FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**AB/LON/00BK/OLR/2019/0249** **PAPER:REMOTE**
Property	**:**	**33 Devonshire Mews West, St Marylebone London** **W1N 1FQ**
Applicant	**:**	**Adedapo Adewale Tejuoso.**
Representative	**:**	**Bishop & Sewell LLP Solicitors**
Respondent	**:**	**Howard De Walden Estates Limited**
Representative	**:**	**Charles Russell Speechlys LLP Solicitors**
Type of application	**:**	**Rule 13 costs application**
Tribunal members	**:**	**Judge Professor Robert Abbey**
Date of Costs Decision	**:**	**18 August 2022**

COSTS DECISION

Application for costs

1. An application was made by the Respondent under Rule 13 of the Tribunal Rules in respect of the Respondent's costs. The Tribunal subsequently received a schedule of costs totalling £31482.50. This is the amount listed by the Respondent and consists of legal costs,

Valuers fees, disbursements and VAT. (This total is made up of £9757.09 legal costs including VAT, Valuer's fees of £11400 including VAT and Counsel's fees of £10200 including VAT). The details of the provisions of Rule 13 are set out in the appendix to these Directions and rights of appeal made available to parties to this dispute are set out in an Annex.

2. The applicant seeks a costs order under Rule 13(1)(b), based on the respondent's unreasonable conduct.

3. Before a costs decision can be made, the Tribunal needs to be satisfied that there has been unreasonableness. At a second stage it is essential for the Tribunal to consider whether, in the light of unreasonable conduct (if the Tribunal has found it to have been demonstrated), it ought to make an order for costs or not. It is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

4. The Respondent filed with the Tribunal the Respondent's written costs application dated 26 July 2022 and comments/observations thereon were requested of the Respondent and these were received by the Tribunal and were dated 29 July 2022. The Respondent then filed and served a reply to the Applicant's submission, that reply being dated 5 August 2022

5. It now falls to me to consider the costs application in the light of the written submissions before me. I do this but in the context of the circumstances of the original decision.

6. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as PAPERREMOTE - used for a hearing that is decided entirely on the papers submitted to the Tribunal. A face-to-face hearing was not held because it was not possible due to the Covid -19 pandemic and more particularly because all issues could be determined in a remote paper-based hearing. The documents that were referred to are in a bundle of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared/agreed by the parties, in accordance with previous directions

DECISION

1. The Tribunal's powers to order a party to pay costs may only be exercised where a party has acted "unreasonably". Taking into account the guidance in that regard given by HH Judge Huskinson in *Halliard Property Company Limited v Belmont Hall & Elm Court RTM, City and Country Properties Limited v Brickman LRX/130/2007, LRA/85/2008,* (where he followed the definition of unreasonableness *in Ridehalgh v Horsefield* [1994] Ch 205 CA), the Tribunal was not satisfied that there had been

unreasonable conduct so as to prompt a possible order for costs. The Tribunal was mindful that that this jurisdiction is generally a "no costs" jurisdiction. By contrast with the county court, residential property tribunals are designed to be "a largely costs-free environment": *(1) Union Pension Trustees Ltd, (2) Mr Paul Bliss v Mrs Maureen Slavin* [2015] UKUT 0103 (LC).

2. The Tribunal was also mindful of a fairly recent but important decision in the case of *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander* [2016] UKUT 0290 (LC) which is a detailed survey and review of the question of costs in a case of this type. At paragraph 24 of the decision the Upper Tribunal could see no reason to depart from the views expressed in *Ridehalgh*. Therefore, following the views expressed in this recent case at a first stage the Tribunal needs to be satisfied that there has been unreasonableness. Under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, this Tribunal can decide whether a party has behaved unreasonably. To make this order, the Tribunal must be satisfied that the party's conduct was unreasonable in bringing the action in the first instance e.g., the claim lacked merits in its entirety.

3. At a second stage it is essential for the Tribunal to consider whether, in the light of any unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

4. In *Ridehalgh* it was said that ""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.

5. The *Willow Court* decision is of paramount importance in deciding what conduct might be unreasonable. I have mentioned the approach of the Upper Tribunal in this decision but I think it appropriate to quote the relevant section of the decision in full: -

> "*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…..."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?"

6. At paragraph 43, the UT emphasised that Rule 13(1)(b) applications "*…should not be regarded as routine…*" and "*…should not be allowed to become major disputes in their own right.*" It seems to this Tribunal that therefore the bar to unreasonableness is set quite high in that what amounts to unreasonableness must be quite significant and of serious consequence. This being so the Tribunal must now consider the conduct of the parties in this dispute given the nature of the judicial guidance outlined above.

7. The Respondent maintains that the Applicant was unreasonable in the conduct of the dispute. Consequently, the Respondent invited the Tribunal to make a finding of unreasonableness on the part of the Applicant. In the original application the applicant sought to proceed with a leasehold enfranchisement in connection with the property. Subsequently after the respondent had incurred costs and disbursements the applicant indicated that he did not intend to go ahead with the case as he was likely to participate in a collective enfranchisement claim involving 133 Harley Street. The Collective Claim then proceeded and eventually completed on 8 February 2022.

8. The Respondent says that The Applicant and his associated LLP, Lovely Sunshine LLP (LS LLP) comprise 50% of the qualifying tenants in the building and therefore, influenced the bringing of the Collective Claim, the timing of which must have been entirely within the Applicant's control. The Respondent went on to assert that the explanation for the Applicant's conduct appears to have been to that he wanted to avoid incurring costs in preparing for the Hearing of the Application, of which he had over 6 weeks' notice, whilst at the same time failing to expedite the timing of the Collective Claim to enable the Respondent to avoid incurring costs also. At the time the Collective Claim was brought, the Respondent says that the Applicant and LS LLP were the qualifying tenants of four out of eight flats in the building. None of the other qualifying tenants in the building joined in the collective claim.

9. In essence the Respondent asserts that despite having made the Application in February 2019, 4 months before the Hearing date, and being advised of the Hearing date in May 2019, 6 weeks beforehand, the Applicant chose to serve the Collective Claim on the Respondent: (i) after its valuation reports had been lodged at the Tribunal; and (ii) Counsel's Brief fee had been incurred despite the fact the Applicant had been advised on numerous occasions that the Respondent was incurring significant fees preparing for the Hearing.

10. In reply the Applicant says that until 20 June 2019 the tenant was the owner of 4 of the 8 flats in the property. The Applicant therefore went on

to say "*He could not have made a collective claim because by virtue of s. 5 (5) of the 1993 Act he was not qualifying tenant of any of his flats. The leases of two of the flats were transferred to Lovely Sunshine LLP and only on completion of those transfers on 20 June 2019 were the tenant and lovely Sunshine LLP in a position to bring the collective claim.*" In that regard in a telephone call between the representatives of the parties on 17 June 2019, the Applicant's representative advised that the Applicant did not intend the Hearing to go ahead as he was likely to participate in a collective enfranchisement claim in respect of the 133 Harley Street, the Building in which the Property is located and which would have the effect of suspending the Application.

11. For clarity, section 5(5) of the Leasehold Reform, Housing and Urban Development Act 1993 says

> *(5) Where apart from this subsection—*
>
> *(a)a person would be regarded for the purposes of this Chapter as being (or as being among those constituting) the qualifying tenant of a flat contained in any particular premises consisting of the whole or part of a building, but*
>
> *(b) that person would also be regarded for those purposes as being (or as being among those constituting) the qualifying tenant of each of two or more other flats contained in those premises,*
>
> *then, whether that person is tenant of the flats referred to in paragraphs (a) and (b) under a single lease or otherwise, there shall be taken for those purposes to be no qualifying tenant of any of those flats.*

12. The Applicant asserted that the conduct alleged by the respondent to have been unreasonable was the delay by the applicant in bringing the collective claim. This the applicant says cannot be unreasonable in that it is not unreasonable conduct of the proceedings. Rather it is about the timing of the service of a S.13 Notice which is a collateral act, not part of the proceedings for the determination of the terms of acquisition of a new lease. In support the Applicant cites the *Willow Court* decision at paragraph 95 which says-

> *The first ground did not relate to the conduct of the proceedings at all. The FTT was entitled to be critical of Ms Sinclair's failure to pay her service charges unless and until she was required to do so in order to participate in the enfranchisement and to obtain her new lease, but it was not entitled to rely on that*

conduct as supporting the charge that she had "acted unreasonably in bringing, defending or conducting proceedings." 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.

13. The applicant went on to say that the stay in the proceedings was the result of the statutory scheme and relied upon section 54(1) in that regard. Consequently, the applicant asserted that it is inherent in the statutory scheme that costs incurred in dealing with the claim for a lease extension may be wasted and that a s.13 notice may be served when the lease extension is at an advanced stage.

14. Again, for clarity, section 54(1) of the Leasehold Reform, Housing and Urban Development Act 1993 says

54 Suspension of tenant's notice during currency of claim under Chapter I.

(1) If, at the time when the tenant's notice is given—

(a) a notice has been given under section 13 with respect to any premises containing the tenant's flat, and

(b)the relevant claim under Chapter I is still current,

the operation of the tenant's notice shall be suspended during the currency of that claim; and so long as it is so suspended no further notice shall be given, and no application shall be made, under this Chapter with a view to resisting or giving effect to the tenant's claim.

15. In reply the respondent said that The Tenant knew it was his intention to bring the Collective Claim and should have conducted his proceedings reasonably by withdrawing his claim for a new lease to prevent the

Landlord from continuing to incur costs in connection with the Application. Consequently, the respondent says that paragraph 95 in *Willow Court* is not therefore relevant to this case.

16. Having carefully noted all of the above, was any of this sufficient to show unreasonableness on the part of the applicant? I think not. The Tribunal accepted the position set out by the applicant in regard to the making of the collective claim and that as a result it did not seem to the Tribunal to amount to unreasonableness.

17. The Tribunal did of course carefully consider the whole conduct of the Applicant and whilst this may have meant costs were incurred by the respondent, this did not in the view of this Tribunal amount to unreasonable conduct so as to allow a Rule 13 costs order. It is not unreasonableness to pursue your statutory rights. The applicant was entitled to seek an application in regard to the lease and the collective claim was an entirely proper application to make and as such the Tribunal was not satisfied that the Applicant's conduct was unreasonable.

18. Taking into account all that the parties have said about the case and the actions of the parties involved, the Tribunal cannot find evidence to match the high bar of unreasonable conduct set out above. The Tribunal was therefore not satisfied that stage one of the process had been fulfilled in that it had not found there has been unreasonableness for the purposes of a costs decision under Rule 13 on the part of the Applicant.

19. In the circumstances the tribunal determines that there be no order for costs pursuant to Rule 13.

Name: Professor Robert M Abbey **Date:** 18 August 2022

Appendix

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8)

Orders for costs, reimbursement of fees and interest on costs

13.

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration 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 Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(**a**), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(**b**) and the County Court (Interest on

Judgment Debts) Order 1991(**c**) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.