



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

Case reference : **CAM/33UC/LSC/2022/0057 and 58**

Property : **20, 46 and 48 Mill Lane, Aylsham,
Norfolk NR11 6WA, and
16 Donthorn Court, Aylsham,
Norfolk NR11 6YF**

Applicants : **1. Mr Jonathan Dempsey
2. Ms Karen Wraighte
3. Mr Paul Fletcher
4. Ms Catherine Watson**

Representative : **Mr Jonathan Dempsey**

Respondent : **Donthorn Mill Property Limited**

Representative : **Mr Robert Haughton**

Type of application : **Rule 13 costs application**

Tribunal members : **Judge K. Seward
Mr G. F. Smith MRICS FAAV**

Date of decision : **4 July 2023**

DECISION AND REASONS

DECISION OF THE TRIBUNAL

The application for an order that the Respondent pay the Applicants' costs pursuant to rule 13(1) of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 is dismissed.

REASONS

The background

1. The application for costs follows the Decisions of the Tribunal made on 5 April 2023 concerning the payability of estimated service charges under section 27A of the Landlord and Tenant Act 1985 in respect of the property at Donthorn Court and Mill Lane.
2. The Tribunal found in favour of the Respondent on the substantive issue of payability of the estimated service charges. Notwithstanding that finding, the Tribunal ordered the Respondent to reimburse the Applicants' Tribunal fees. Orders were also made under section 20C of the 1985 Act and under paragraph 5A of schedule 11 of the Commonhold and Leasehold Reform Act 2002 to prevent the Respondent from recovering the costs of the proceedings from the Applicants either through the service charge or against individual leaseholders directly.
3. By email to the Tribunal on 20 April 2023, the Applicants sought an additional order for the payment of costs of the proceedings. The application was made by Mr Jonathan Dempsey, as representative of all four Applicants. Mr Dempsey described the application as a "review" of the Tribunal's decision. The Tribunal has taken this as incorrect terminology as there is no suggestion of an application for permission to appeal to trigger a review under rule 55 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"). From the particulars provided, it was plain that the application was in fact for an award of costs pursuant to rule 13(1)(b).
4. The costs sought were not for the recovery of legal costs or other professional representation. Rather, they principally concern costs incurred for professional printing and for stationery purchased in the preparation of the hearing bundles. A total sum of £232.74 is sought. This represents the sum of £166.80 for professional printing and collating, £39.99 for printer cartridges, £15.20 for lever arch files and £10.75 for file dividers.
5. Mr Dempsey had copied his email of 20 April 2023 to Mr Haughton, the Respondent's representative. Mr Haughton clearly received the email because he emailed the Tribunal office on 27 May 2023 to

enquire if the Tribunal had accepted the application. On 30 May 2023 the Tribunal formally invited the Respondent to make representations in response to the costs application. Mr Haughton replied by email on 31 May 2023 to oppose the costs application and setting out his grounds. These included an assertion that the Tribunal had already awarded the Applicants £100 too much in Tribunal fees.

6. The Applicants took the opportunity to make brief comments in response on 5 June 2023. However, they also sought to add to their application having “discovered Civil Procedure Rule 46.5”. They proceeded to set out a claim for the time spent by Ms Watson and Mr Demspey in attending the hearing, mileage costs, plus the time taken in preparing their statement of case and response to the Respondents. The amount claimed was increased from a total of £232.74 to £1,427.94.
7. Mr Haughton then emailed the Tribunal on 8 June 2023 to say that the Applicant’s final comments were out-of-time because of the 28-day limitation within rule 13(5). He added: “We have not responded to the points or sums referred to in the email of 5 June as we do not believe the Tribunal can consider it”.
8. The parties consented to a paper determination of the costs application.

Analysis

9. The Civil Procedure Rules do not apply to proceedings before the Tribunal. It is the 2013 Rules which govern proceedings. Under rule 13(5) an application for costs must be made within 28 days after the date on which the Tribunal dispatches its decision finally disposing of all issues in the proceedings. The application of 20 April 2023 was made within the requisite 28-day period running from 5 April 2023. The supplemental application was considerably out-of-time having been submitted on 5 June 2023, without consent of the Tribunal. The Tribunal disregards the supplemental claim for costs.
10. It is incorrect that the Tribunal awarded £100 too much to the Applicants for reimbursement of their fees. A £100 application fee was payable in respect of each postcode. As the application concerned two postcodes, the application fees totalled £200. A £200 hearing fee was paid in addition, hence the award of £400.
11. Except to the limited extent provided by rule 13, the Tribunal is normally a “no costs” jurisdiction. The basic power of the Tribunal to award costs is found in section 29 of the Tribunals, Courts and Enforcement Act 2007. This states that costs shall be in the discretion of the Tribunal subject to, in the case of this Tribunal, the 2013 Rules.

12. Rule 13(1)(b) of the Rules states: *“The Tribunal may make an order in respect of costs ... if a person has acted unreasonably in bringing, defending or conducting proceedings in ... a leasehold case”*.
13. In *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC) (*“Willow Court”*), the Upper Tribunal (“UT”) gave clear guidance on the principles to be applied in respect of rule 13(1)(b). The UT suggested a sequential three-stage approach, which is not of rigid application but provides a helpful framework. It may be summarised as:-
 - (1) applying an objective standard, has the person acted unreasonably?
 - (2) if so, should the Tribunal exercise its discretion to make an order for costs?
 - (3) if so, what should the terms of the order be?
14. Stage 1 is essentially a gateway to stages 2 and 3. In deciding what is meant by acting “unreasonably”, the UT followed the approach set out in *Ridehalgh v Horsfield* [1994] EWCA 23 Civ 40, [1994] Ch 205, and stated (in paragraph 24) that *“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” [in Ridehalgh]: is there a reasonable explanation for the conduct complained of?”*.
15. The UT in *Willow Court* (in paragraph 23) also expressly rejected the submission that *“unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous”*, i.e. it rejected the contention that ‘unreasonableness’ should be given a wider meaning. The UT did not go so far as to state that rule 13(1)(b) costs should only be awarded in the most exceptional of cases. However, it is clear that orders under rule 13(1)(b) are to be reserved for the clearest cases and the bar is a high one.
16. The burden is on the Applicants for an order to be made pursuant to rule 13. The actual wording of rule 13(1)(b) is important. It is specific that an order may *only* be made “if a person has acted unreasonably in ... defending or conducting proceedings”. Under the 2013 Rules, the word “proceedings” means acts undertaken in connection with the application itself and steps taken thereafter (rule 26).
17. Therefore, an application does not involve any primary examination of a party’s actions before an application is brought (although pre-commencement behaviour might be relevant to an assessment of the

reasonableness of later actions in “defending or conducting proceedings”).

18. In ordering the Respondent to reimburse the Applicants’ Tribunal fees, the Tribunal noted that the Applicants were essentially left with little option but to pursue their application when details of the sums demanded were so scant. The application was entirely avoidable with better information and communication from the Respondent at the outset. This provided justification for the award of fees under rule 13(2). It does not automatically follow that a costs application will succeed.
19. This conduct by the Respondent occurred before the proceedings began. It was not conduct in “defending or conducting proceedings” for rule 13(1)(b) to be engaged. Accordingly, it cannot be basis to make a costs award.
20. Once proceedings were initiated, the Tribunal was critical of the lack of clarity on the Respondent’s part in the written evidence produced to explain the basis of its defence. The information should have been presented more clearly with sufficient explanation of the sums charged and why they were due. It took the Tribunal prolonged questioning of the Respondent’s representatives during the hearing to establish how the estimated service charge had been calculated and the works involved.
21. However, there was no indication that the Respondent’s representatives were deliberately evasive or unhelpful. It struck the Tribunal that they simply struggled to articulate their case clearly and to appreciate the information required of them. That is most likely attributable to a lack of expertise in leasehold management. The position was not helped by the lack of involvement in the proceedings of the managing agents who were not present at the Hearing and might reasonably be expected to answer the Tribunal’s questions.
22. The conduct of the Respondent’s representatives fell short of the high bar required for the Tribunal to conclude that they acted unreasonably in conducting proceedings. Furthermore, the Respondent was able to justify that the sums charged to each Applicant were reasonable and payable and so there is no question of the Respondent having acted unreasonably in defending the proceedings.
23. The first part of the test is not met, and the application must fail. The discretionary power of the Tribunal under stage 2 is not engaged.

Name: Judge K. Saward **Date:** 4 July 2023

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).