



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

**Case reference** : **BIR/41UD/LLC/2019/0010**

**HMCTS code (paper, video, audio)** : **V:SKYPEREMOTE**

**Property** : **Marina View Tamworth B78 3BF**

**Applicant(s)** : **1) Fairhold Properties No 6 Ltd  
2) Brigante Properties Ltd  
3) Fairhold Properties No 4 Ltd  
4) Fairhold Properties No 8 Ltd**

**Representative** : **Estates and Management Limited**

**Respondent(s)** : **1) Marina View Fazeley Limited  
2) Various Leaseholders of Block A**

**Representative** : **Somerfield and Co. solicitors**

**Type of application** : **Application for costs order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**

**Tribunal** : **Judge D. Barlow**

**Date of decision** : **13 August 2020**

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**DECISION**

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## **Decision of the Tribunal**

**The Tribunal makes the following costs order under Rule 13(1)(b) (ii) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules'):**

**The Applicants shall pay the Respondents costs summarily assessed in the sum of £10,171.20 (ten thousand, one hundred and seventy-one pounds and twenty pence) within 14 days of the date of this order.**

## **Reasons**

1. This application ('the Costs Application') arises from the Tribunal's decision dated 10 December 2019, made in proceedings under section 27A of the Landlord and Tenant Act 1985 ('the Substantive Proceedings').
2. The relevant legal provisions are set out in the Appendix to this decision

## **Background**

3. Marina View is a development of 5 residential Blocks containing 57 Apartments, all held on long residential leases ("the Estate"). The Estate was completed in 2007/2008 by Barratt Homes Limited ("Barratt").
4. The present freeholders are:
  - Block A (Apartments 1-9) – First Respondent (SF530136)
  - Block B (Apartments 10-16) – First Applicant (SF543443)
  - Block C1 (Apartments 17-22) – Second Applicant (SF530137)
  - Block C2/D (Apartments 23-24) – Third Applicant (SF536435)
  - Block E/F (Apartments 35-58) – Fourth Applicant (SF343043)
5. The residential leases, which are in common form, provide for all lessees to contribute to the costs incurred by the lessor in maintaining and repairing the 5 residential Blocks and the common areas of the Estate, in accordance with the provisions of the Sixth and Seventh Schedules to the leases. The Sixth Schedule separates the maintenance costs into Part A "Estate Costs" and Part B "Block Costs".
6. Following sale of the long leasehold interests, Barratt disposed of the freehold reversion of the Blocks to 5 companies who each took over the lessor's obligation to maintain their individual Blocks. The Fourth Applicant also took ownership of and responsibility for the common areas of the Estate. The 5 original transferee companies were connected allowing maintenance of the Estate to continue to be carried out collectively following the disposals. This remained the position until the freehold of Block A was transferred to the First Respondent on 1 March 2016.
7. The First Respondent is a company owned by the residential leaseholders of Block A (the Second Respondents). They collectively acquired the freehold reversion of Block A to allow them to manage the required maintenance and repair of their block separately, which they have done since 1 March 2016.

The Block A lessees have however continued to pay their proportion of the Part A Estate Costs to the Fourth Applicant for maintenance of the common areas of the Estate.

8. The transfer of the freehold reversion of Block A to the First Respondent created an issue for the Applicants. The service charge mechanism for the Part B Block Costs allowed for 100% recovery from the lessees of the whole Estate, but did not anticipate the need for flexibility should the Blocks cease to be managed collectively. The lessees' proportions of the Part B Block Costs are fixed and no provision was included in the leases for the proportions to be varied in the circumstances that have arisen. Consequently, from 2016 on the transfer of Block A created a 15.79% shortfall in the Part B costs recoverable from the lessees of the remaining 4 Blocks of the Estate.

### **The Substantive Proceedings**

9. On 24 May 2019 the Applicants applied to the Tribunal under s27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of the liability of the First and/or Second Respondents to pay the lessees' proportion of the Part B Block Costs to the Applicants, to allow for 100% recovery of the Part B service charge.
10. A Case Management Conference was arranged on 25 September 2019 ("the CMC") to determine the following preliminary issue:

*"Are Block Costs under Part "B" of the Sixth Schedule to the Lease, being a part of the Lessees' Proportion of the Maintenance Expenses to be determined in accordance with the Seventh Schedule, payable in accordance with paragraph 2 of Part One of the Eighth Schedule by the Leaseholders of Block A (Apartments 1-9, Marina View) to the Applicants?"*

11. In finding that the Part B Block Costs were not payable by the lessees of Block A to the Applicants, Judge Jackson concluded that there was no privity of contract or privity of estate between the Applicants and either the First Respondent, or the Second Respondents. Further, that the Applicants' are a "non-party to the lease who did not own the reversion" to Block A and had no lawful right to enter Block A to carry out the Part B services. This effectively disposed of the s27A application leaving determination of the costs applications outstanding.

### **The Costs Application**

12. The Respondents' made two applications for costs; and requested an oral hearing of the applications:
  - (1) First, an application under s20C of the 1985 Act made by the Respondents on 15 July 2019.
  - (2) Secondly, an application for costs under Rule 13(1)(b) made by the Respondents within their submissions on the preliminary issue dated 18 November 2019, on the grounds that the application was unreasonable, hopeless, frivolous or vexatious.

13. A Schedule of Costs has been provided by the Respondents solicitors. The hourly rate claimed for the solicitor is £250 (Grade A) and the costs Schedule summarises the fee earners time, split between attendances on client, opponent and others; and work done on documents. Mr Gales brief fee for the costs hearing was £2000.00 and there was an additional fee for preparation of written submissions of £2000.00, plus a further hearing fee of £200.00, all plus VAT. The total sum claimed is £13,610.00 inclusive of VAT, which is broken down as follows:

- Solicitor's costs                      £7175.00
- Counsel's fees                         £4,200.00
- VAT                                        £2235.00

(This actually totals £13,650.00, suggesting there is a small error in the schedule).

14. The Applicants' filed written submissions on 28 January 2020 concerning both costs applications and the Respondents Schedule of Costs.

15. A remote oral hearing took place on the 1 July 2020. The Respondents were represented by Mr J. Gale of Counsel, the Applicants were represented by Mr P. Sweeney of Counsel. Mr Gale filed a skeleton argument shortly before the hearing setting out the Respondents submissions.

16. Mr Gale conceded at the start of the hearing that the Respondents could not succeed on the s20C application. The lessees of Block A were not liable to contribute to the costs of Part B services charges payable to the Applicants for their Blocks; and the lessees of those Blocks that were liable to contribute to the relevant costs, had not been specified in the s27A application, or consented to it. (***Plantation Wharf Management Limited v Fairman [2019] UKUT 236 (LC)***)

17. Not surprisingly, both parties referred to the Upper Tribunal's decision in ***Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC)***, which outlined a three-stage test for deciding rule 13 applications. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order. The second and third stages both involve the exercise of judicial discretion, having regard to all relevant circumstances and there need not be a causal connection between the unreasonable conduct and the costs incurred. Given the requirements of the three stages, rule 13 applications are fact sensitive.

18. At paragraph 24 of ***Willow Court***, the UT said "*An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance in ***Ridehalgh v Horsefield [1994] Ch at 232E***, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious and designed to harass the other side*

*rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"*

19. At paragraph 43 of ***Willow Court***, the UT emphasised that Rule 13(1)(b) 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."

### **The Respondents submissions**

20. The Respondents submissions on the Rule 13 (1)(b) application were largely advanced by Mr Gale in his skeleton argument but expanded on at the hearing. They can be summarised as follows:

As to the first limb of the three stages in ***Willow Court***.

(a) The Applicants, who are all legally represented property management companies, acted unreasonably in making and pursuing a hopelessly misconceived application for the determination of service charge, against strangers to the lease, based on erroneous legal arguments derived from an obvious misconstruction of the Landlord and Tenant Act 1994 (Covenants) Act 1995.

(b) The only explanation provided for the application appears to be a desire to make up the shortfall in the Applicants' recovery from its own tenants. This is not a reasonable reason.

(c) The attempt to obtain money from strangers to the lease, by using the Tribunal procedure, was vexatious. The Applicants' knew that there was no privity of contract or estate with the Respondents, as evidenced by the invoices that were sent to the Second Respondents by their agent purporting to have been sent on behalf of the First Respondent.

(d) On 25 September 2019, Tribunal Judge Jackson raised serious concerns about the Applicants' claim, which should have alerted the Applicants to the desirability of dropping the claim at that stage. Instead the Applicants' advanced, for the first time, a specious argument based on s3 of the Landlord and Tenant Act 1994 (Covenants) Act 1995 and continued with the claim.

(e) The Applicants are a group of commercial landlords with an agent and an inhouse legal department. They were represented by an organisation called Estates Management Limited, which has a legal department. The Applicants clearly had access to legal advice, and the standard of reasonableness ought to be judged accordingly.

As to the second limb

(f) This is a case where the Respondents have wrongly been brought to the Tribunal on pain of being held liable for service charges going back

to 2016 and continuing, a significant sum of money to which the Applicants had no right.

(g) Sending demands to the Second Respondents purporting to act as agents for the First Respondent forms part of the circumstances, and suggests that the Applicants were trying to strong-arm the Second Respondents into paying the Part B service charge to them.

As to the third limb

(h) Responding to the application, which involved technical arguments on the preliminary point, caused the Respondents to incur significant legal costs which the Applicants' should be ordered to pay on an indemnity, or at least standard basis. Mr Gale requested that the Tribunal summarily assess the Respondents costs.

### **The Applicants' submissions**

21. The Applicants' submissions on the Rule 13(1)(b) application are largely set out in their written submissions and also rely on the three-stage approach in *Willow Court*. Mr Sweeney expanded on some of these at the hearing. The submissions can be summarised as follows:

As to the first limb

(a) The application was designed to resolve a real issue between the lessees of all the Blocks on the Estate, not to harass the lessees of Block A.

(b) That the situation was unsatisfactory for all, is a reasonable explanation of the conduct complained of.

(c) Reliance on s3 of the Landlord and Tenant (Covenants) Act 1995, in response to the Tribunals directions following the CMC, was a genuine attempt to resolve an unsatisfactory situation and clarified that the Applicants' were "strangers to the lease". The submissions were not specious, vexatious or designed to harass, despite the Tribunal rejecting the argument. The Tribunal did not find that the s3 argument was vexatious, just misconceived.

(d) The Tribunal should consider the Applicants' motive in making the application, which was to redress the shortfall in the service charge. The burden of demonstrating unreasonable conduct is on the Respondents and they have failed to satisfy this burden.

As to the second and third limb

(e) The nature, seriousness and effect of the unreasonable conduct are important factors and there is no allegation of unreasonable conduct in relation to the conduct of the proceedings themselves.

(f) The Respondents' costs are grossly inflated and disproportionate. In particular:

- (i) The hourly rates are excessive and Grade A is inappropriate for issues that are not complicated.
- (ii) The hours claimed are excessive, 7.6 hours for solicitor attendance is not warranted and should be reduced to 3 hours.
- (iii) Emails are not recoverable.
- (iv) Work on documents/general work is excessive – no explanation has been given for the amounts of time spent on these items and they should therefore be disallowed.
- (v) 1 hour for consideration of the Applicants submissions is inflated and should be reduced to 30 minutes.
- (vi) 2 hours drafting instructions to Counsel is excessive and should be reduced to 1 hour.
- (vii) 1 hour for considering Mr Gales submissions should be disallowed.
- (viii) 1 hour for considering the Tribunals decision should be reduced to 30 minutes.
- (ix) 2 hours drafting the costs schedule is excessive and should be reduced to 30 minutes.
- (x) The Respondents should not recover any costs for the time spent on the s20C application.

### **Tribunals Consideration**

- 22. The threshold for making a Rule 13(1)(b) costs order is a high one. As stated at paragraph 24 of *Willow Court* “...the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level.”
- 23. When considering the Applicants’ conduct, the Tribunal reminded itself of the guidance at paragraph 23 of *Willow Court* “Unreasonable” conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case.” Such conduct can take various forms and is not limited to that “designed to harass the other side...”. That is clear from the use of the word “includes”.
- 24. There is nothing inherently unreasonable in pursuing an unsuccessful case. However, it is unreasonable to pursue a case that is totally devoid of merit, against parties with which the Applicants had no contractual relationship that could possibly found the cause of action they were pursuing.
- 25. The Tribunal is not persuaded that in advancing an argument under s3 of the Landlord and Tenant Act 1994 (Covenants) Act 1995 following the CMC, the Applicants obtained any retrospective cloak of reasonableness when assessing their conduct in bringing and pursuing these proceedings. It should have been obvious to the Applicants at the CMC that their application could not succeed. Rather than withdraw, the Applicants pressed on advancing the misconceived argument that s3 somehow applied to their situation.
- 26. The only explanation offered by the Applicants is that they were seeking to remedy a shortfall in their Part B service charge account, which was an issue for all lessees on the Estate. It is however clear from facts in this case that

the shortfall was an issue only for the Applicants and their own lessees. Although of understandable concern to the Applicants given the inadequately drafted leases, no reasonable person would attempt to pick the pockets of strangers to remedy their predicament.

27. The dispute, to the extent there is one, is between the Applicants and the lessees of their own Blocks, who have been under-paying the Part B service charge since 2016 due to inadequate drafting of the leases.
28. Section 35 of the Landlord and Tenant Act 1987 (*Application by party to lease for variation of lease*), provides a statutory remedy for lessors to pursue in these circumstances. The shortfall was entirely an issue between the Applicants and their own lessees and the Applicants should never have considered embroiling the Respondents, with whom they had no privity of contract or estate; and no right to carry out the services they intended charging for.
29. The Tribunal finds for the above reasons that the Applicants acted unreasonably in bringing the proceedings and in pursuing them after the CMC.
30. Having found unreasonable conduct, the Tribunal then considered whether to make an order for costs. When doing so it had regard to all relevant circumstances, including the fact that the Applicants are all professional property companies who appointed First Port Property Services to manage the estate on their behalf and have been represented throughout by the legal department of Estates and Management Limited. By contrast, The First Respondent, is owned by the lessees of Block A (the Second Respondent), who purchased the freehold reversion to allow them to manage their own Block free from the requirement to instruct agents. They have been obliged to seek legal advice and representation to defend a claim that should never have brought against them.
31. The Tribunal also had regard to the lack of any explanation for the service charge notices and demands issued by First Port to the Second Respondents purporting to have been sent for and on behalf of the First Respondent. When asked, Mr Sweeney could offer no explanation, but did acknowledge that it was wrong and the letters should not have been sent.
32. The hopelessness of the Applicants case should have been apparent at latest, by the date of the CMC yet instead of withdrawing the claim, the Applicants continued, raising a misconceived argument under s3 of the Landlord and Tenant Act 1994 (Covenants) Act 1995 which only served to considerably increase the Respondents legal costs.
33. Taking all these factors into account, it is appropriate to make a costs order under Rule 13(B)(ii).
34. The Tribunal then considered what costs order should be made. Summary determination is encouraged by the UT at paragraph 43 of ***Willow Court***; and was requested by Mr Gale. The Tribunal finds that summary



assessment of the Respondents legal costs on the standard basis to be appropriate in this case.

35. Turning to the Respondents Schedule, The Applicants made a number of challenges as set out in paragraph 21(f) above which I will comment on using the same numbering:

- (i) The case involves detailed knowledge of landlord and tenant law and the regulatory framework and procedure of an expert property tribunal. The work requires a specialism which justifies the hourly rate.
- (ii) to (iv) The solicitor was advising a group of residents on complicated areas of law and procedure concerning a claim which totalled some £15,231.00, plus a continuing liability of about £5-6000.00 a year. Using the Judge's knowledge and long experience as a solicitor in private practice, the time claimed for these amounts is reasonable and the Tribunal allows them in full.
- (v) and (vi) The Tribunal allows these amount in full.
- (vii) The Tribunal allows 30 minutes for this item (£125).
- (viii) The Tribunal allows 30 minutes for this item (£125)
- (ix) Two hours is reasonable and the Tribunal allows this time in full.
- (x) The Schedule does not break down the costs between the s20C application and the Rule 13 application. However, perusal of the documents indicate that the s20A application took only a small amount of the overall time spent. The Tribunal will therefore reduce the overall costs by 20% to take account the time spent on the s20C application.

36. No challenge has been made either to the use of Counsel or Counsel's fees which are allowed in full.

37. The solicitor has included 2 hours for attendance at the costs hearing but was not present. The £500.00 costs for this item is disallowed.

38. The total recoverable sum (excluding VAT and before the 20% deduction) is £10,595.00, which is broken down as follows:

- Attendance on clients, opponents and others: £1,870
- Work done on Documents/General work: £4,525
- Counsels fees: £4,200

39. The adjusted sum after the 20% deduction is £8,476.00 plus VAT of £1,695.20, totalling: **£10,171.20.**

**Name:** Tribunal Judge D. Barlow

**Date:** 13 August 2020

## **Covid-19**

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V:SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable, no-one requested it and all issues could be determined in a remote hearing.

### 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.

## Appendix

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

#### **Orders for costs, reimbursement of fees and interest on costs**

##### **Rule 13**

- 13.-** (1) The Tribunal may make an order in respect of costs only –
- (a) ...
  - (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
    - (i) an agricultural and land 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.

...

(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 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.