FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference **HMCTS Code**	**:**	**CAM/26UC/LSC/2023/0021** **P: PAPER REMOTE**
Property	**:**	**26,32,34,36,38 and 40 Bridge Street, Hemel Hempstead, HP1 1EF**
Applicant	**:**	**Zas Ventures Limited**
Representative	**:**	**Lester Dominic Solicitors**
Respondents	**:**	**The leaseholders named in the application**
Representatives	**:**	**1.Brethertons LLP (26,34,36,38)** **2.Mr Islam (32)** **3.Mr Ullah (40)**
Type of application	**:**	**Rule 13 costs**
Tribunal member(s)	**:**	**Judge Wayte** **Mr Gerard Smith FRICS**
Date of decision	**:**	**17 December 2024**

DECISION

The tribunal has decided that:

The applicant must pay £32, 642 plus VAT in respect of the represented respondents' costs, £2,821.50 in respect of Mr Islam's costs and £1,948.88 in respect of Mr Ullah's costs.

Background

1. These applications for costs, made by Brethertons LLP in respect of their clients (the represented respondents) and Mr Ullah and Mr Islam on behalf of their parents, followed the tribunal's decision dated 27 August 2024 in respect of the application for a determination of service charges payable by the leaseholders for three years from the year ending 24 March 2021 through to 24 March 2023. The application stated that the total amount in dispute was over £107,000, with almost £18,000 claimed from each leaseholder. The main item was work to the first floor yards and walkway ("the resurfacing works"), carried out in 2022 at the stated cost of £96,000.

2. This application followed a previous decision of the tribunal dated 17 March 2022, case reference CAM/00KA/LDC/2021/0035. That was an application for dispensation from consultation in respect of the resurfacing works, which was granted but subject to conditions and caveats. That tribunal was told by Mr Ali of Westcolt Surveyors, the applicant's managing agent, that the works had been carried out by the Almira Group Limited and had cost some £114,000. That included the replacement of boundary walls with mesh fencing, which the tribunal decided should be paid by the applicant as a condition of dispensation. The tribunal therefore calculated that the cost of the resurfacing works would be some £80,000 plus VAT.

3. As detailed in the August 2024 decision, the tribunal found that nothing was in fact payable by the respondents in relation to the resurfacing works, associated costs for the removal of waste or Westcolt's fees for their alleged supervision of the works. Those items amounted to £94,090.17 plus VAT, almost all of the sum in dispute. As stated in paragraph 53 of the August 2024 decision, the tribunal found that the applicant's evidence was unsatisfactory. In this application, they claimed that the works had in fact been carried out by Essex Shopfitters Limited (ESL) and admitted at a late stage that the invoices that were alleged to prove their expenditure had been recreated by that company during the proceedings, as the originals had been lost. An "after the event" priced specification was also produced in an attempt to justify the alleged expenditure but the tribunal pointed out that this appeared to show the cost of resurfacing should have been more like £40,000, as suggested by alternative quotes obtained by Mr Ullah, acting for his father.

4. The represented respondents had instructed an expert and the tribunal accepted his evidence that the works would only last another 2-3 years before the resurfacing would need to be completely redone. The works

were of no benefit to the leaseholders and would appear to have been carried out due to leaks to the commercial premises situated below the residential flats. The tribunal therefore found that any costs payable for these works should fall on the commercial leases this time round. In future, any costs should be shared on a fair basis between the commercial and residential leaseholders and properly taking into account the respective leases.

5. In addition to other comments made in the body of the August decision, the tribunal came to this conclusion at paragraph 97:

"*The Applicant's lack of success in these proceedings is due to their failure (and that of their chosen agent) to properly read the leases and consider respective liabilities for the works given the layout of the property, as well as their failure to provide sufficient evidence to support the amounts claimed. In particular, it should have been obvious that the commercial premises would need to pay a share for repairs to their roof and that the works were really for their benefit and not for the leaseholders. Westcolt's fees took no account at all of the limited service charge provisions in the lease and their fees were generally excessive, for example the apparent fixed fee of £2,000 for very limited consultation, which did not progress into actual work. The claim for £12,000 for allegedly managing the resurfacing works was particularly cynical, given the total failure to provide any evidence at all in support of that claim – even the correct identity of the contractor (wrongly identified by Mr Ali in the dispensation proceedings shortly after the works had completed).*"

The tribunal also found that the recreated invoices by ESL were not credible.

6. Following the issuing of that decision to the parties, all of the respondents made a claim for costs on the basis that the applicant had acted unreasonably in bringing the proceedings. The submissions and outline arguments will be considered below.

The Law

7. Under Rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal may make an order for costs only under section 29(4) of the Tribunal Courts and Enforcement Act 2007 (wasted costs) or if a person has acted unreasonably in bringing, defending or conducting proceedings (unreasonable costs).

8. The leading Upper Tribunal decision on Rule 13(1) unreasonable costs is *Willow Court Management Company 1985 Ltd v Alexander* [2016] UKUT 0290. There are three steps: I must first decide if the

respondent acted unreasonably. If so, whether an award of costs should be made and, finally, what amount.

9. In deciding whether a party's behaviour is unreasonable the Upper Tribunal in *Willow Court* cites with approval the judgment of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 2005. It does so at paragraph 24 of its decision in these terms:

> *""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?".*

10. The Court of Appeal has recently considered the test for unreasonable conduct justifying a Rule 13 order in *Kathryn Lea (and others) v GP Ilfracombe Management Company Ltd* [2024] EWCA Civ 1241. That decision makes it clear that a finding of unreasonable conduct does not require vexatious conduct or harassment. The relevant question is the "acid test" in the light of the facts of each case.

Was the applicant's conduct unreasonable?

11. In submissions dated 24 September 2024, counsel Harley Ronan on behalf of the represented respondents submitted that the objective standard of reasonableness had to take into account the fact that the applicant was in business as a landlord, had the benefit of managing agents and lawyers and the sum sought was, on any view, significant – almost £18,000 per leaseholder.

12. Given that context, it was plainly unreasonable to bring the application without a proper consideration of the respective liabilities of the occupants of the property (both residential and commercial) or any proper evidence that the costs had been incurred or were reasonable. In fact, the tribunal had found that the ESL invoices were not credible. No reasonable, professionally advised landlord in the applicant's circumstances would have relied on evidence which was not genuine to bring or conduct a section 27A application.

13. Mr Ronan also argued that it was unreasonable to seek to recover the full cost of the resurfacing works given the departure from the order for dispensation. This argument depended on the "concession" during the hearing that the applicant had not fully followed the specification of work produced by Westcolt's surveyor. Mr Ronan submitted that in those circumstances the applicant could not rely on dispensation and

should have been aware that the leaseholders' liability would be limited to £250 each.

14. Mr Ullah had already applied for costs incurred by his father on 10 September 2024. He claimed £1948.88 based on 164.5 hours at £11.44 per hour. Mr Islam made an application for costs on 25 September 2024. He was employed as Global Release Manager for a digital business service company at a basic salary of £60,000. His claim for costs of £4,895.04 was based on a daily rate of £230.77 and time spent of 148.5 hours. Both stated that they had asked their parents to cover their costs.

15. On 30 October 2024 counsel Barnaby Hope made submissions in response to those made by the respondents. He argued that the principal reason why the majority of the application failed was not due to unreasonable conduct in the *Willow Court* sense. Applications fail every day due to insufficient documentary evidence and poor performance of witnesses. Similarly, the suggestion that the applicant had failed to properly understand the leases and consider respective liabilities was not unreasonable conduct. The case was not hopeless – otherwise the represented respondents would have applied to have it struck out.

16. While Mr Hope accepted that reliance on evidence which is known not to be genuine is in principle reasonable, he maintained that the tribunal's finding that the ESL invoice(s) were not genuine was not the same as a finding that the applicant knew they were not genuine. If the tribunal had intended to make a finding essentially akin to fraud, it would have done so.

17. The applicant also took issue with the final argument in relation to the difference between the works carried out and those detailed in the application for dispensation. Mr Hope submitted it is not right as a matter of law that any difference between the two sets of works automatically invalidates the order for dispensation and it cannot possibly give rise to a finding of unreasonable conduct.

18. On 8 November 2024 Mr Ronan replied to those submissions. By that time the Court of Appeal had handed down the *Ilfracombe* decision which Mr Ronan stated had factual parallels to this case, in particular an attempt by the landlord in that case to justify significant sums claimed on account without any supporting material was held to constitute unreasonable behaviour. Coulson LJ also considered that it may be unreasonable for rule 13 purposes for an applicant to pursue a hopeless claim.

19. Here, the applicant had no cogent evidence that the costs were incurred. They were aware that the ESL invoices lacked credibility, only admitting late in the day that they had been created in 2024, when

that was pointed out by Mr Ullah. They also knew there was no proper costed specification for the works prior to the instruction of the contractor and that the identity of that contractor was similarly unclear, with different evidence given to the tribunal in the dispensation application as to who had carried out the works. The application was therefore doomed to fail.

20. Mr Ronan pointed out that the applicant had not offered any explanation as to why it relied on the invoices or indeed for any of its other failings in the litigation. This offended the "acid test" for unreasonableness as set out in *Ilfracombe*: "*A good practical rule is for the tribunal to ask: would a reasonable person acting reasonably have acted in this way? Is there a reasonable explanation for the conduct in issue?*".

The tribunal's decision

21. The tribunal agrees with the respondents that the applicant acted unreasonably in pursuing the disallowed service charges, given their lack of ability to provide any cogent evidence that the costs were reasonably incurred. In particular, the tribunal was incredulous that works allegedly costing £80,000 plus VAT would have been given to a contractor without a proper specification and there was no evidence of any invoices having been approved by the managing agents, despite their claim to £12,000 for allegedly supervising the works. The lack of invoices was raised by the respondents at an early stage and it was only after Mr Ullah used his technical expertise to identify that the invoices produced during the litigation had been newly created, that a statement was provided by ESL with a story which the tribunal did not find credible. As Mr Ronan points out, no explanation has been given by the applicant at all for this sorry state of affairs and in the circumstances it appears reasonable to conclude that is because the applicant is unable to provide a reasonable explanation. The applicant's own evidence of payments said to have been made to ESL in respect of the works was also unsatisfactory, the tribunal did not accept the applicant had incurred the alleged cost and found its evidence unreliable.

22. The applicant's justification for the works was originally that they were required by the council, which the tribunal dealing with the dispensation claim rejected. At the hearing shortly after the works had been completed, Mr Ali told that tribunal that the contractor was the Almira Group, which was at least inaccurate and at worst untrue. No evidence has been produced at all to establish that the Almira Group did any work for the applicant. ESL did not exist as a company when they allegedly took over the works from Almira, although its director Mr Aziz was said to have worked for the applicant under various trading names. The tribunal found that a reasonable cost for the works would have been about half of that claimed by the applicant, had the quality also been reasonable. The respondents' surveyor was of the

opinion that the works were in fact only worth a fraction of that amount, given their poor quality. By the time that the application was made, the applicant was aware of the respondents' dissatisfaction with the works and also that its agents had not supervised them. Despite that and the lack of any credible evidence as to the cost of that work, they chose to pursue the full amount.

23. These failures were exacerbated by a failure to consider whether the commercial leaseholders should also pay their share and the terms of the residential leases. The application smacks of a cynical attempt to extract as much money as possible from the residential leaseholders, with parallels to *Ilfracombe*. The tribunal is not convinced that the suggestion that the work moved away from the specification prepared by Westcolt reduced recoverability to £250 per leaseholder but agrees that the applicant must have realised the weakness of their case in advance and their pursuit of such excessive sums from the leaseholders was unreasonable conduct in bringing proceedings.

Should the tribunal make an order for costs?

24. Given the significant sums claimed by the applicant, it is not surprising that some of the respondents engaged lawyers and expert's costs. Some £50,000 is claimed on behalf of the represented respondents, with smaller sums claimed by Mr Ullah and Mr Islam who each represented their parents.

25. Mr Hope for the applicant conceded that whether to make an order for costs would largely be governed by the tribunal's findings under stage one. He argued that this should not automatically lead to an entitlement to all of the costs and that the indemnity basis of assessment should not be applied. Mr Ronan pointed out that the vast majority of the costs related to the service charges claimed in respect of the resurfacing works and the tribunal's criticism of the applicant's approach concerned the proceedings as a whole.

The tribunal's decision

26. The tribunal agrees that the applicant's conduct justifies an order covering the respondents' costs for the proceedings. The applicant wholly failed to justify its claim for a share of over £94,000 plus VAT sought from the respondents. The tribunal considered that the works (assuming they were of reasonably quality) should have cost around £40,000 plus VAT. The applicant was aware that the works were not of reasonable quality and that damage had been caused to the residential leaseholders' terraces. They were also aware that despite their claim for £12,000 Westcolt had not supervised the works and that they had no invoices from ESL. By proceeding regardless with the full claim, the applicant should not be surprised that the respondents resorted to professional advice and must now bear the consequences, subject to an

assessment of those costs. The basis of that assessment will be standard, with any doubt exercised in favour of the paying party. Although the tribunal has concluded that the applicant's conduct has been unreasonable, triggering an award, that is not enough to merit an indemnity approach being taken in respect of the assessment of those costs.

What order should be made?

27. The applicant submitted that the represented respondents' costs were excessive and disproportionate, in particular the solicitor's fees. Issue was taken with the hourly rates which were above the guidelines for that area and the fixed fee approach. Mr Hope submitted that £25,000 plus VAT was a reasonable and proportionate figure (including counsel's and expert's fees).

28. In response, Mr Ronan submitted that the costs were reasonable bearing in mind the complexities of the case, involving four respondent properties. Over £107,000 had been sought by the applicant, with sporadic and inadequate disclosure on their part. The complex title structure and multiple leases were an added complication. The guideline rates were precisely that and the tribunal was well able to assess whether the costs incurred at each stage were reasonably incurred and reasonable in amount.

29. In terms of Mr Islam and Mr Ullah, the applicant's primary submission was that the costs were not recoverable as they were not being claimed by the litigant. In the alternative, a litigant in person can only claim £19 per hour unless they can prove financial loss. If costs were payable, that would reduce Mr Islam's costs to £2,821.50. Mr Ullah's costs of £1,948.88 were accepted as being within the litigant in person rate.

The tribunal's decision

30. The tribunal agrees that given the use of counsel (particularly for the CMH) and the departure from the guideline hourly rates, some reduction is due in respect of the solicitor's costs. Doing the best we can with the schedule of costs, the solicitors fees are reduced to £20,000 plus VAT. Assuming that the unattributed £3,750 was indeed solicitor's as opposed to counsel's costs, that should mean that disbursements of some £12, 642 are payable plus VAT. That makes the total payable by the applicant in respect of the represented respondents' costs £32,642 plus VAT.

31. In this tribunal, a party in entitled to engage any representative to act on their behalf and Mr Ullah and Mr Islam have both confirmed that their parents paid them to act on their behalf. Although Mr Islam confirmed that he was separately employed, he has provided no evidence of any loss, meaning that he is only entitled to claim £19 per hour. Mr Ullah claimed his costs at a lower rate still. The tribunal

therefore also orders the applicant to pay £2,821.50 in respect of Mr Islam's costs and £1,948.88 in respect of Mr Ullah.

Name: Judge Wayte **Date:** 17 December 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).