the landlord access. So, in essence I have tried as a landlord to do any works to the property but tenant hasn't*

	allowed this to proceed. The attendees all witnessed these statements."
28.09.22	Tenants vacate property
23.12.22	Final Penalty Notice served
16.01.23	Email from the Applicant to the Respondent (including Mykia Angus): "*Is there any update on the house and the notice and fine against the property. As told previously when I met you at the property with the other case officer you agreed that the payment/appeal date will be from when I hear from yourself with an update…*"
16.01.23	Email from Mykia Angus to Applicant: "*Above my pay grade. I have copied in my manager Charlotte Ward.*"
20.01.23	Works completed
20.03.23	Appeal against a Financial Penalty to the FTT with application to extend the deadline for the appeal
21.03.23	Improvement Notice revoked
03.04.23	Respondent files detailed objection to the application to extend time
25.04.23	Case Management Conference: Respondent does not attend but had submitted written representations
02.05.23	Preliminary Decision: Late appeal allowed (i.e. time extended for the submission of the appeal). Directions given for a final hearing to take place on 5 September 2023. Respondent to provide a bundle setting out its case by 6 June 2023. Applicant to provide bundle in response by 4 July 2023.
19.06.23	Unless order made in respect of Respondent's failure to file its bundle in accordance with directions
20.06.23	Respondent withdraws the Financial Penalty
21.06.23	Applicant serves a Notice of Withdrawal of his appeal
14.07.23	Applicant's application for costs

The law

8. By virtue of s.29 Tribunals, Courts and Enforcement Act 2007, the tribunal has discretion regarding the award of costs. The relevant parts of that section read as follows;

> (1) The costs of and incidental to—
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> (a) all proceedings in the First-tier Tribunal, and
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> (b) all proceedings in the Upper Tribunal,
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> shall be in the discretion of the Tribunal in which the proceedings take place.
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> (2) The relevant Tribunal shall have full power to determine by whom and to
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> what extent the costs are to be paid.
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

9. The tribunal's rules [The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013] restrict this discretion at Rule 13, the relevant parts of which state:

> (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 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.

10. Comprehensive guidance on the consideration of applications for costs made pursuant to Rule 13(1)(b) was given by the Upper Tribunal in *Willow Court Management Company (1985) Limited v Alexander and others* [2016] UKUT 0290 (LC). The tribunal laid out a three-stage approach as follows;
    (a) Has the person acted unreasonably?
    (b) Should an order be made?
    (c) What should the order be?

The Applicant's case

11. Counsel for the Applicant, Mr Loveday, starts by pointing out that none of the three cases considered in *Willow Court* concerned the withdrawal of a notice by a local authority; all the cases considered in *Willow Court* concerned conventional party and party applications. Other chambers of the First-tier Tribunal deal regularly with cases where a public body withdraws the original decision appealed against, thus rendering the appeal redundant. Two 'guidance' cases from the Immigration and Asylum Chamber were relied upon by Mr Loveday; *Cancino v Home Secretary* [2015] UKFTT 59 (IAC) and *Awuah v Home Secretary (No.2)* HU/042300/2015. He also referred to the *Presidential Guidance Note No.2* of 2018. He submitted that the propositions that could be drawn from these were as follows:
    (a) There is a duty on a public body to conduct an initial assessment of the viability of defending an appeal
    (b) The contextual nature of the initial assessment of an appeal by the public body will be informed *inter alia* by the state, presentation and completeness of the papers served upon it.
    (c) The initial assessment of the public body should be made within six weeks of the appeal, but in some cases sooner.
    (d) The public body will normally be expected to conduct subsequent reassessments when any material development occurs.
    (e) In particular, as per *Cancino*;
    > *"25(i) Concessions are an important part of contemporary litigation, particularly in the overburdened realm of immigration and asylum appeals.*

... Occasionally, a concession may extend to abandoning an appeal (by the appellant) or withdrawing the impugned decision (by the respondent). We consider that applications for costs against a representative or party should not be routine in these circumstances. Rule 9 cannot be invoked without good reason. To do otherwise would be to abuse this new provision. Accordingly, representatives or parties must be conscientiously satisfied that it is appropriate to have recourse to the rule.

This will require, in every case, a considered decision dictated by the standards, principles and constraints of good professional practice. In every case, the fundamental enquiry for the tribunal will be why the withdrawal has occurred, coupled with the related enquiry of why it did not materialise sooner. This draws attention to the intrinsically fact sensitive nature of every appeal.
(ii) Subject to the above, the belated withdrawal of an appeal is unlikely to be adequately explained on the bare ground that legal advice was to this effect, particularly if the appellant was legally represented from the outset. On the other hand, a change of representative or the late engagement of a lawyer might, in appropriate cases, provide a satisfactory explanation for this course. Judges will be alert to the balance to be struck so as to ensure that withdrawals are not discouraged.

(iii) A belated withdrawal of a Home Office decision is unlikely to be satisfactorily explained simply on the basis of the timing of the presenting officer's involvement. The Home Office is a large government department and the belated commendable conduct of one of its servants cannot, in this context, excuse or justify the acts or omissions of others at earlier stages of the appeal process. Absent exceptional factors or circumstances, a protestation of inadequate resources will be unyielding in this context. Striking the appropriate balance as in (ii) above will be necessary.

(iv) Where a tribunal is satisfied that an appeal has been withdrawn as a result of the belated production of documents or other evidence by the respondent, this could, in certain circumstances, justify the consequential assessment that the respondent had acted unreasonably in conducting its defence of the appeal, thereby attracting a costs order against the respondent under r 9(2)(b).

(v) The converse applies, in principle. Thus where a tribunal is satisfied that the respondent has withdrawn the impugned decision as a result of the belated production of evidence or witness statements on behalf of the appellant, particularly where this involves a breach of case management directions, an order for costs under either limb of r 9 could be appropriate. As ever, the specific context will be determinative."

12. Mr Loveday argued that it was at all times clear that the Applicant would have had a 'reasonable excuse' defence to the penalty on the basis that he was unable to complete the works set out in the Improvement Notice by the deadline given in that notice because he required access to the subject

property, which the tenant occupying the property at the time, was unwilling to give.

13. Following the guidance in *Cancino*, the approach should be first to consider why the withdrawal of the Financial Penalty occurred. The withdrawal of the notice was expressly linked to the appeal and the Respondent's failure to file its bundle in accordance with the tribunal's directions. The only explanation for this was that the Respondent recognised it was unable to rebut the Applicant's case.

14. The next step is to consider why the withdrawal did not occur earlier. The reason for this, suggests Mr Loveday, is that the Respondent failed to review, or adequately review, all the evidence available and/or the provisions of the Act at any reasonable point.

15. More generally, Mr Loveday argued that the Applicant's appeal was at all times made clearly, with the benefit of legal representation with full argument set out at the outset. This is in contrast to the Respondent's conduct in failing to file any substantive response to the appeal, failing to change its course despite the revocation of the Improvement Notice in March 2003, failing to attend the Case Management Conference listed following the filing of the appeal.

The Respondent's case

16. The Respondent argued that merely withdrawing a Civil Penalty Notice does not constitute unreasonable behaviour, there is nothing to suggest that in this case the Respondent has acted in any way other than in good faith.

17. The notice was issued by the previous case officer, Mykia Angus. After she left, the notice was reviewed by another officer who investigated the matter and concluded that notice should be withdrawn. There was nothing improper in this.

18. A local authority should not be deterred from reasonably reviewing its decisions and changing its position by the threat of adverse costs orders.

Consideration and decision - costs

19. The starting point on any application for costs is Rule 13 of the tribunal's rules. Insofar as they relate to costs (as opposed to fees which are dealt with later) they limit any award of costs to situations where a person has acted unreasonably in; '*bringing, defending or conducting proceedings*'. It appears therefore that the behaviour (on the part of a Respondent) complained of, must relate, in the first place, to behaviour *within the proceedings*.

20. The next point of reference is the guidance in *Willow Court* and the three-stage process.

21. *Has the person acted unreasonably?* If one accepts that that the unreasonable behaviour must firstly relate to behaviour within the proceedings, the relevant time period for that behaviour, in this case, has to be between the lodging of the appeal on 20 March 2023 and the withdrawal of the Financial Penalty on 20 June 2023.

22. The Applicant lodged his appeal out of time. He had a period of 28 days from the date the Financial Penalty was sent to the Respondent. This would have given a deadline for the appeal of 20 January 2023. The appeal was therefore substantially out of time and the application to extend time acknowledged this with the grounds for the appeal stating; '*It is conceded that the delay in this case is serious*' [I accept that this appears to be a reference to the *Denton* test which is not relevant in these proceedings]. Given the background to this case, there can be no doubt that the Applicant had a very arguable case that he had a defence to the Civil Penalty Notice on the grounds of 'reasonable excuse' and that accordingly the appeal against the Civil Penalty had good prospects of success. However, I do not consider that the Respondent's opposition to the application to extend time can be considered as unreasonable behaviour, given that the appeal was lodged out of time. I do not consider that the Respondent's failure to attend the Case Management Conference was unreasonable given that it had filed a written response to the application to extend time (albeit that this response focussed on the fact of the delay rather than the substantive merits of the appeal).

23. Once time had been extended and directions given, the Respondent had until 6 June 2023 to present its case. The tribunal clearly considered that this deadline provided a reasonable time period for response. I find it difficult to conclude that the Respondent could be described in behaving unreasonably in not presenting its case or withdrawing the Civil Penalty prior to the expiry of that time period. A local authority has a vast range of roles and responsibilities, enforcement of housing standards being only one of them. It has to carry out these responsibilities on limited resources. It is only once that deadline, set by the tribunal, had expired, that the Respondent's behaviour can be questioned. In my view, by 6 June 2023, the Respondent had been given adequate time to consider its position. Given the relatively straightforward history of the matter and the substantive merits of the appeal, the delay in the Respondent's response to the 20 June 2023 was unreasonable.

24. I cannot see anything in the propositions drawn from *Cancino* and *Awuah* to detract from that view. In particular, as to the duty to conduct an initial assessment of the viability of defending the appeal, that duty effectively began once the tribunal had extended time for the bringing of the appeal and had given directions. The time period given by the directions for a response was five weeks. The tribunal obviously considered that this was a reasonable period (as do I considering my comments regarding the many calls upon a local authority's resources). I take into account the fact that

the grounds of the appeal were clearly set out and well argued from the outset.

25. As to the Respondent's assertion that the matter had been reviewed by another officer after the departure of the officer who had served the penalty notice and the comments in *Cancino* on such a scenario, again, I consider that it was reasonable for the Respondent to take until 6 June to view the matter.

26. Moving on to Mr Loveday's suggested consideration as to why the withdrawal did not occur earlier, this, it seems to me, criticises the Respondent's behaviour which occurred prior to the start of the proceedings, such behaviour is not directly relevant to the consideration of costs.

27. *Should an order be made?* If the unreasonable behaviour occurred between 6 – 20 June 2023, what was the effect of that upon the Applicant? The answer, it seems to me, is very little beyond the Applicant being forced to apply to the tribunal for an order, all that application consisted of was a one line email sent to the tribunal on 16 June 2023 "*We have not received the Respondent's bundle as directed by the Tribunal*".

28. The answer appears to be the same even if the unreasonable behaviour takes place earlier. If we assume that, upon the tribunal making a decision to extend time, the Respondent should have very quickly reviewed the matter and withdrawn the financial penalty, it is difficult to see what additional costs the Applicant has incurred between the tribunal's decision to extend time for the appeal and the deadline for the Respondent's submission given in the tribunal's directions. All the Applicant was doing during this time was waiting for the Respondent's submission.

29. The Applicant would argue that, if there is unreasonable behaviour at some point during the proceedings, this opens the door to the making of a costs order generally. That is, not just the costs specifically relating to the specific behaviour itself, but other costs incurred. I agree that the door can be widened to this effect, but I do not consider that it would be right, in this case, to make an award in respect of costs incurred outside the period of unreasonable behaviour. What if the Respondent had at 4.30pm on the last day of the period to file its bundle (6th June) withdrawn the Financial Penalty? On the primary view that I have taken so far in this decision, the Applicant would have no cause for complaint. The Respondent had been given a reasonable time to respond to the proceedings and had responded within that reasonable time. To make a wider award of costs would, it seems to me, to be making a judgement regarding the substantive merits of the appeal and the Respondent's conduct prior to the appeal.

30. In my view therefore, the consequence of the unreasonable behaviour was the Applicant's solicitors having to send an email to the tribunal. I do not consider that the extra work involved extended to the Applicant having to withdraw his appeal as he would have had to have done this in any event

no matter when the Penalty Notice was withdrawn (during the course of the proceedings).

31. In those circumstances, given the limited nature and effect of the unreasonable behaviour, I do not consider that it would be just to make any award of costs.

Decision - fees

32. The position regarding fees is much more straightforward and less constrained by wording or authority. The Applicant has had to pay fees to pursue an appeal which was conceded by the Respondent. The Applicant ought to be re-imbursed.

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 should be made on Form RP PTA available at https://www.gov.uk/government/publications/form-rp-pta-application-for-permission-to-appeal-a-decision-to-the-upper-tribunal-lands-chamber
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).