FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/LBC/2019/0098**
Property	**:**	**Flat 39, Prospect Quay, 98 Point Pleasant, London SW18 1PR**
Applicant	**:**	**Prospect Quay Limited**
Representative	**:**	**Mrs Jill Batterley, Chair of Board of Directors**
Respondent	**:**	**Ms Rhiannon Brewster**
Representative	**:**	**Ms Imogen Dodds of Counsel instructed by Farrer & Co LLP**
Type of application	**:**	**Costs – Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**
Tribunal members	**:**	**Judge N Hawkes**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date	**:**	**21 July 2020**

DECISION

The Decision of the Tribunal

The Applicant's application for an order for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 is dismissed.

The application

1. The Applicant's original application dated 26 November 2019 was for a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent was in breach of covenant by letting the Property through Airbnb, and by doing so without giving notice or paying registration fees.

2. The Applicant's bundle of documents in support of the original application was served on the Respondent on 20 January 2020. On 29 January 2020, the Respondent's solicitors wrote to the Applicant stating that the Applicant admitted historic breaches of her lease. There was then some correspondence concerning the letter of 29 January 2020 following which, by letter dated 19 February 2020, the Applicant's application for a determination that the Respondent was in breach of covenant was withdrawn.

3. By letter dated 14 February 2020 and by its Statements of Case dated 2 March 2020 and 22 March 2020, the Applicant seeks an order against the Respondent for costs in the sum of £14,251.60.

The Tribunal's determination

4. The Tribunal's power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which includes provision that:

29. Costs or expenses

(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal …

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules …

5. Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules") provides so far as is material:

13.—(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—

…

(ii) a residential property case.

6. In determining this application pursuant to rule 13 of the 2013 Rules, the Tribunal has had regard to *Willow Court Management Ltd v Alexander* [2016] UKUT 290 (LC); [2016] L. & T.R. 34, in which the Upper Tribunal gave guidance concerning the approach that a Tribunal should take when considering a rule 13 cost application.

7. I have considered the entirety of *Willow Court* and note that at paragraph [43], the Upper Tribunal stated:

"A decision to award costs need not be lengthy and the underlying dispute can be taken as read."

8. In summary, the Tribunal is to apply a three-stage approach. Firstly, applying an objective standard, the Tribunal must consider whether or not the Applicant has acted unreasonably. An unsuccessful outcome is not sufficient on its own to warrant an order under rule 13 and the Tribunal must be careful not to use this power too readily.

9. At [24] of *Willow Court*, the Upper Tribunal stated:

"… 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 v Horsefield 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?"

10. If the Applicant is found to have acted unreasonably, the Tribunal must consider whether or not an order for costs should be made. This involves a consideration of the nature and seriousness of the Applicant's conduct and the Tribunal retains a discretion at this stage.

11. If the Tribunal determines that it will make an order for costs, the terms of the order fall to be considered. There is no need for a causal connection to be established between the conduct and the costs incurred. The Tribunal can make an order for payment of the whole or part of a party's costs. The nature, seriousness and effect of the unreasonable conduct are important factors.

12. At paragraphs [35] to [37] of *Willow Court* the Upper Tribunal considered the making of concessions (emphasis supplied):

> *35. In one of the appeals with which we are now concerned (Stone), costs were awarded under rule 13(1)(b) on the grounds that the applicant had delayed in withdrawing proceedings until after a time when it should have been clear to him that he had achieved as much by concession from the management company as he could realistically expect to obtain from the FTT by proceeding to a hearing. It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and to abandon less important points of contention or even, where appropriate, their entire claim.* ***Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs***.
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> *36. In this regard our attention was drawn to the decision of the Court of Appeal in McPherson v BNP Paribas [2004] EWCA Civ 569, which concerned rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (permitting the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably). Having noted that in civil litigation under the CPR the discontinuance of claims was treated as a concession of defeat or likely defeat, Mummery LJ went on, at paragraph 28:*
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> > *"In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for Employment Tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed.*

> *As Miss MacAtherty appearing for the Applicant, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and* ***the Tribunal should not adopt a practice on costs which would deter applicants from making sensible litigation decisions****."*

37. The views of the tribunal in Cancino were to similar effect, at paragraph 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 the 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."*

13. At paragraphs 12-43 of the Applicant's Statement of Case, the Applicant refers to conduct which took place prior to the Applicant making its application to the Tribunal on 26 November 2019. At paragraph 10 of its Reply to the Respondent's Statement of Case, the Applicant clarifies that it considers the Respondent's conduct prior to the issue of the Tribunal application on 26 November 2019 to be relevant for the following reason (emphasis supplied):

"it indicates that ***her consistent motive*** *has been to avoid being found to have been in breach of her lease, at any cost, presumably so that she could continue to run the letting of her flat as she saw fit – either by longer term tenancy or Airbnb or both. This is exemplified by her denial in all correspondence that she is in breach of her lease, a matter taken up (somewhat misleadingly) by her solicitors."*

14. Accordingly, the Respondent's conduct prior to the issue of the Tribunal proceedings appears to be relied upon insofar as it may provide the motive for any unreasonable conduct which is found to have occurred following the issue of proceedings.

15. The conduct relied upon by the Applicant which follows the issue of the Tribunal proceedings on 26 November 2019 is set out at paragraphs 44 to 47 of the Applicant's statement of case. The summary at paragraph 49 does not distinguish between conduct which occurred before and after the issue of proceedings.

16. Prior to the issue of the Tribunal proceedings, the Respondent had instructed Farrer & Co LLP to represent her. Having carefully reviewed the correspondence which was sent to the Applicant by Farrer & Co LLP on behalf of the Respondent following the issue of proceedings, I am not satisfied that the content of this correspondence meets the threshold of unreasonable conduct applying the guidance set out in *Willow Court*. The Tribunal has not been referred to any direct communication between the Respondent herself and the Applicant which post-dates the issue of proceedings.

17. In summary, following the issue of proceedings the Respondent denied that she had breached the terms of the lease; she made an application to strike out the Applicant's application; and, subsequently, she admitted that she had historically been in breach of covenant.

18. The Respondent's strike out application was made on the grounds that the jurisdiction under section 168 of the 2002 Act was not engaged if the landlord would in any event be precluded from serving a notice under section 146 of the Law of Property Act 1925 (in this instance, on the basis that the breach had been remedied), or alternatively, that such a determination would accordingly be futile.

19. By letter dated 6 January 2020, the Tribunal made preliminary comments and asked the Respondent whether she wished to continue with her application. The Respondent did not pursue the rule 9 application. Accordingly, the Tribunal did not hear full argument and a Tribunal determination was not made. In my view, the rule 9 application raised arguable points insofar as breaches had been remedied and the making of this application does not meet the threshold of unreasonable conduct.

20. The Respondent states that, at an early stage in the proceedings (having received the Applicant's Statement of Case and prior to preparing her own), the Respondent took the commercial decision not to incur the costs of defending the Applicant's application and instead opted to admit that she had breached the terms of the lease. This decision was taken upon receipt of the Applicant's evidence and submissions and it saved both parties the costs of proceeding to a hearing. The admissions were set out in a letter which made the Respondent's position concerning the historical nature of the breaches clear.

21. Applying an objective standard, I am not satisfied that it was unreasonable for the Respondent to initially defend the Applicant's application, to issue the rule 9 application, and then to admit that she had breached the terms of the lease at a relatively early stage, after considering the evidence and submissions relied upon by the Applicant in support of the application which had been issued.

22. A reasonable explanation for such conduct would be an intention on the part of a party to Tribunal proceedings to protect their position following issue until they had fully considered the nature of the evidence served and the argument relied upon against them, and the potential legal costs of defending the litigation if they remained legally represented.

23. In all the circumstances, I am not satisfied that the conduct of these Tribunal proceedings by the Respondent through her solicitors, Farrer & Co LLP, meets the threshold set by rule 13 of the 2013 Rules and the Applicant's application for costs is dismissed.

Name: Judge N Hawkes **Date:** 21 July 2019