



FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER (RESIDENTIAL  
PROPERTY)

Case reference : CHI/45UG/LSC/2023/0093

Property : The Priory, Syresham Gardens,  
Haywards Heath, West Sussex RH16  
3XB

Applicant : Mr B McNamara

Representative : In person

Respondent : The Priory HH Limited

Representative : Fountayne Managing Limited (Mr S  
Stern), but no representation at the  
hearing

Type of application : Rule 13 costs application

Tribunal members : Mr C Norman FRICS  
Valuer Chairman  
Mrs J Coupe FRICS, Regional Surveyor  
Ms J Dalal

Date of Hearing : 13 August 2024

Date of Decision : 24 February 2025

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DECISION ON AN APPLICATION UNDR RULE 13

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### DECISION

1. The application for an order for wasted costs against the respondent The Priory HH Limited pursuant to rule 13(1)(a) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 is REFUSED.

### REASONS

2. This is an application for the award of costs pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"). The application is made on behalf of the applicant tenant in connection with an application under section 27A of the Landlord and Tenant Act 1985. The Tribunal's substantive decision in the section 27A proceedings was handed down on 11 November 2024.
3. The applicant asserts that the respondent's representative, its Property Managing Agent, acted unreasonably in the conduct of the proceedings. He seeks a wasted costs order pursuant to rule 13(1)(a). The grounds may be summarised as follows:
  - (i) unreasonably delaying / missing deadlines
  - (ii) no offers to settle
  - (iii) multiple breaches of the lease
  - (iv) employing a managing agent who is not legally compliant
  - (v) the applicant is a litigant in person who has spent a great deal of time preparing the case
  - (vi) the applicant attended hearings in Havant and Brighton
  - (vii) the respondent failed to attend the hearing in Brighton
  - (viii) the buildings insurance has not been paid causing mental anguish
4. The respondent did not respond to the application.
5. Section 29 of the Tribunal Courts and Enforcement Act ("TCEA") provides that cost of and incidental to all proceedings in the FTT are to be in the discretion of the Tribunal subject to Tribunal Procedure Rules. Also, that the Tribunal shall have full power to determine by whom and to what extent the costs are paid. Additionally, the Tribunal may order the legal or other representative concerned to meet the whole or part of any wasted costs.
6. Rule 13 sets out the circumstances where the FTT (Property Chamber) may make cost shifting orders. It provides that the FTT may make an order in respect of costs only in specified circumstances. Accordingly, costs orders are made only where the section specifically allows the Tribunal to do so. Even if one of the listed exceptions is established, the Tribunal has a residual discretion as to whether or not to make an award of costs, and if so the amount.
7. By section 13(1)(a) the first exception is that the Tribunal may make an order for "wasted costs." "Wasted costs" are defined in section 29(5)-(6) of the TCEA as meaning

any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative which, in the light of such act or omission, the Tribunal considers it is unreasonable to expect that party to pay. Legal or other representative in relation to a party includes “any person exercising a right of audience or right to conduct the proceedings on his behalf.”

8. In *Triplark Limited v Wismayer and Various Lessees of Northwood Hall* the (LON/00AP/LSC/2022/0206/0206) the FTT (Judge McGrath, Chamber President, Mr C Norman FRICS and Mr M Bell ACA CTA) said:

7. In *Willow Court Management Co v Alexander* [2016] 290, the ambit of rule 13(1) was considered in some detail. It determined that Tribunals should approach a rule 13 costs application in three stages:

- (1) The Tribunal must determine that there has been “unreasonable conduct.”
- (2) If there has been unreasonable conduct, then the Tribunal must consider whether, in the light of that unreasonable conduct, it ought to exercise its discretion to make an order for costs.
- (3) If so, then it must consider what the terms of any costs order should be.

Although *Willow Court* was concerned only with costs under rule 13(1)(b) it is submitted on behalf of Triplark that the three-stage test is also relevant when considering rule 13(1)(a). We agree.

9. In *Willow Court* reliance was placed on *Ridehalgh v Horsefield & Anr* [1994] Ch 205 where the Court of Appeal considered the meaning of “unreasonable.” Both cases were considered and approved in *Kathryn Anne Lea (and other leaseholders) v GP Ilfracombe Management Company Limited* [2024] EWCA Civ 1241.

10. Lord Justice Coulson referred to the authorities as follows:

6. In *Ridehalgh v Horsefield & Anr* [1994] Ch 205, the Court of Appeal was concerned with wasted costs orders. One of the requirements for such an order is that the conduct must be ‘unreasonable’. Sir Thomas Bingham MR (as he then was) said at 232 E-G:

‘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.'

7. In *Willow Court Management Co (1985) Limited v Alexander* [2016] UK UT 290 (LC); [2016] L.&T.R.34, the UT dealt with the same issue as that which arises on this appeal, namely the applicable test for unreasonable conduct in bringing, defending or conducting proceedings. One of the issues was whether or not the guidance in *Ridehalgh* was applicable. The UT decided that it was, saying at [23]-[26]:

'23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in *Ridehalgh* on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. 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* at 232E, despite the slightly different context. "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?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship."

11. The Court of Appeal approved and followed those decisions and also the decision in *Dammerman v Lanyon Bowdler LLP* [2017] EWCA Civ 269 which was concerned with the similar jurisdiction to allow costs in the county court in small claims litigation, where it was confirmed that the test to be applied when considering unreasonable conduct was that set out in *Ridehalgh*.

12. Several other points of principle are made in the *Lea* case. Firstly, that neither *Ridehalgh* nor *Willow Court* decide that unreasonable conduct *must* involve vexatious conduct or harassment. Although unreasonable conduct may include such conduct it is not a requirement. It would be potentially too restrictive to elide unreasonable conduct with vexatious or harassing behaviour.
13. Secondly, that deciding whether or not there has been unreasonable conduct, and if so, whether an adverse order for costs should be made, is a fact-specific exercise. Although sufficient guidance in respect of rule 13(1)(b) had been set out in *Ridehalgh* and *Willow Court*, 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?
14. Finally, to the extent that the appellants in the case sought to argue that a different or wider test should apply to rule 13(1)(b) that was rejected. The test in *Ridhalgh* and *Willow Court* for unreasonable conduct is in accordance with the authorities and consistent with a generally 'costs neutral' regime.
15. The Tribunal respectfully agrees with and adopts the above approach. In the present case, it notes that there were multiple case management applications by both parties. On two occasions, the applicant's requests were refused. However, the respondents were the subject of an intended debarment arising from failure to state their case in accordance with the directions. Ultimately, their case was served and although slightly outside the extended prescribed time, that breach was waived, and no debarment took place.
16. The Tribunal finds that the circumstances that led to the notice of intended debarment did amount to unreasonable behaviour. The absence of offers to settle, alleged breaches of the lease, time expenditure, the status of the managing agent and the applicant, non-attendance at hearings and the status of building insurance do not fall within or relate to the definition of unreasonable conduct within the meaning of rule 13.
17. In exercising its discretion, the Tribunal finds that as no debarment was ultimately ordered and having regard to the other factors above, that it should not make an award of costs under rule 13.
18. It is therefore unnecessary for the Tribunal to consider the third stage in *Willow Court*.

24 February 2025

### **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).