FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/OCE/2016/0338**
Property	:	**66 & 68 Crimsworth Road, London SW8 4RL**
Applicants	:	**Marcus Jon Willcocks** **Fatima Gashi**
Representative	:	**Bennett Welch Solicitors**
Respondent	:	**London Borough of Lambeth**
Representative	:	**TLT LLP**
Type of Application	:	**Costs – rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	:	**Judge Nicol**
Date of Decision	:	**22nd May 2017**

DECISION

The Tribunal refuses the Applicants' application for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the reasons set out below.

Background

1. The Applicants sought, and eventually agreed, on the collective enfranchisement of the Respondent's freehold interest in the subject property under the Leasehold Reform, Housing and Urban Development Act 1993. It is not known if the agreement covered the Applicants' recoverable costs under that Act but they have now applied

for their costs of these proceedings under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The relevant law

2. The relevant parts of rule 13 state:

> (1) The Tribunal may make an order in respect of costs only—
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
> (iii) a leasehold 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.

3. The Upper Tribunal considered rule 13(1) in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 0290 (LC). They quoted with approval the following definition from *Ridehalgh v Horsefield* [1994] Ch 205 given by Sir Thomas Bingham MR at 232E-G:

> "Unreasonable" ... 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.

4. The Upper Tribunal in *Willow Court* went on to say:

> 24. ... 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?
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> 26. We ... 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.

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only ... if a person has acted unreasonably...." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. ...

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. ...

Stage 1 – has the Respondent acted unreasonably in the proceedings?

5. The Applicants' argument is that, if the Respondent had acted quickly enough, it would not have been necessary for the Tribunal application to have been made or for the hearing to have been set down – the hearing was ultimately not needed but the Applicants incurred the hearing fee and some preparation time.

6. In the Tribunal's opinion, this argument does not even get off the ground so that the particular facts relied on are irrelevant. Those

seeking leasehold enfranchisement are obliged by the terms of the aforementioned Act, having served their initial notice, to apply to the Tribunal within a fixed time limit. There is no suggestion that the Respondent deliberately delayed matters, whether in order to frustrate or incur expense for the Applicants or for any other reason. Aside from such circumstances, the Tribunal agrees with the Respondent that there is no duty on the respondent to an initial notice to conduct themselves so as to avoid the need for a Tribunal application or hearing.

7. Further and in any event, the Tribunal agrees with the Respondent that rule13(1)(b) is about behaviour during the Tribunal proceedings. Earlier behaviour which might have resulted in the necessity for a Tribunal application can only be relevant on the second stage of consideration below.

8. The Tribunal cannot see how the Respondent's behaviour could be regarded as unreasonable within the meaning of rule 13(1)(b).

Stage 2 – should the Tribunal exercise its discretion to order costs?

9. Even if the Tribunal were wrong and the Respondent's behaviour should be regarded as unreasonable, the Tribunal would be minded not to exercise its discretion in favour of an order for costs. It is common practice for parties seeking enfranchisement to reach final agreement after an application has been made and even just before the hearing is due to take place. It is the common practice of the Tribunal not to apply any sanction to any party for allowing that to happen. Any potential party looking at such practice would be under the impression that they would not be subject to any sanction for doing so and would arrange their affairs accordingly. Unless and until steps are taken both to change that practice and to make it widely known, it would be grossly unfair to make costs orders against parties for acting in accordance with standard practice.

Tribunal fees

10. The Tribunal's power to order reimbursement of Tribunal fees under rule 13(2) is not circumscribed by the same limitation as to unreasonable behaviour contained in rule 13(1)(b). However, again the Respondent had no duty to avoid the application or the hearing and only acted in the same way as the overwhelming majority of parties in such cases. The Act already provides for the recovery of certain costs and there is an insufficient basis in this case for adding to them.

Conclusion

11. In the circumstances, the Applicants' application for costs must be refused.

Name: NK Nicol **Date:** 22nd May 2017