FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BA/LSC/2020/0141**
Property	**:**	**Various units at Poplar Court, Gap Road, London SW19**
Leaseholders	**:**	**Various leaseholders at Poplar Court (see list in Appendix)**
Representative	**:**	**James Fieldsend of Counsel instructed by Jury O'Shea LLP for the First Group of Leaseholders (see Appendix) and by TWM Solicitors for the Second Group of Leaseholders (see Appendix)**
Landlord	**:**	**Clarion Housing Association Limited**
Representative	**:**	**David Mold of Counsel instructed by Clarke Wilmott LLP**
Type of Application	**:**	**(i) Appeal for relief from sanctions and (ii) Rule 13 cost application, both supplemental to a service charge application under section 27A Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge P Korn** **Mr J Naylor MRICS MIRPM**
Date of hearing	**:**	**8 December 2022**
Date of decision	**:**	**11 January 2023**

DECISION ON APPLICATION FOR RELIEF FROM SANCTIONS AND RULE 13 COST APPLICATION

Description of hearing

The hearing was a face-to-face hearing.

Decisions of the tribunal

(1) The Landlord's application for relief from sanctions is refused.

(2) Pursuant to paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Tribunal Rules**"), the Landlord is ordered to pay the sum of £13,666.02 to the First Group of Leaseholders (see Appendix as to which leaseholders are in this group) and £9,865.79 to the Second Group of Leaseholders (again, see Appendix), in each case by way of contribution towards the costs incurred by them in connection with these proceedings, including in relation to the original application. Payment to be made within 28 days after the date of this decision.

(3) Pursuant to paragraph 13(2) of the Tribunal Rules, the Landlord is ordered to reimburse to the First Group of Leaseholders the sum of £55.00 and to the Second Group of Leaseholders the sum of £45.00, being their respective share of the original application fee. Payment to be made within 28 days after the date of this decision.

The background

1. These applications are supplemental to an application (the "**Original Application**") made by the Leaseholders pursuant to section 27A Landlord and Tenant Act 1985 challenging the cost of certain major works. The applications comprise (i) an application by the Landlord for relief from sanctions imposed by the tribunal and (ii) a cost application by the Leaseholders under paragraph 13 of the Tribunal Rules.

2. There are two separate groups of Leaseholders (in this determination referred to as the First Group of Leaseholders and the Second Group of Leaseholders – see Appendix), but the reason for there being two separate groups is not relevant to this determination. It suffices to state (a) that the First Group of Leaseholders is represented by Jury O'Shea LLP and the Second Group of Leaseholders is represented by TWM Solicitors and (b) that those two firms have jointly instructed James Fieldsend of Counsel in connection with these supplemental applications.

3. The Original Application was made on 12 March 2020. Directions in relation to the Original Application were given on 15 September 2020 following a case management hearing, and one of the directions required the Landlord to provide a full response to a list of questions

annexed to the Original Application by 23 October 2020. The Landlord did not do so, and the Leaseholders reported this non-compliance to the tribunal on 11 November 2020. The Landlord questioned whether the directions accurately reflected what was discussed at the case management hearing, but the tribunal then wrote to the parties on 14 December 2020 confirming that it was satisfied that the written directions accurately reflected what was agreed at the case management hearing and it directed a revised timetable. The Landlord provided answers to the list of questions on the revised date set by the tribunal.

4. Following receipt of the Landlord's answers to the list of questions, the Leaseholders proposed a stay of the Original Application pending production of the final account for the major works. The Landlord agreed to a stay until 1 June 2021 and stated that it was hoped that the final accounts would be available before then. The stay was confirmed by the tribunal. On 28 May 2021 the Leaseholders requested further directions from the tribunal as they were no clearer as to when the final account would be available. The Landlord then indicated that the final account would be available by 30 June 2021, but it was not available by then and no explanation for the further delay was provided.

5. On 10 August 2021, having heard nothing further from the Landlord, the Leaseholders wrote again to the tribunal requesting revised directions. These were issued, with the Landlord being required by 24 August 2021 to produce the account and provide other disclosure and to explain why the final account was so late and why the Leaseholders and the tribunal had not been kept informed as to the reasons for lateness. On 24 August 2021 the Landlord requested an extension until 3 September 2021 but did not provide the required explanations. The extension was granted but by 3 September 2021 no account was provided and nor was there any other communication from the Landlord.

6. On 15 October 2021 the Landlord stated that an on-site meeting was booked for 21 October 2021 and that it would then have a clearer idea as to when the account would be available. Between 15 October 2021 and 22 March 2022 nothing further was heard from the Landlord by the Leaseholders or the tribunal, and the matter was listed for a further case management hearing on 22 March 2022. At that hearing the tribunal gave further directions whereby the Landlord was required to give disclosure of certain items by certain dates, and it was directed that sanctions would be applied in the event of non-compliance. The effect of those conditional sanctions was essentially that if the Landlord did not give the specified disclosure by the specified dates it would be treated as not having contracted for the carrying out of the major works in question with the consequence that no service charge would be payable by the Leaseholders in respect of those works. Also at that hearing the Landlord, in the presence of its solicitors, assured the tribunal that it would be communicating more effectively in future.

7. The Landlord then failed to comply with the directions agreed at the case management hearing on 22 March 2022. By an email sent on 29 March 2022 its then solicitors purported to send to Leaseholders documents that it had been required by the directions of 22 March 2022, but the documents could not be opened by the Leaseholders. The Landlord was informed by email that same day (29 March 2022) that the documents could not be opened but it failed to respond to that email or to subsequent chasing correspondence. It also failed to respond to an email from Jury O'Shea LLP (on behalf of the First Group of Leaseholders) to its then solicitors stating that there had been a failure to comply with the March directions and that consequently the sanctions applied. On 13 April 2022, having still received no response from the Landlord, Jury O'Shea wrote to the tribunal requesting confirmation that there had been non-compliance with the March directions and that therefore the sanctions now took effect. PWM Solicitors (on behalf of the Second Group of Leaseholders) also wrote to the tribunal to the same effect. Both communications were copied to the Landlord who did not respond to either of them.

8. The tribunal then listed the matter for a further case management hearing on 22 June 2022. The Landlord did not respond until its solicitors sent an email to the tribunal on the morning of the hearing. At the June hearing the Landlord was unable to explain why it had failed to re-send the attachments or even to respond to the concerns raised about non-receipt of those attachments. The tribunal also stated that it too had been unable to open the attachments in questions, the relevant email of 29 March 2022 having been forwarded to it. At that hearing the tribunal confirmed that the sanctions had taken effect, with the consequence that no service charge was payable by the Leaseholders in respect of the major works in question. In response, the Landlord's then solicitors said that an application for relief from those sanctions would be made within 28 days. The tribunal's determination records that it made no comment as to the merits of any application for relief (this being a matter for the tribunal panel hearing any such application), but it commented that the Landlord might wish to take legal advice on any such application including the relevance of any delay in applying for relief. The application for relief was made on 20 July 2022.

Application for relief from sanctions

Landlord's submissions

9. In a witness statement the Landlord's then solicitor, Sian Evans of Weightmans LLP, refers to the decision of the Court of Appeal in *Denton v TH White Ltd [2014] EWCA Civ 906* as being the leading case on the issue of relief from sanctions, and she states that the starting point is whether the breach of the tribunal's order in the March directions was a serious or significant one.

10. Ms Evans states that the required documents were sent by 'Mimecast', which enables users to send or receive secure email with files up to 2GB without putting a burden on email infrastructure. She states that this system is used frequently and that her firm has previously used this system to provide disclosures in this matter which the Leaseholders appear to have opened without difficulty. She submits that the Landlord complied with the disclosure obligation by sending documents in that format on 29 March 2022. She notes that the Leaseholders indicated that they were unable to open the documents, but her firm's IT department is unable to explain why the documents could not be opened by them. She also states that the Landlord had provided all of the documents to their solicitors and should not be penalised if for some reason the Leaseholders were unable to open them, and it is clear from the email dated 29 March 2022 that the documents were sent. Weightmans re-sent the documents by Mimecast on 24 June 2022, and she understands that this time they were opened without difficulty.

11. Ms Evans adds that the third stage of the test in the *Denton* case referred to above requires the tribunal to consider all of the relevant circumstances but to give particular weight to two factors. First of all, the tribunal is required to consider the need to conduct litigation efficiently and at proportionate cost. The technical failing which caused the Landlord to be debarred from defending the Original Application has in her submission not significantly affected the overall efficiency with which this case is being conducted because the final account was not due to be delivered to leaseholders until September 2022. The Landlord has not significantly affected the likely overall costs of the proceedings because the Leaseholders could not comment on the reasonableness of the major works until the final account was received. In addition, whilst the Leaseholders issued the Original Application some time ago that application was premature as the works had not been completed at the time. The works have now been completed and the final account was completed in May 2022.

12. Secondly, the tribunal is also required to consider the need to enforce compliance with rules, practice directions and orders. She submits that, in view of her explanation for the default which was not the fault of the Landlord itself (as it had provided all the relevant documents in order for Weightmans to send them on to comply with the tribunal's direction), the Landlord should not be penalised. The delay in re-sending those documents was entirely the fault of Weightmans LLP rather than the Landlord. Prior to the order for disclosure having been made the Landlord had already provided disclosure of 290 documents. She submits that in all the circumstances of the case it would be just for the Landlord's application to be granted. Other relevant circumstances, in her submission, are as follows:

a) The application for relief was made within 28 days of the tribunal's order.

b) The failure was not intentional.

c) Apart from the delay caused by the failure to comply, there was no particular effect on the Leaseholders given that the issue of reasonableness of the service charge could not have been considered until receipt of the final account which was served in compliance with the tribunal's direction on 13 May 2022.

d) There was no loss of a hearing date as one had not been fixed.

e) This is not a case where there was no action taken at all by the Landlord, as an email was sent on 29 March 2022 and the Landlord should not be penalised for the fact that a common method of sending large documents did not appear to have been accessed by the Leaseholders. The Leaseholders would have a windfall in that they would not be required to pay for substantial works that have been carried out if any sanctions take effect. The Leaseholders' final account bills range from £6,000-£19,000 and the total amount currently claimed in respect of major works by the Landlord against the Leaseholders is over £188,000.

f) The effect of granting relief would mean that the issue of the reasonableness of the service charge can be properly considered.

13. The hearing bundle also includes a witness statement from Andrea Williams, the Landlord's Head of Legal Services. In her statement, Ms Williams apologises for the failures to comply with the directions in this case but states that she has no reason to believe that any of the failures of any individuals involved in this case were intentional failures. However, she appreciates that there have been repeated failures which have impacted on the proper administration of justice, and the Landlord fully accepts that there was a breach when the link sent on 29 March 2022 could not be opened. She adds that the breach itself was a failure to provide the documents between 22 March 2022 and 24 June 2022, and she accepts that the delay constituted a serious or significant breach, especially in the context of the overall delay in providing these documents and of the fact that the breaches have disrupted the conduct of litigation. As to the reasons for the breach, the Landlord accepts there is no good explanation for the breach. Ms Williams expressly retracts the arguments advanced by Ms Evans that the Leaseholders were not significantly prejudiced by the Landlord's conduct because their challenge was to the estimated cost and was therefore premature.

14. As to whether the application for relief from sanctions was made promptly, Ms Williams argues that it could not realistically be made earlier for two reasons. In April 2022 the Leaseholders asked the tribunal to confirm that the sanctions were effective, which led to the tribunal making directions leading to a hearing on the point on 22 June 2022. Thereafter, the Landlord had to consider its position carefully,

including whether to retain its then solicitors in all the circumstances. She submits that the 28 days taken until 20 July 2022 after the hearing of 22 June 2022 is not so gross as to affect the merits of the application for relief, especially given that the final account had been provided on 13 May 2022 and the specification of works on 24 June 2022.

15. Ms Williams adds that there would be considerable prejudice to the Landlord if no relief from sanctions were to be given. The amount claimed against the Leaseholders is over £188,000 in service charges, and the Landlord is a not-for-profit housing association. And whilst she appreciates that litigants cannot expect relief from sanctions by simply offering to pay the affected party's costs, nevertheless she has authority to offer to pay the Leaseholders' costs sought in their Rule 13 applications (to be agreed, if not assessed) as a condition of relief being granted.

16. At the hearing, Mr Mold – Counsel for the Respondent – said that the Landlord's position on Rule 13 costs had changed since the date of Ms Williams' witness statement and that the Landlord was now only offering to pay the Leaseholders' costs from the date of breach onwards, i.e. from 30 March 2022.

17. Mr Mold said that it was accepted by the Landlord that there had been a significant breach for no good reason, although he noted that there had at least been an attempt to comply with the directions. He added that the application for relief had been made in time. It was, though, accepted that the breach had caused delay and that the hearing would otherwise have been listed for October to December 2022. Mr Mold referred the tribunal to the explanations provided by the Landlord for the various delays in this matter and referred in general terms to the test set out in *Denton* to be applied when considering an application for relief from sanctions, including cost, enforcement, proportionality and all the circumstances. In his submission, as this case involves a service charge dispute to the value of nearly £190,000 the proportionate approach would be to allow relief on the basis of the Landlord's Rule 13 costs offer.

Leaseholders' submissions

18. In written submissions, Mr Fieldsend – Counsel for the Leaseholders – states that throughout this case the Landlord has repeatedly shown itself unable or unwilling to comply with case management directions. Those failures have caused significant delay to the progress of the case and caused the Leaseholders to incur otherwise avoidable costs.

19. He notes that on 22 March 2022 the tribunal gave further directions managing the case to a final hearing. Those directions contained disclosure obligations on the Landlord (paragraph 4 of the directions). Those disclosure obligations were framed as an "unless order" in that

they provided for sanctions in the event of non-compliance (paragraphs 6 and 7 of the directions). In particular, they provided that that in the event of non-compliance the Landlord would be treated as having not incurred costs in connection with the major works insofar as the liability of the Leaseholders was concerned. The Landlord did not object to the directions being framed in this way. The Landlord then defaulted, and the sanctions took effect. Consequently, the case came to an end.

20. In the absence of any correspondence or communication from the Landlord (despite communications from the Leaseholders) and in order to obtain clarity, in April 2022 the Leaseholders sought confirmation as to the position from the tribunal. On 22 June 2022 the tribunal confirmed that there had been non-compliance and that the sanctions took effect. The Landlord applied for relief from sanctions on 20 July 2022.

21. Mr Fieldsend notes that it is common ground between the parties that the correct approach for the tribunal to take in relation to the relief application is to follow the approach of the courts in those cases to which it has been applied under the Civil Procedure Rules (CPR) and as explained in the related case law, materially the *Denton* case referred to above. This, he contends, is consistent with what was said by Lord Neuberger PSC in *BPP Holdings Ltd v Revenue and Customs Comms [2017] 1 WLR 2945* at paragraph 26, namely that *"… the cases on time limits and sanctions in the CPR do not apply directly [to Tribunals], but the Tribunals should generally follow a similar approach"*.

22. Under the CPR, the court's power to grant relief from sanctions is governed by rule 3.9, which provides: *"(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need – (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders. (2) An application for relief must be supported by evidence"*.

23. Guidance on the application of rule 3.9 was given in *Denton*, and Mr Fieldsend summarises the guidance as stating that an application for relief from sanctions should be addressed in three stages. First, identify and assess the seriousness and significance of the failure to comply. Second, consider why the default occurred. Third, evaluate all the circumstances of the case to enable the application to be dealt with justly, including the matters set out in rule 3.9(1)(a) and (b). He notes that Ms Williams on behalf of the Landlord has conceded that the failure was serious and/or significant and that there was no good reason for the breach. It follows, therefore, that the Landlord is only

focusing its arguments on the third stage of the test, namely an evaluation of all the circumstances of the case.

24. Mr Fieldsend submits that when evaluating all of the circumstances regard must first be had to the overriding objective of the Tribunal Rules (Rule 3), in particular the need to deal with the case fairly and justly including dealing with it proportionately having regard to the parties' resources and those of the tribunal and avoiding delay. Secondly, he states that the courts have previously emphasised the importance in the evaluative exercise of considering (as per CPR rule 3.9(1)) the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders. In *Denton*, the Court of Appeal said at paragraphs 32 and 34: *"Although the two factors [i.e. (a) and (b) above] may not be of paramount importance, we re-assert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule… Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past"*.

25. The length of time taken to make the relief application is also relevant: see Denton at paragraph 36 where it is stated that *"the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances"*. In *British Gas Trading Ltd v Oak Cash and Carry Ltd [2016] 1 W.L.R. 4530* the defendant's lack of promptness in applying for relief from sanctions was the critical factor for consideration at the third stage. Had the application been made promptly, it would have been granted. However, the application for relief was delayed for 31 days, and when that delay was added to all the other factors, it could be seen that the defendant's default had substantially disrupted the progress of the action. The application for relief was refused.

26. *In Clearway Drainage Systems Ltd v Miles Smith Ltd [2016] EWCA Civ 1258*, there was a 2-month delay in serving witness statements and delay in making the application for relief. The prolonged failure over a period of months was serious or significant even though it had not imperilled the trial date. No good reason for the late service of statements had been shown. The loss of opportunity to rely upon witness evidence effectively terminated the applicant's case and that factor weighed in favour of granting relief, but in all the circumstances it did not outweigh other factors including factors (a) and (b) and the lack of promptness in the application.

27. The relevance of the time taken to apply for relief was more recently reaffirmed in *Diriye v Bojaj [2021] 1 WLR 1277* where a delay of 2 months in making the application for relief was said to be unsupportable and *"militates strongly against granting relief from sanctions"* (see paragraph 65 of that decision).

28. In the present case Mr Fieldsend contends that there has been an extraordinary level of non-compliance with directions by the Landlord. There has been a multitude of failures, often without explanation, with deadlines passing without communication or correspondence from the Landlord. Correspondence from the Leaseholders has gone ignored by the Landlord until the tribunal has intervened (at the request of the Leaseholders). In such circumstances the need to enforce compliance with orders is all the more important because of the repeated failures. For the Landlord, non-compliance became habitual. In the *BPP Holdings Ltd* case, Lord Neuberger at paragraph 25 quotes from Ryder LJ in the Court of Appeal in that case, who stated: *"It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's"*. Through its repeated defaults, the Landlord has shown that it does not regard the tribunal's directions as deserving of the same respect as the court's. In repeatedly failing to comply and repeatedly failing to communicate in connection with its defaults, the Landlord's conduct is disrespectful and even contemptuous of the Leaseholders and of the tribunal.

29. He goes on to state that the Leaseholders complied with directions in the belief that the tribunal expects compliance and that in the absence of a consequence to default confidence that the tribunal will enforce compliance with its orders is undermined. The absence of a consequence encourages a sense of unfairness: the Leaseholders on the one hand complying with directions, the Landlord on the other hand failing to comply without consequence. It reduces the tribunal's timetable and the overriding objective to the Tribunal Rules to an irrelevance.

30. Mr Fieldsend notes that Ms Williams in her witness statement points to the default having been caused by the Landlord's solicitors. He submits that whilst that is not an irrelevant circumstance it cannot excuse the Landlord from the consequence of non-compliance. This issue was addressed by Turner J in *Gladwin v Bogescu [2017] 4 Costs LO 437* at paragraphs 30-31:

30. Particular reference can be made to the case of Training in Compliance Ltd v Dewse [2001] CP Rep 46 at p 66: "Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to that as a fact, though it does not follow that it would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general,

the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting."

31. Furthermore, since the introduction of the Jackson reforms, the general approach of the courts is likely to be less rather than more indulgent of the defaults of legal advisers as a justification for granting forbearance to the litigants themselves. In this respect, I endorse at least the general thrust of the views expressed by Zuckerman [on Civil Procedure: Principals and Practice 3rd Edition] at paragraph 11.191: "Although it may appear unjust at first sight to refuse an extension of time or relief from sanction when the default was due to the carelessness of a party's legal representatives, it causes greater harm in the long term to spare litigants the consequences of their lawyers' defaults. A policy of absolving clients from the consequences of their lawyers' default undermines the court's ability to enforce process requirements because it obliges the court to grant relief whenever a legal representative puts up his hands and accepts responsibility. This imposes a burden on the administration of justice and on the opponent. Tolerance of lawyer's default encourages sloppy practice and satellite litigation, thereby making litigation more hazardous and the cost more unpredictable."

31. Therefore, he argues, the contention that failure to comply was the fault of the solicitors is a factor that ought to carry limited weight in the evaluation.

32. Mr Fieldsend disputes the proposition that the application for relief was made promptly. The timing of the application must be judged against the date of default. Here, there was default on 29 March 2022 but the relief application was not made until 20 July 2022, a delay of almost 4 months. The timing should not in his submission be considered against the 20 June 2022 hearing, as the Landlord suggests, as that hearing only came about because the Leaseholders required confirmation that the sanctions had taken effect. And the need for that confirmation only came about because the Landlord was not responding to correspondence and was taking no steps to remedy the default or apply for an extension of time or relief from sanctions. The Landlord had also not stated whether it accepted that the sanctions had taken effect. In anchoring the timing analysis with reference to the June hearing, the Landlord is, effectively, looking to benefit from its own continuing failures.

33. In any event, the Landlord was immediately told by the Leaseholders (at the end of March 2022) that it was in default and that the sanctions applied, and yet it chose not to make its relief application for almost 4 months. It could have applied in advance of the June hearing; it chose not to. Furthermore, it only remedied the default after that hearing. In Mr Fieldsend's submission, the Landlord's delay in applying for relief weighs heavily against the granting of relief. The delay frustrates and undermines the overriding objective. Promptness is materially relevant because delay in applying for relief compounds the delay already caused by breach of the time limit.

34. Mr Fieldsend notes that the parties are now approaching the end of 2022, over 8 months after the default, not knowing whether a section 27A application made in March 2020, which was already significantly delayed by earlier defaults by the Landlord, is to continue. That in his submission is an unacceptable position, and therefore the Landlord should face the sanctioned consequences directed by the tribunal in March 2022.

35. Mr Fieldsend also notes that the Landlord claims that it would suffer "considerable prejudice" if relief is not given, but he comments that prejudice is a consequence of every case where relief is refused and that it is inherent in the structure of there being a sanction for non-compliance. The balance is struck in there being a warning shot before the sanction bites, namely the "unless order". In this case, not only was the Landlord aware of the consequence of non-compliance but at the March 2022 hearing it did not even object to there being a sanction in the event of default. Furthermore, it is only the Leaseholders' contribution to the costs of the major works that the Landlord loses (i.e. those leaseholders who were party to the Original Application). The decision does not affect other service charge paying leaseholders. In any event, he submits that such prejudice as will be suffered if relief is refused needs to be balanced against the prejudice to the Leaseholders from the manner in which the Landlord has conducted these proceedings which led to the imposition of the sanction in the first place. The prejudice that the Landlord now complains of arises only as a direct consequence of its own conduct; it was prejudice that was within its power to avoid.

36. The Landlord has offered to pay some of the costs claimed by the Leaseholders in their Rule 13 application as a condition of relief. If having considered all the circumstances of the case the tribunal decides to grant relief, Mr Fieldsend submits that payment of all of the costs should be directed as a condition. But consideration of the circumstances should in his submission ignore or give very little weight to the offer to pay some of the Leaseholders' costs. To give it weight in the evaluation sends the wrong message in that it tells parties that they can buy their way out of the consequence of their default. Moreover, it rewards those who have the financial wherewithal to pay and prejudices those who cannot; it is an approach that risks there being a two-tier

approach: a rule for those with money and a rule for those without. In any event, what the offer cannot redress is the cost to the tribunal's resources caused by the Landlord's defaults. Considerable time has been given to this case, both in terms of paper decisions as well as hearings. That time has been at a cost to the tribunal and other tribunal users. With reference to the overriding objective, it would in his submission be disproportionate to grant relief and allocate yet more resources of the tribunal to this case.

Rule 13 cost application

Leaseholders' written submissions

37. There are different written submissions from each group of Leaseholders. Both groups begin by setting out the factual background, which is already summarised above, and both invite the tribunal to apply the test set out in the decision of the Upper Tribunal in *Willow Court Management Ltd v Mrs Ratna Alexander [2016] UKUT 290 (LC)*. Both have provided details of the costs incurred by them.

38. The First Group of Leaseholders state that they seek a cost order under paragraph 13(1)(b) of the Tribunal Rules ("**Rule 13(1)(b)**") and reimbursement of the application fee under paragraph 13(2) of the Tribunal Rules ("**Rule 13(2)**"). They argue that in the manner in which the Landlord has defended/conducted these proceedings it is clear that it has acted unreasonably within the meaning of Rule 13(1)(b), that an order for costs under Rule 13(1)(b) should be made and that it is appropriate to order the reimbursement of fees under Rule 13(2).

39. The First Group of Leaseholders state that the Landlord's conduct of these proceedings is exceptional and that its repeated failure to communicate is egregious, all the more so since March 2022 when it assured the tribunal that it would communicate more effectively. The repeated failure to comply with the directions, compounded by the repeated failure to communicate (without any explanation for that failing) bears of no reasonable explanation, and the Landlord's conduct is therefore unreasonable within the meaning of Rule 13(1)(b). The manner in which the Landlord has conducted itself has also undermined the efficient progress of the proceedings, leading to inefficiencies as to time, costs and allocation of the tribunal's resources. This is, in their submission, a paradigm case of conduct that undermines rather than furthers the overriding objective of the Tribunal Rules. Substantial avoidable costs have been incurred, a considerable amount of avoidable tribunal resource has been allocated to this case (at the expense of other tribunal users), and there has been significant delay in the matter reaching a conclusion.

40. The Second Group of Leaseholders state that there has been a continued lack of explanation from the Landlord following each deadline missed and a failure on the Landlord's part to improve its conduct throughout the proceedings, in particular following its assurances to the tribunal on 22 March 2022. Its lack of proper participation has meant that after 3 years the case has not proceeded beyond the initial stages. The Landlord has therefore failed to advance the resolution of the case. Consequently, in their submission the Landlord has been unreasonable under the *Willow Court* test. The Landlord is a large housing association, has previous experience at the tribunal and has been legally represented throughout the proceedings.

41. The Second Group of Leaseholders add that, aside from the increased cost, the delays have had a real effect on their ability to sell and/or enjoy their properties and the matter has caused prolonged stress and anxiety, with some leaseholders having to pull away from the case due to financial constraints. The Landlord's failings have also placed a burden on the tribunal's resources, particularly during the period from 29 March to 22 June 2022 those failings were easily avoidable.

Landlord's written submissions

42. The Landlord accepts that *Willow Court* is the leading case. However, it asserts that at paragraphs 23 and 24 of *Willow Court* the Upper Tribunal held, inter alia, that costs should only be awarded in the most exceptional of cases.

43. Further or alternatively, the Landlord submits that the question for the tribunal to consider is whether the Landlord has acted unreasonably defending the proceedings. In this case, the Leaseholders issued their service charge application prematurely, because at that time the major works had not even been completed and so the application was based on a section 20 notice of estimated costs which had been provided by the Landlord.

44. By a letter dated 29 May 2020 the Landlord made it clear that works were on hold due to the Covid-19 pandemic and that it was hoped that the works would restart before 31 March 2021. Proceedings were stayed by the tribunal in February 2021 until June 2021 following a request from both parties, as it was hoped that the final certificates for payment would be ready in time for the Leaseholders to consider their position. The proceedings were then further stayed until 13 August 2021 as the final certificates were not yet ready. The draft final account was received on 22 July 2021, but this account was queried by the Landlord. Sophie Hardy explained to the tribunal at the hearing on 22 March 22 that there had been delays in agreeing the final account and as a result no demands had been sent to any of the leaseholders party to the Original Application. She also said that, following service of a section 20B(2) notice under the Landlord and Tenant Act 1985 on the

leaseholders, no money would be due until September 2022. The final account was actually served on 13 May 2022 in compliance with tribunal directions. The Landlord also cross-refers to other background information detailed in the statement of Sian Evans from Weightmans dated 20 July 2022 in support of its application for relief from sanctions and submits that the Leaseholders have failed to demonstrate that the Landlord has acted unreasonably.

45. In the alternative the Landlord submits that, if it is found to have acted unreasonably, then the nature, seriousness and effect of that behaviour is 'de minimis' and no order for costs ought to be made. Further in the alternative, any order should be for a nominal sum at worst. If the tribunal disagrees with the Landlord's position, the Landlord then takes issue with a lack of particularity in the description of some of the work done by the Leaseholders' legal advisers, in particular the references to "perusal" and "drafting". In relation to the claim made for surveyors' fees, the reports have not been disclosed in these proceedings and should not be paid for by the Landlord.

Follow-up arguments on Rule 13

46. In his skeleton argument, Mr Fieldsend takes issue with the Landlord's submission that Rule 13 cost orders are limited to exceptional cases. He also takes issue with Ms Evans' contention that the section 27A application was made prematurely and notes that this contention was later expressly retracted by Ms Williams. He presumes that this contention is also now retracted for the purposes of the Landlord's response to the Rule 13 application. Mr Fieldsend also argues that the Landlord's offer to pay the costs claimed in the Rule 13 application as a condition of relief is an acknowledgment that its conduct has been unreasonable.

47. At the hearing Mr Fieldsend argued that this case passes the second stage of the *Willow Court* test because the Landlord's conduct needs to be punished. It is also conduct which has caused the Leaseholders to incur costs. For the purposes of the third stage of the *Willow Court* test, Mr Fieldsend briefly took the tribunal through the amounts of costs being claimed. These amount in aggregate to £45,553.39 for the First Group of Leaseholders and £32,885.95 for the Second Group of Leaseholders, in each case excluding the tribunal application fee.

48. Mr Mold noted that there was correspondence from the tribunal which seemed to accept that there was some explanation for some of the Landlord's delay. He also said that Weightmans LLP had attempted to comply with the directions of 22 March 2022, albeit that they had failed to do so. He added that in paragraph 26 of *Willow Court* the Upper Tribunal said that a tribunal should not be over-zealous in finding unreasonable conduct. In this case there was only a relatively short period of unreasonable behaviour without explanation. As regards

quantum, since July 2022 a lot of extra costs had been incurred just for the present hearing, and he submitted that there should be a detailed – not a summary – cost assessment.

49. Mr Fieldsend submitted that a detailed cost assessment would lead to more delay and more cost.

The tribunal's analysis

Application for relief from sanctions

50. In its further directions dated 22 March 2022, following a case management hearing held on that same date, the tribunal issued (inter alia) the following further directions:-

> *4. The Respondent [i.e. the Landlord] shall by **29 March 2022** serve on the Applicants:*
> *a) a copy of the contract between Circle Housing Group and United Living dated 14 January 2013, this being the contract that the Respondent has stated it relies upon as the contract with United Living for the carrying out of the major works ("**the Major Works Contract**");*
> *b) the description of the works and specification for those works which United Living contracted to carry out under the Major Works Contract;*
>
> *6. If the Respondent [the Landlord] fails to comply with paragraph 4a) and 4b) above, the Respondent [the Landlord] shall be treated as not having contracted for the carrying out of the major works and in those circumstances it shall be determined that no service charge is payable by the Applicants in relation to those works.*

51. It is common ground between the parties that the Landlord committed a breach of the further directions triggering the sanctions referred to in direction 6 above and that the breach was serious and/or significant and that there was no reasonable excuse for it.

52. The Landlord's case in favour of granting relief from sanctions, following the retraction of certain arguments which were advanced previously, can be summarised as follows. First of all, it is argued that the default was caused by the Landlord's solicitors, not the Landlord itself. Secondly, the application for relief could not realistically have been made earlier and it was made on time. Thirdly, there would be considerable prejudice to the Landlord if no relief from sanctions were to be given and it would be disproportionate to impose these sanctions rather than merely imposing a cost penalty on the Landlord. Fourthly, although this is not an argument in itself, the tribunal was invited generally to consider the test in *Denton*. In addition, there are certain

other arguments which were advanced by Ms Evans in her witness statement but which although not expressly retracted by Ms Williams in her own witness statement were also not actively advanced by her or mentioned by Mr Mold of Counsel at the hearing.

53. As is agreed between the parties, the leading case on applications for relief from sanctions is the decision of the Court of Appeal in *Denton v TH White Ltd [2014] EWCA Civ 906*. The Court of Appeal in that case set down a three-stage test, namely: (i) identify and assess the seriousness and significance of the failure to comply, (ii) consider why the default occurred and (iii) evaluate all the circumstances of the case to enable the application to be dealt with justly, including the factors set out in CPR rule 3.9(1)(a) and (b). CPR rule 3.9(1) is set out in paragraph 22 above. The CPR, of course, governs court proceedings rather than tribunal proceedings but, as noted by Mr Fieldsend, Lord Neuberger PSC in *BPP Holdings Ltd v Revenue and Customs Comms [2017] 1 WLR 2945* at paragraph 26 confirmed that tribunals should generally follow a similar approach. At the same time, it is in our view self-evident that the tribunal should also have regard to the Tribunal Rules, including the overriding objective as set out in paragraph 3 of the Tribunal Rules.

54. The Landlord concedes that the breach in this case was serious and/or significant and it accepts there is no good explanation for the breach. It would seem, therefore, that its application for relief rests on the third limb of *Denton*, namely an evaluation of all the circumstances of the case.

55. In *Denton*, the Court of Appeal stated at paragraph 34 that *"if the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief"*. It also stated (in paragraphs 32 and 34) that of particular importance and a factor that should be given particular weight at the third stage when all the circumstances of the case are considered is the importance of complying with rules, practice directions and orders, an aspect which it stated had received insufficient attention in the past.

56. The question of how promptly the Landlord applied for relief is also an important factor on a consideration of whether to give relief from sanctions. At paragraph 36 of *Denton* the Court of Appeal stated that *"it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities ... the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances"*. It also goes on to state in that same paragraph: *"likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance"*.

57. In *British Gas Trading Ltd v Oak Cash and Carry Ltd [2016] 1 W.L.R. 4530* the Court of Appeal considered the third stage of the *Denton* test and stated at paragraph 55 that *"if the defendant had made an immediate application for relief at the same time as filing its PTC [pre-trial checklist], or very soon after, I would have been strongly inclined to grant relief from the sanction of striking out. To debar a party from defending a £200,000 claim because it was somewhat late in filing a PTC is not in my view required"*. However, the application for relief was delayed for over 30 days and relief was refused, the Court of Appeal stating in paragraph 61: *"in my view the defendant's lack of promptness in applying for relief is the critical factor. When that delay is added to all the other factors, it can be seen that the defendant's default has substantially disrupted the progress of the action"*.

58. In *British Gas Trading* one reason, but certainly not the only reason, why the lack of promptness in applying for relief was adjudged to be the critical factor in deciding to deny relief was that it had caused the trial date to be lost. However, in *Clearway Drainage Systems Ltd v Miles Smith Ltd [2016] EWCA Civ 1258* the Court of Appeal stated at paragraph 69 that the trial judge in that case was fully entitled to take into account a delay of some two months before the making of the applications for relief even though the delay in that case did not imperil the trial date. Similarly in *Diriye v Bojaj [2021] 1 WLR 1277* there was a delay of 2 months in applying for relief. The Court of Appeal in that case stated at paragraph 65 that *"the need to act promptly if a party is or might be in breach of a court order is axiomatic … [and] to allow weeks and months to go by before even making the application for relief from sanctions was unsupportable. The delay in making the application therefore militates strongly against granting relief from sanctions"*.

59. In the present case the Landlord was made aware on 29 March 2022 that the Leaseholders had not received the documents that it had purported to send to them. Having not remedied the failure to send the documents during the course of that day it was in breach of the relevant further directions as from 30 March 2022 and therefore was – or at least should have been – aware at that stage that the sanctions would apply (subject to any successful application for relief). The point was expressly drawn to its attention when Jury O'Shea LLP for the First Group of Leaseholders wrote to the tribunal, with a copy to the Landlord, on 13 April 2022 requesting confirmation that there had been non-compliance with the March directions and that therefore the sanctions now took effect. And whilst it is understandable that the Leaseholders will have wanted the tribunal's confirmation of the position, the date of formal confirmation of the position by the tribunal is not the key date in this regard. The Landlord has been legally represented throughout these proceedings and its solicitors were perfectly capable of reading the further directions dated 22 March 2022 and understanding the basis on which sanctions would apply, especially

as they were present at the case management hearing on 22 March 2022 together with a representative of the Landlord and did not raise any objections to the further directions. The Landlord therefore knew – or ought to have known – as early as 30 March 2022 that the sanctions applied, yet the application for relief was not made until 20 July 2022 – nearly 4 months later. In addition, whilst the delay did not imperil a specifically agreed final hearing date, a window had been set for the final hearing of October to December 2022 and it would not now be possible for any final hearing (if relief were to be granted) to take place within that window.

60. Ms Williams contends that the application for relief from sanctions could not realistically have been made earlier. Her line of argument implies that the Landlord only knew that the sanctions had taken effect once a formal ruling had been obtained from the tribunal, but for the reasons set out above it was already self-evident that the sanctions had taken effect on 30 March 2022, subject only to a successful application for relief. It is almost incomprehensible that a legally advised party in these circumstances could have responded to its own failure to comply with directions and the clearly stated consequences for non-compliance by (a) not remedying the breach when it was so easy to remedy, (b) not communicating with the Leaseholders or the tribunal, including not responding to requests from the Leaseholders for it to remedy its breach and (c) waiting nearly 4 months before applying for relief. In that context, the suggestion on behalf of the Landlord that the application for relief was made "in time" rather misses the point; the case law shows that applications for relief need to be made promptly and that promptness is an important factor in deciding whether to grant relief.

61. As regards the argument that the breach of the further directions (and perhaps also the delay in applying for relief) was the fault of the Landlord's solicitors and that therefore the Landlord should not itself be penalised, this argument was explored in the decision of Turner J in *Gladwin v Bogescu [2017] 4 Costs LO 437*. This decision has been quoted from at length by Mr Fieldsend (see paragraph 29 above), and the key passages in our view are as follows:-

"... if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to that as a fact ... [but] it seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from

that which the party himself must be treated as knowing, or encouraging, or permitting. Furthermore, since the introduction of the Jackson reforms, the general approach of the courts is likely to be less rather than more indulgent of the defaults of legal advisers as a justification for granting forbearance to the litigants themselves … A policy of absolving clients from the consequences of their lawyers' default undermines the court's ability to enforce process requirements because it obliges the court to grant relief whenever a legal representative puts up his hands and accepts responsibility. This imposes a burden on the administration of justice and on the opponent."

62. There is no evidence that the Landlord's solicitors took any relevant positive action against the expressed wishes of the Landlord, and nor is there any evidence that the Landlord's solicitors' failure to act was contrary to any instructions expressed by the Landlord. As per the decision in *Gladwin v Bogescu*, therefore, the inactions of the Landlord's solicitors must be treated as the inactions of the Landlord.

63. We turn now to the Landlord's argument that not to allow relief from sanctions would cause considerable prejudice to the Landlord and would be disproportionate to the harm caused. First of all, as noted by Mr Fieldsend, sanctions necessarily cause prejudice; that is part of the point of sanctions. In the present case, the sanctions were imposed on a conditional basis in the form of an "unless order". The sanctions were therefore triggered by conduct which the legally represented Landlord knew would lead to sanctions if that conduct occurred. Not only was it entirely within the Landlord's control to avoid sanctions, it was also extremely easy for it to do so as it demonstrated much later by successfully sending the documents that it had originally purported to send on 29 March 2022.

64. The arguments in relation to prejudice and proportionality also need to be weighed against all of the other circumstances. As already noted, one important factor when deciding whether to grant relief is the promptness with which the application for relief. In the present case the Landlord took nearly 4 months to apply for relief and, for the reasons already set out above, we do not consider that the Landlord has any reasonable excuse for having delayed so long. On the contrary, it was an extraordinary failing, compounding its previous failings, for it to wait for so long before applying.

65. The context of the imposition of sanctions is also a significant factor. The "unless order" was granted following a catalogue of case management failings on the part of the Landlord. Whilst it could be argued that some of its failings were for understandable reasons, others were not. The Landlord failed to provide a full response to a list of questions annexed to the Original Application by 23 October 2020. It then stated that it was hoped that the final account would be available

before 1 June 2022 but then failed to provide an update or an explanation when it was not. It then indicated that the final account would be available by 30 June 2021 but again it was not available and again no explanation for the further delay was provided. It was then required to produce the account by 24 August 2021 and to explain why the final account was so late and why the Leaseholders and the tribunal had not been kept informed as to the reasons for lateness, yet on 24 August 2021 it merely requested an extension until 3 September 2021 and did not provide the required explanations. The extension was granted but by 3 September 2021 no account was provided and nor was there any other communication from the Landlord. On 15 October 2021 it stated that an on-site meeting was booked for 21 October 2021 and that it would then have a clearer idea as to when the account would be available, but then between 15 October 2021 and 22 March 2022 nothing further was heard from the Landlord by the Leaseholders or by the tribunal and the matter was listed for the further case management hearing on 22 March 2022.

66. The Landlord's repeated failure to comply with directions and to communicate with the Leaseholders and with the tribunal caused significant delay to the progress of the case and also caused the Leaseholders to incur significant extra costs, including but not limited to chasing up responses and preparing for and attending further case management hearings. The level of non-compliance has been quite extraordinary, compounded not only by the lack of explanation but also by an inability to explain many aspects of the lack of compliance. Whilst we do not accept the Leaseholders' contention that the Landlord has shown that it does not regard the tribunal's directions as deserving of the same respect as the court's, there being no evidence before us to indicate that the Landlord would treat a court's directions any more seriously, it is clear from the Landlord's conduct that it did not attach much importance to compliance with the tribunal's directions. We do, though, accept the Leaseholders' argument that the Landlord's conduct led to an unfairness between the parties which needs to be addressed because the Leaseholders complied with directions in the belief that the tribunal expected compliance. We also agree that in the absence of a consequence to default, confidence that the tribunal will enforce compliance with its orders is undermined. The overriding objective of the Tribunal's Rules is to enable the tribunal to deal with cases fairly and justly, and the tribunal cannot properly do so if this level of non-compliance escapes a serious penalty.

67. Specifically applying CPR rule 3.9(1), on the basis that the Supreme Court confirmed in *BPP Holdings* that tribunals should generally follow a similar approach to this rule and that neither party has argued that it should be departed from, we note that as well as requiring consideration of all the circumstances of the case in a general sense so as to deal justly with the application, it singles out for special consideration the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice

directions and orders. As already noted above, it is clear from the relevant case law that the length of time taken to make the relief application is also relevant.

68. A consideration of all of the above factors points firmly in favour of refusing relief from sanctions. The Landlord's conduct prevented the Original Application from being conducted efficiently and at proportionate cost, and the Landlord has repeatedly breached the tribunal's directions, often without explanation. Tribunal directions need to be respected, and the only realistic way to do so in the face of such blatant and repeated flouting of its directions is to put – and to keep – in place appropriate sanctions. It was within the Landlord's power to avoid the sanctions by complying with the specific directions to which the "unless order" applied, and it would have been very easy for the Landlord to comply with those directions, particularly as its initial failure to do so was promptly pointed out to the Landlord. Yet not only did it continue to fail to comply but it did not even communicate with the Leaseholders for several weeks. The failure to make a prompt application for relief then considerably strengthened an already strong case against granting relief. The delay of nearly 4 months was inexplicable and, again, easily avoidable.

69. The decision in *British Gas Trading* demonstrates that it is not disproportionate to refuse relief in a case of this nature even though the sum involved is nearly £190,000.

70. Accordingly, for all of the reasons set out above the application for relief from sanctions is refused.

Rule 13 cost application – Rule 13(1)(b)

71. Rule 13(1)(b) (of the Tribunal Rules) states as follows: *"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"*.

72. As noted by all parties, the leading case on this point is the decision of the Upper Tribunal in *Willow Court Management Ltd v Mrs Ratna Alexander [2016] UKUT 290 (LC)*. In *Willow Court*, the Upper Tribunal prescribed a sequential three-stage approach which in essence is as follows: (a) applying an objective standard, has the person acted unreasonably? (b) if so, should an order for costs be made? and (c) if so, what should the terms of the order be?

73. The first stage of the test, namely whether the person acted unreasonably, is a gateway to the second and third parts. As to what is meant by acting "unreasonably", the Upper Tribunal in *Willow Court* followed the approach set out in *Ridehalgh v Horsfield [1994] EWCA*

Civ 40, [1994] Ch 205, albeit adding some commentary of its own, 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?"*.

74. The Upper Tribunal 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. However, the Upper Tribunal did not go so far as to state (as has been suggested on behalf of the Landlord) that Rule 13(1)(b) costs should only be awarded in the most exceptional of cases.

75. In the present case, the Landlord has repeatedly been in breach of the tribunal's directions and has repeatedly either failed to communicate properly with the Leaseholders and with the tribunal or has failed to communicate at all. The factual background is set out above, and it reveals a catalogue of failings on the part of the Landlord over a very long period of time. In particular, the Landlord was required by 24 August 2021 to produce the final account and to explain why it had been prepared so late and why the Leaseholders and the tribunal had not been kept informed as to the reasons for lateness. However, on 24 August 2021 the Landlord simply requested an extension until 3 September 2021 and failed to provide the required explanations. The extension was granted but by 3 September 2021 no final account was provided and nor was there any other communication from the Landlord. On 15 October 2021 the Landlord stated that an on-site meeting was booked for 21 October 2021 and that it would then have a clearer idea as to when the final account would be available, but between 15 October 2021 and 22 March 2022 (over 5 months) nothing further was heard from the Landlord by the Leaseholders or by the tribunal. At the further case management hearing on 22 March 2022 the Landlord was unable to explain the extent of its failure to comply with the tribunal's directions. Then the Landlord failed to comply with directions issued at the 22 March 2022 hearing despite the fact that those directions were backed up by sanctions via an "unless order" and despite assuring the tribunal that its conduct would improve.

76. As noted above, the 'acid test' laid down in *Ridehalgh* and adopted by the Upper Tribunal in Willow Court is whether there is a reasonable explanation for the conduct complained of. Not only can we see no reasonable explanation but the Landlord was and remains incapable of offering one. Accordingly, this case passes the first part of the *Willow Court* test.

77. The second part of the test is whether an order for costs should be made. In *Willow Court*, the Upper Tribunal at paragraphs 29 and 30 made it clear that this second stage involves the exercise of judicial discretion, subject to the tribunal applying the Tribunal Rules, including the overriding objective in paragraph 3 of the Tribunal Rules to deal with cases fairly and justly. Turning to the parties' respective submissions, we do not accept that the Original Application was premature as the Leaseholders were entitled to challenge the estimated costs, but in any event the Landlord has retracted this particular argument. We are also not impressed by the Landlord's attempt to argue (if this is what the Landlord is indeed seeking to argue) that it did broadly comply with the directions, although it appears that this argument may also have been retracted. On the other hand, we do not accept the Leaseholders' submission that the Landlord's offer to pay some of the costs claimed in the Rule 13 application as a condition of relief is an acknowledgment that its conduct has been unreasonable. The offer may well have been a tactical offer as a way of trying to avoid a situation in which it cannot recover any service charges in respect of the major works from any of the Leaseholders.

78. However, we do accept that the Landlord's conduct has caused the Leaseholders to incur significant extra cost. Its unreasonable conduct has also in our view been serious. It was given several opportunities to improve its conduct but either chose not to do so or – for reasons which are unclear – was unable to do so. The Landlord's conduct had a material effect on the Leaseholders, and it has been plausibly argued that the delays have had an effect on their ability to sell and/or enjoy their properties and that the matter has caused prolonged stress and anxiety, with some leaseholders having to pull away from the case due to financial constraints. The Landlord's failings have also placed an unreasonable burden on the tribunal's resources. Also, as noted by the Leaseholders, the Landlord has previous experience at the tribunal and has been legally represented throughout the proceedings, and therefore it does not have the excuse either of being inexperienced or an unrepresented party. Taking all of these factors together, we consider that it is appropriate for us to make a Rule 13(1)(b) cost order.

79. The third and final stage of the *Willow Court* test, the first and second stages having been passed, is to decide the terms of the costs order. As with the second stage of the test, the third stage involves the use of judicial discretion which must be exercised having regard to all relevant circumstances including but not limited to the nature, seriousness and effect of the unreasonable conduct. The Upper Tribunal also mention some other potentially relevant circumstances, including whether the party behaving unreasonably was legally represented and the issue of causation.

80. The Landlord in this case has been legally represented throughout. If and to the extent that it is appropriate to be more indulgent towards an unrepresented party, the Landlord in this case is not entitled to such

indulgence. On the issue of causation, the Upper Tribunal at paragraph 40 of Willow Court states that the exercise of the power to award costs under Rule 13(1)(b) is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned.

81. It follows from the Upper Tribunal's guidance in *Willow Court* that when deciding the terms of a cost order it is not a simple matter of the tribunal working out the extra costs that have been caused by the unreasonable conduct, even as a starting point. Rather, the tribunal needs to assess the terms of the cost order by reference to all relevant circumstances, albeit that causation is one of those circumstances.

82. In the present case the Landlord's unreasonable conduct has been serious, with the Landlord having had plenty of opportunities and considerable incentive to behave better but having failed to do so. The Landlord also does not have the excuse that it was unrepresented, and it is used to the tribunal's procedures. The Landlord's conduct has caused the Leaseholders to incur considerable extra cost. Furthermore, it is plausibly asserted that the delays have had an effect on their ability to sell and/or enjoy their properties and that the matter has caused prolonged stress and anxiety, as well as financial difficulties for some.

83. On the other hand, it is at least arguable that much of the Landlord's reasonable conduct – whilst not admitting of a reasonable explanation – was not deliberate in that it is not clear that it formed part of a conscious strategy to frustrate the progress of the Original Application. It is also noted that the Landlord is a housing association, not a fully commercial landlord. Furthermore, whilst there is no need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned, causation is a relevant factor and it is clear that a significant proportion of the costs incurred by the Leaseholders would have been incurred even if the Landlord has behaved reasonably.

84. In addition, this tribunal has now found in the Leaseholders' favour in respect of the Landlord's application for relief against sanctions. Although this point has not been explored by the parties in anticipation of the tribunal's decision on the relief application, one significant consequence of the Landlord's unreasonable conduct is that the service charges challenged in the Original Application are not payable, following the tribunal's refusal to grant, which itself is a good outcome for the Leaseholders. A counter argument would be that these are two stand-alone applications and that the Landlord should not benefit in relation to one application from the failings that have caused it to be unsuccessful in the other one.

85. As regards the amounts being claimed, the First Group of Leaseholders is claiming £45,553.39 and the Second Group of Leaseholders is claiming £32,885.95 (in each case plus the tribunal application fee). Mr Mold has objected that the Leaseholders' representatives have

provided insufficient narrative to justify many aspects of the costs incurred and has proposed a detailed assessment rather than a summary assessment. However, whilst this is not meant as a criticism of Mr Mold who was instructed at an extremely late stage, this point was raised for the first time at the hearing. There was plenty of time for the Landlord to have raised this point previously, but it chose not to do so. We accept that the statement of costs incurred would have benefited from a more detail narrative, and had this point been raised earlier it would have carried more weight and might even have led to a further direction requiring the Leaseholders to provide more detail in advance of the hearing. But to carry out a detailed assessment at this stage would lead to further costs being expended and yet further delay in this much delayed case, and in our view this would be the wrong approach at this stage. The Leaseholders are entitled to finality, particularly as this point has been raised at the last moment in keeping with the Landlord's rather cavalier approach to the case throughout.

86. Looking at the costs claimed by each group of Leaseholders, there are no items which we consider to be obviously ones which are unreasonable either in nature or in amount, albeit that we accept that on a detailed assessment it is likely that there would be an element of discounting. In any event, the third stage of the *Willow Court* test involves a large element of judicial discretion, and in all the circumstances of the case including the need for finality it is best in our view to take the amounts claimed by the Leaseholders (in the absence of a persuasive challenge to any specific items) and then consider what proportion it would be appropriate to order the Landlord to reimburse. Taking this approach and in the light of all the circumstances already considered, we consider that the Landlord should reimburse 30% of these costs. Accordingly, the Landlord must reimburse to the First Group of Leaseholders the sum of £13,666.02 and to the Second Group of Leaseholders the sum of £9,865.79.

<u>Rule 13 cost application – Rule 13(2)</u>

87. Rule 13(2) (of the Tribunal Rules) states as follows: *"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"*.

88. The Leaseholders between them have paid an application fee of £100, £55.00 of which has been paid by the First Group of Leaseholders and £45.00 of which has been paid by the Second Group of Leaseholders. The tribunal has already found that the Landlord's conduct has been unreasonable for the purposes of Rule 13(1)(b), the Leaseholders have been wholly successful in relation to the Original Application and the Landlord has not sought to argued that it should not have to reimburse the application. In the circumstances we are satisfied that the Landlord must reimburse the application fee to the Leaseholders.

Paragraph 5A and Section 20C cost applications

89. The Leaseholders had originally made an application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (a "**Paragraph 5A Application**") for an order extinguishing any liability to pay towards the Landlord's costs in these proceedings as an administration charge. They had also made an application under section 20C of the Landlord and Tenant Act 1985 (a "**Section 20C Application**") for an order extinguishing any liability to pay towards the Landlord's costs in these proceedings as a service charge.

90. At the hearing it was confirmed by the Landlord's representative that it was not seeking to recover these costs from the Leaseholders, and the Leaseholders' representative confirmed in the circumstances that on that basis the Leaseholders did not require an order in relation to either their Paragraph 5A Application or their Section 20C Application.

Name: Judge P Korn **Date:** 11 January 2023

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.

APPENDIX

First Group of Leaseholders

1. David Waite
2. Abbas Davoudi & Shahla Kasaei
3. Akbar Ali Khan Sherwani
4. Nasser Afshar Azad
5. Korrina May Dunton
6. Peter Julian Bowley
7. James Arjun Theivendran
8. Patrick Mahon Minchin & Talitha Jane Minchin
9. Antony Artun Senny
10. Vishal Vashisht
11. Priscilla Yaa Owusu-Pomaa.

Second Group of Leaseholders

1. Paul James Kendrick
2. Soheil Dadkhah
3. Alex Logan Halli
4. Scott James Atherton
5. Linval Simpson
6. Liliya Vasileva Lubczynska
7. Bianca Virginia Larch and Anthony Larch
8. Nicholas James Clarke and Louise Anne Clarke
9. Annie Ayomide Ade-Ajayi.