



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

Case reference : **LON/00BD/LBC/2017/0008**

Property : **Flat 7 Fourways House 121a Nelson Road
Twickenham Middlesex TW2 7AZ**

Applicant : **Assethold Limited**

Representative : **Mr Gurvits (Managing Agent of
Eagerstates Limited)**

Respondent : **Mr Robert Wintercross**

Representative : **Mr Duncan Richards (Counsel Instructed
by Bradys Solicitors)**

Type of application : **Costs under Rule 13 Tribunal Procedure
(First –tier tribunal) (Property Chamber)
Rules 2013**

Tribunal member(s) : **Judge N Haria
Member W R Shaw FRICS**

Date and venue of hearing : **10 Alfred Place, London WC1E 7LR**

Date of decision : **21 June 2017**

DECISION

Decision of the tribunal

- (1) The Tribunal make no order for costs.

The application and the background

1. The applicant had submitted an application for a determination of a breach of a leasehold covenant pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002. The application was made on two grounds, firstly that the respondent was housing a dog and secondly that certain of the respondent's chattels were being placed and left in the communal hallway outside the subject flat.
 2. Directions were issued on the 27 January 2017 and the matter was listed for a hearing on 27 March 2017. Due to delays in compliance with the Directions the hearing was postponed to the 15 May 2017.
 3. On 11 May 2017, the applicant's solicitors confirmed by letter to the tribunal and the respondent that the application was discontinued "*...in the interests of saving costs...*" as the respondent had provided written confirmation that the dog had been removed from the property and there were no obstructions in the hallway.
 4. Emails from both parties solicitors were sent to the tribunal and on 12 May the tribunal clerk confirmed on behalf of the tribunal that a procedural judge directed that the hearing listed for 15 May 2017 shall not be vacated as requested by the applicant and shall proceed to deal with the matter of costs under rule 13.
 5. This decision is in respect of the respondent's rule 13 application for costs. The respondent seeks an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). Rule 13(1)(b) provides that the tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case or a leasehold case.
1. A hearing of the application took place on the 15 May 2017. Both parties were represented at the hearing and the respondent attended the hearing.
 2. The costs in issue are those said to be incurred by the respondent in defending the substantive application to the tribunal in relation to alleged breaches of covenants (the "Substantive Application"). The costs being claimed by the respondent amount to £4,935.60 inclusive of VAT.
 3. The relevant provisions of the Rules are set out in the Appendix attached to this decision.

The respondents' case

4. The respondent relies on the Note for the hearing made by Mr Richards dated 15 May 2017 and his oral evidence.
5. Mr Richards in his Note refers to the Upper Tribunal case in **Willow Court Management Co (1985) Limited and Ors [2016] UKUT 0290 (LC)**, the leading authority in relation to rule 13 costs in this jurisdiction.
6. The respondent contends that the applicant's conduct in relation to the Substantive Application has been unreasonable in particular in deciding to discontinue the Substantive Application just one working day before the scheduled hearing.
7. The respondent contends that the applicant's solicitor's letter of the 11 May giving the reason for the discontinuance makes little sense. The letter of the 11 May states:

“ The Respondent has provided written confirmation that the dog at the property has now been removed and there are no obstructions in the hallway ...in the interests of saving costs our client therefore wishes to discontinue their application.”
8. The respondent argues that it is axiomatic that virtually no costs will be saved upon discontinuance at such a late stage in the proceedings as Counsel for the respondent was instructed on 10th May 2017.
9. The respondent states that the Applicant would have been or should have been satisfied with an earlier written note from the respondent, even on a without admission of liability basis, that he would remove the dog and not place any objects in the hallway. The respondent contends that there is no evidence that they even attempted to settle the proceedings on this basis.
10. The respondent contends that the applicant's acceptance of the respondent's written notification is in stark contradiction with the applicant's sole intention to serve a section 146 notice prior to forfeiture. The respondent submits that the proceedings are entirely unnecessary and should never have been brought. The respondent states that the letter dated 23 December 2016 from the applicant to the respondent makes plain the applicant's intentions and exactly what they require from the respondent as it states:

“[Our client] intends to serve upon you a notice under section 146 of the Law of Property Act 1925. The s.146 notice will provide a reasonable period for the breaches to be remedied in so far as they are capable of remedy. In order to serve the s.146 notice our client requires either an

admission of the breach or determination by a court or First tier Tribunal of the same.....if the breach is admitted as statement of admission will be prepared for your signature and return. In the absence of admission, it is our client's intention to issue proceedings for a determination of breach."

11. The respondent states that the applicant did not give the respondent:
 - (i) A chance to respond to the allegations before proceedings were commenced.
 - (ii) Full or any proper particulars of the alleged breaches; the narrative of the breaches complained of is extremely weak in relation to the items left in the corridor. The paucity of evidence for the applicant has not been improved upon.
 - (iii) Any other proposals for settlement of the proceedings either at that time or any other time until late in the week prior to the hearing and up to the day discontinuance had taken place.
 - (iv) The applicant (or its agent) have recently demanded service charge from the respondent and also discussed the respondent's proposed assignment. Therefore any right to forfeit has been waived. Despite this, the application has continued, the applicant's solicitors must or should have known that the application was not going to succeed.

12. The respondent submits that the applicant failed to take into account a number of highly relevant matters surrounding the application until very recently:
 - (i) The breaches complained of are, even taken at their highest, de Minimis. Proceedings are wholly inappropriate.
 - (ii) The respondent is marketing the flat and has accepted an offer. Conveyancing Solicitors have been instructed and exchange of contracts is imminent. It is therefore highly unlikely that, even with a favourable outcome, the applicant will be able to forfeit because by that time the respondent's interest in the flat will have been assigned.

13. Both parties made offers to each other on the day before discontinuance, the offers lapsed and were withdrawn before 11 May 2017. The applicant had the chance to avoid the costs of the hearing.
14. The respondent claims all his costs. The decision of the applicant to make the application without making better efforts to liaise with the respondent or his solicitors until the last days of the week before the hearing is wholly disproportionate, unnecessary and unreasonable.
15. The respondent has produced a statement of costs and a schedule of the work done on documents.

The applicant's case

16. The applicant was represented at the hearing by Mr Gurvits of Eagerstates Limited the managing agents of the building within which the flat is situated. He made oral submissions in support of the applicant's case.
17. Mr Gurvits stated that the test in any Rule 13 application is whether the conduct complained of is unreasonable. A landlord seeing a breach of a covenant in a lease will take action and the first stage is to send a letter before action. This conduct cannot be considered unreasonable.
18. The Upper Tribunal makes clear in **Willow Court** that withdrawal should not be seen as an admission that there was no case to answer.
19. The only reason for the hearing today is that the respondent upon being notified of the applicant's withdrawal of the Substantive Application submitted a rule 13 application for costs.
20. Mr Gurvits referred to paragraph 43 of the guidance given by the Upper Tribunal in **Willow Court** where it is stated that rule 13 applications ".....should be determined summarily, preferably without the need for a further hearing.....".
21. Mr Gurvits pointed out even if the tribunal finds the conduct to be unreasonable the power under rule 13 to award costs is still a discretionary power and it is a matter for the tribunal to determine whether to award costs.
22. Mr Gurvits submitted that the failure by the respondent to respond to the letter dated 23 December 2016 from the applicant led to the issue of proceedings. The respondent admitted he became aware of the letter dated 23 December 2016 sometime towards the end of January 2017 and yet he only instructed his solicitors in April. Mr Gurvits stated that the respondent's conduct was unreasonable. He accepted that the

address in Yorkshire to which the letter was sent was not the respondent's address but that of his parents. He did not know the basis on which the address in Yorkshire had been used. The service charge demands are sent to the flat.

23. The original hearing was listed to take place in March but the applicant on realising that the respondent had not sufficient time to see the correspondence agreed to an extension of time and the tribunal Directions were amended accordingly.
24. The respondent filed his response late on the 6 April 2017 and it was served on the 10 April but the applicants due to religious events were not able to deal with it straight away.

The Tribunal's decision

25. The Tribunal make no order for costs under Rule 13.

Reasons for the Tribunal's decision

26. In dealing with any application for costs the Tribunal must seek to give effect to the overriding objective under Rule 3 of the Rules.
27. The Tribunal considered the bringing of the Substantive Application, the manner in which the Substantive Application was conducted and the merits of the Substantive Application. In order for the applicant's conduct to be unreasonable, it must be conduct, which is out of the ordinary or incapable of any reasonable explanation.
28. The leading case on the tribunal's powers to award costs is the case of **Willow Court** in which the Upper Tribunal set out this tribunal's power to award costs and gives detailed guidance on the exercise of this power.
29. The Upper Tribunal concurred with the guidance given by the Court of Appeal in **Ridehalgh v Horsefield [1994] Ch 205, CA** as to the the meaning of 'Unreasonable' given at 232E which states that it ".....describes conduct which was vexatious, designed to harass the other side rather than advance the resolution of the case: it made no real difference that the conduct was the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.....".

30. In addition even where “unreasonable” conduct was shown, a costs order does not necessarily follow as this remains within the Tribunal’s discretion.
31. This tribunal is essentially a costs-free jurisdiction where an applicant should not be deterred from bringing an application for fear of having to pay the other party’s costs in the event that their application is unsuccessful. There should be no expectation that a party that is successful will recover its costs. The award of costs under Rule 13(1)(b) should be reserved for cases where on any objective assessment a party has behaved so unreasonably that it warrants an order for costs as it is only fair and reasonable that the other party is compensated by having their legal costs paid.
32. An order for costs under Rule 13(1)(b) can clearly embrace the whole of the “*proceedings*”. Potentially it is capable of bringing under scrutiny conduct from when the Substantive Application comes into existence and ends when that application is finally determined in the tribunal.
33. The first issue for this tribunal to determine is whether the conduct complained of amounts to unreasonable conduct on the part of the applicant.
34. This tribunal does not accept the applicant acted unreasonably in bringing the Substantive Application. The respondent argues that the breaches complained of are de minimis and the application as well as any subsequent forfeiture under s.146 had little prospect of success. The applicant considered it had an arguable case and was of the view that there was a reasonable prospect of success. The submissions made by both parties in relation to the Substantive Application show that there was an arguable case not only in relation to the alleged breaches of covenants but also on a matter of interpretation of the covenants in question. It is a matter for a party to decide how best to present its case and the evidence it wishes to rely upon. The applicant took the advice of its managing agent and legal advisors acted on their professional advice.
35. There are many circumstances where this tribunal makes a finding that a breach of covenant has occurred the landlord is unable to obtain forfeiture either because relief from forfeiture is granted, or the landlord is found to have waived the right to forfeiture. The fact that the landlord has no prospect of succeeding in an application for forfeiture does not inevitably mean that any proceedings issued by a landlord under s.168(4) is manifestly unreasonable. A landlord is obliged by covenants in the lease and in the leases of the other flats to enforce the covenants and the landlord could be criticised by the other lessees of flats within the block for failing to do so.

36. The fact that the applicant withdrew its application on receiving written confirmation from the respondent that the breach (in so far as it was admitted) was no longer continuing does not inevitably mean that it acted unreasonably in bringing the Application. The Upper Tribunal in **Willow Court** at paragraph 35 made this clear and stated:

“It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and to abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs.”

37. The subject property is a flat on the first floor of a purpose built block of 7 flats known as Fourways House. In relation to the alleged breaches of covenant, the applicant relied upon the witness statement of Mr Hudy Bloom a managing agent of the building known as Fourways House.

38. The respondent submits that prior to bringing the proceedings the applicant should have given the respondent:

- (i) A chance to respond to the allegations.
- (ii) Full or any proper particulars of the alleged breaches; the narrative of the breaches complained of is extremely weak in relation to the items left in the corridor.
- (iii) Any other proposals for settlement of the proceedings either at that time or any other time until late in the week prior to the hearing and up to the day discontinuance had taken place.

39. The applicant’s solicitor wrote to the respondent on the 23 December 2016, this letter sets out the alleged breaches of covenant, invites the respondent to admit the breaches and informs him of the applicant’s intention to issue proceedings in the absence of such an admission. The letter also recommends that the respondent seek legal advice and respond within 7 days failing which proceedings will be issued. This letter gave the respondent a chance to respond to the allegations. The respondent did not respond to the letter of the 23 December 2016, so on the 10 January 2017 the applicant issued proceedings. The Tribunal appreciates that it has since transpired that the respondent was unable to respond within the 7 days as the letter was sent to his parents address in Yorkshire so he was not aware of the contents of the letter until the end of January.

40. It would seem that the first communication from the respondent that the applicant, the applicant's solicitor or the managing agents received following the letter of the 23 December 2016 and the issue of proceedings on the 10 January was sometime towards the end of March. It was only on the 10 May that the respondent provided written confirmation of the removal of the dog.
41. It is accepted by the parties that once the proceedings were issued that there was delay at various stages and for various reasons on the part of both parties. The relevant party has given a valid reason for the delay, this has been accepted by the other party and appropriate revision in the timetable set out in the Directions issued by the tribunal have been agreed.
42. Under these circumstances the issue of proceedings on the 10 January 2017 following a letter before action of the 23 December 2016 and the subsequent action by applicant in pursuing the application cannot be said to amount to unreasonable conduct.
43. The applicant freeholder is a limited company and acts through its directors. The fact that the applicant's case relied heavily on the witness statement of a managing agent employed to manage the building does not make the decision to bring the proceeding unreasonable.
44. The respondent submits that the failure by the applicant to offer other proposals for settlement of the proceedings prior to the discontinuance of the proceedings amounts to unreasonable conduct. By the same token it could be said that the respondent should have either remedied the breaches or put forward an offer of settlement. In this case there were some negotiations between the parties albeit in the last few days leading up to the listed hearing. Unfortunately, these negotiations lapsed and did not result in a settlement. Such negotiations are the norm in litigation.
45. It could be said that the respondent's application for rule 13 costs in this case was premature and hasty as there was no time prior to the hearing for Directions to be issued by the tribunal and for the parties to exchange statements of case and prepare bundles for the hearing. The tribunal only had the bundles relating to the Substantive Application and the Note produced by Mr Richards. The Upper Tribunal in **Willow Court** at paragraph 43 emphasises that rule 13 costs applications should not be routine it states:

“such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. We consider that submissions are likely to be better

framed in the light of the tribunal's decision, rather than in anticipation of it, and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation."

46. In this case the applicant's conduct in bringing the Substantive Application may be considered to have been optimistic but it certainly falls short of conduct that is unreasonable. Accordingly, the Tribunal makes no order to costs under Rule 13.

Name: Judge N Haria

Date: 23 June 2017

Appendix

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3: Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Rule 13: Orders for costs, reimbursement of fees and interest on costs

(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.