



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

**Case reference** : LON/00AG/LBC/2014/0066

**Property** : Flat B, 13 Laurier Road, London NW5  
1SD

**Applicant** : 13 LAURIER ROAD LIMITED

**Respondent** : Gergana Dragomirova DRAGANOVA

**Applicant's Representative** : Jonathan Upton, Counsel  
instructed through Public Access

**Respondent's Representative** : Daniel Dovar, Counsel  
instructed by Wallace LLP

**Type of application** : Costs of proceedings under section 168  
of the Commonhold and Leasehold  
Reform Act 2002

**Tribunal members** : Judge T Cowen  
Mr Richard Shaw FRICS

**Venue** : 10 Alfred Place, London WC1E 7LR

**Date of Hearing** : 10 October 2016

---

**COSTS DECISION**

---

**DECISION OF THE TRIBUNAL**

- (1) The Tribunal directs that the Applicant pay to the Respondent the sum of £17,000 under rule 13(1)(b) of the Rules.

## REASONS FOR THE DECISION

1. Ms Draganova, the Respondent, lives in a flat on the ground floor of 13 Laurier Road with her partner and their young child. Mr Rowe lives in the basement flat. Each of them owns a long lease of their respective flats. The freehold of the building is owned by the Applicant company (“the Company”). Mr Rowe effectively controls the Company.
2. The Company brought an application against Ms Draganova before this Tribunal requesting a determination under section 168 of the Commonhold and Leasehold Reform Act 2002 alleging that she had committed numerous breaches of covenant. The purpose of the application was as a prelude to forfeiture of Ms Draganova’s lease. We heard the evidence and submissions over 4 days. On 5 October 2015, we gave our decision which rejected all of the alleged breaches and dismissed the Company’s application. On 8 March 2016, the Upper Tribunal refused the Company permission to appeal.
3. The Upper Tribunal also refused Ms Draganova’s application for costs of dealing with the application for permission to appeal. We do not regard that costs decision as having any bearing on our own, as it was decided in a different jurisdiction, under a different test and with consideration of different circumstances.
4. Ms Draganova has applied to us for an order for her costs of the First-tier Tribunal proceedings under rule 13(1)(b) of the Tribunal procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Rules”). The Company opposes the application.
5. We have heard submissions from counsel for both parties. We have listened carefully to those submissions and considered all the material supplied by the parties for the purposes of this application. This is the Tribunal’s decision on the costs application.
6. We start by reminding ourselves of the guidance given by the Upper Tribunal, as to the format for decisions in such applications, in *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC). At paragraph 43 of its decision, the Upper Tribunal said as follows:

“A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as

read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding that it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid.”

7. We will therefore take the underlying dispute as read and record our decision here as briefly as possible. As a result, we do not propose to set out and deal with every argument made by the parties orally and in their lengthy skeleton arguments. We also do not propose to deal with every authority cited to us nor every document in the two bundles to which we were referred. Despite not recording those matters at length in our decision, we have taken account of all of them in reaching our decision.
8. We also bear in mind the further guidance of the Upper Tribunal at paragraph 61 of *Willow Court* to the effect that this Tribunal is a costs-shifting jurisdiction by exception only, and that parties should usually expect to bear their own costs.
9. The relevant part of rule 13(1)(b) of the Rules reads as follows:

“The Tribunal may make an order in respect of costs only: ... (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in ...(ii) a leasehold case...”
10. The proper approach to applications under this rule has been comprehensively considered in the *Willow Court* case which was decided in June 2016. The parties in the present matter had a full opportunity to address the Tribunal on the implications of *Willow Court*.
11. The Upper Tribunal in *Willow Court* at para 28 prescribed a three stage process of issues to decide, in considering rule 13(1)(b) applications, which can be summarised as follows:
  - a. Whether a person has acted unreasonably (by applying an objective standard of conduct to the facts of the case).
  - b. Whether, in the light of the unreasonable conduct it has found to have been demonstrated, the Tribunal ought to make an order for costs or not.

- c. What the terms of the order should be.
12. It hardly needs pointing out that each of the last two stages is only relevant if the previous stage has been satisfied.
13. The Tribunal's first task in the present matter is therefore to decide whether the Company has acted unreasonably. It follows from the wording of rule 13(1)(b) that any such unreasonableness must have been "in bringing, defending or conducting proceedings". So in order to satisfy the first stage of the test, it is not enough for the applicant to point to unreasonable conduct in the background to the dispute.
14. The test for determining what constitutes unreasonable conduct for the purposes of rule 13(1)(b) is set out in paragraph 24 of the Upper Tribunal's judgment in *Willow Court* as follows:

"Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?

15. We reject some of the allegations of unreasonable conduct alleged by Mr Dovar. In particular, we do not think that either of the following amount to unreasonable conduct which satisfies the *Willow Court* test: (a) the way in which the Company's Statement of Case was amended or (b) the length of time spent cross examining Ms Draganova.
16. The more attractive submission by Mr Dovar was that some or all of the claims made and issues raised by the Company were pursued in such a way as to amount to unreasonable conduct in bringing/conducting proceedings. We need to be careful when considering such submissions because of the decision in *Willow Court* which clearly held that pursuing a claim with a poor chance of success is not of itself unreasonable conduct. See for example paragraph 136 of *Willow Court*:

“It is not unreasonable to submit genuine claims for determination by the FTT, and the fact that some claims may have a greater chance of success than others makes no difference. It may be unreasonable to bring a claim which is fanciful, which the claimant knows is bound to fail, or which is brought solely for the purpose of causing expense and inconvenience to the respondent.”

17. We start our application of these guidelines to the facts of the present case by noting that most of the substantive proceedings were taken up with dealing with (a) the Structural Issue (whether the works came within the absolute prohibition part of the alterations clause in the Lease) and (b) the Stacking Issue (which played a large part in the question whether consent was unreasonably withheld as well as being an alleged breach in its own right).
18. It seems to us that the Structural Issue was a genuine claim. The question required interpretation of the Lease and the resolution of contested expert evidence.
19. On the other hand, the Stacking Issue seems to us to have been a completely fanciful claim which could never have succeeded, not least because there was no uniform stacking in the building to start with. We have explained our view on that in detail in our substantive decision and we do not propose to repeat it here. In our view, the Company's arguments on this issue were irrational and absurd. Consideration of them took up a substantial proportion of the hearing time in evidence and submissions and a substantial proportion of the four lever arch files submitted for the hearing.
20. We go further, however, and have reached the clear view that the Stacking Issue was raised and pursued as a continuing part of Mr Rowe's campaign of harassment of Ms Draganova. We have set out in our substantive decision the impression we gained of Mr Rowe and his motivation from having seen him give live oral evidence for several hours before us. His demeanour when presented with the absurdity of his case on this issue was just as telling as the words he used (if not more). We have set out the history of previous incidents of his harassment of Ms Draganova (including climbing onto a ladder to take photographs of her underwear drying on a clothes line and through the window into her bedroom while she was sleeping). Those previous incidents are not themselves unreasonable conduct for the purposes of Rule 13(1)(b) because they were not within the proceedings, but they

form part of the background from which we have formed the overall picture that the Company (through its main driving force, Mr Rowe) was engaged in a campaign of harassment of Ms Draganova and that these proceedings (or at least the Stacking Issue part of them) is a part of that continuing campaign. See paragraph 95 of *Willow Court* in which the Upper Tribunal said that previous conduct could sometimes be relevant to consider a party's motive. This case was designed to cause expense and inconvenience to Ms Draganova.

21. In considering the conduct of the Company as a party, we take into account that the Company is owned by all four leaseholders and that Mr Rowe is not the only director. There is one other: Mr Graf. But it was however quite clear to us, over the course of the four days of evidence and submissions at the substantive hearing, that Mr Rowe is the main driving force and prime decision maker of the Company and that in relation to its dealings with Ms Draganova, it is being used as a vehicle for Mr Rowe's personal campaign of harassment against her.
22. Mr Upton submitted that because the proceedings were brought and conducted by the Company with the assistance of solicitors (who were instructed at the substantive hearings), the Company was not unreasonable, because it was following the advice of the solicitors. That is a difficult submission for us to accept without evidence of all the advice given by previous solicitors and previous counsel to the Company. Such advice is, of course, covered by confidential client privilege and we did not ask to see it for that reason. Mr Upton elected to show us a copy of some instructions to counsel (which relate solely to the structural issue, not the stacking issue) and we were asked to infer that the Company's solicitors felt positive about the potential claim at the time of those instructions. But we were not shown what advice was given in response to the instructions nor what view the solicitors took about the merits of the claim at other times. We were not convinced that the instructions themselves indicated that the solicitors felt positively about the claim. In our experience of litigation, the way a case is presented by solicitors with a view to obtaining counsel's opinion does not even necessarily reflect what the solicitors themselves think about the case. We are not in a position to find as a fact that the Company's motivation for bringing the claim was the receipt of positive legal advice.
23. When applying an objective standard of conduct to the facts of this case, we find (for all the above reasons) that a reasonable person in the position of the Company would not have conducted themselves as this Company did. We find that there is no reasonable explanation for the

pursuing of the Stacking Issue and all its implications. Ms Draganova has therefore satisfied the “acid test” in relation to that allegation of unreasonable conduct.

24. That then raises a new issue. We have found that the Company has acted unreasonably in bringing and conducting the proceedings in relation to part of the proceedings, but not all of the proceedings. This begs the question whether unreasonable conduct as to part of proceedings can form the basis of a successful application under rule 13(1)(b) or whether acting unreasonably in bringing proceedings can only apply if it is the whole of the proceedings which are unreasonably brought. We put this issue to the parties at the hearing and Mr Upton for the Company conceded that rule 13(1)(b) can apply to acting unreasonably in bringing or conducting part of the proceedings.
25. In any event, in our judgment, rule 13(1)(b) can apply to unreasonable conduct as to part of proceedings for the following two reasons:
  - a. The wording of the rule is “in bringing...proceedings” rather than “by bringing...proceedings” and is therefore capable of bearing the meaning that the unreasonable conduct can relate to part of the bringing of proceedings and not necessarily the whole of it.
  - b. Any other interpretation would lead to the potentially absurd result that costs could not be awarded in a clear case of proceedings brought for the purposes of harassment if there happened to be even one small legitimate issue which could be said to justify the bringing of proceedings.
26. We would in any event add that we regard the entire proceedings in this case (including the Structural Issue) as having been brought and conducted as part of the same campaign of harassment, because we think that without Mr Rowe’s intransigent and inflammatory approach to dealing with Ms Draganova throughout this matter, even the Structural Issue could have been dealt with consensually and without recourse to section 168 proceedings, which are very aggressive by the nature of their jurisdiction and the ultimate remedy sought. We note in passing that we heard evidence that a previous leaseholder of Ms Draganova’s Flat had carried out unlawful alterations and was granted a retrospective licence by the Company. This contributes to our conclusion that these proceedings were conducted as a personal attack on Ms Daraganova.

27. When concluding that part of the proceedings were brought and conducted unreasonably, we also have in mind the guidance in *Willow Court* at paragraph 26 that we should take into account the Tribunal's interim case management powers. We have reached the conclusion that the absurdity of the Stacking argument raised by the Company was not obvious until the Tribunal was faced with the evidence at the substantive hearing and so there was no realistic opportunity for the issue to have been disposed of any earlier or with any less tribunal and party preparation time.
28. That brings us to stage two. We have decided in the exercise of our discretion that an order for costs ought to be made. It would be most unjust if the Company could succeed in its aim of causing expense and inconvenience to Ms Draganova by exploiting the usual rule that this is not a cost-shifting jurisdiction. In addition, we take the view that section 168 proceedings are in a different category from the service charge challenges which were the basis of the applications considered in *Willow Court*. By a section 168 application, the leaseholder stands to lose a great deal and cannot afford not to defend every issue. The binary nature of the jurisdiction (breach or not breach) makes it difficult for the leaseholder to try to compromise against an intransigent freeholder.
29. We next consider stage 3: what the terms of the order should be. We keep in mind the Upper Tribunal's guidance at paragraph 43 of *Willow Court* that the matter should not be allowed to become a separate major dispute in its own right. We therefore do not propose to order a detailed assessment of costs. We also do not propose to attempt to calculate the exact amount of costs attributable to the Stacking Issue. Even if it were possible to do so, it would be a disproportionately complicated and time-consuming task. We further keep in mind the conclusion of the Upper Tribunal in paragraph 40 of *Willow Court* on the issue of causation.
30. Mr Upton submitted that we should also take account of the Company's ability to pay any costs order. He said that the Company has no reserve funds and would have to make a call on its shareholders – the lessees – in order to pay any costs order. He referred us to paragraph 134 of *Willow Court* in which the Upper Tribunal held that the personal circumstances of the paying party could be taken into account. We do not however think that the financial circumstances of the Company are relevant here. We have no evidence of the state of the Company's accounts and Mr Upton's submissions cannot, of course, be accepted as evidence. In any event, even if the Company did have to



make a call on its members (or on the same individuals as lessees by way of service charges), there was no evidence that the members/lessees would have any difficulty paying.

31. Taking all that into account, we have decided to estimate a percentage proportion of Ms Draganova's costs to be payable by the Company and for that proportion to be the subject of a summary assessment. Ms Draganova's solicitors submitted a costs schedule in the amount of about £62,000. Mr Upton saw a copy of the schedule, but did not make any submissions on particular items in the costs schedule.
32. In the light of all of the above, we have decided in our discretion that the Company should pay one-third of Ms Draganova's costs and that if one allows for the usual possibility that the amount of £62,000 would be taxed down on a detailed assessment, we have settled on a figure of £17,000 to be paid by the Company to Ms Draganova within the next 28 days after the date of this order.

**Dated this 8<sup>th</sup> day of December 2016**

**JUDGE TIMOTHY COWEN**