



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

**Case reference** : **CAM/00MF/LSC/2018/0005**

**Property** : **Flat 14, 44 Finchampstead Road,  
Wokingham, Berks RG40 2NN**

**Applicants** : **(1) Gerald Francis Moir and (2)  
Francisco De Sousa**

**Representative** : **Mr C King of counsel**

**Respondent** : **44 Finchampstead Road Management  
Ltd**

**Representative** : **Mr W Beetson of counsel**

**Type of application** : **For the determination of the  
reasonableness of and the liability to  
pay a service charge**

**Tribunal members** : **Judge S Brilliant  
Mrs S Redmond BSc MRICS  
Mr N Miller BSc**

**Date and venue of  
hearing** : **24 July 2018  
Reading Tribunal Hearing Centre, 30-31  
Friar Street, Reading, Berkshire**

**Date of decision** : **10 August 2018**

**Date of costs decision** : **12 October 2018**

## **Decision of the Tribunal**

1. The hearing in these proceedings took place on 24 July 2018 . On 10 August 2018, we made the substantial decision. At the hearing we found that all of the service charges claimed by the Respondent were payable by the Applicants.

### **The Respondent's application for costs**

2. On 24 August 2018, the Respondent made an application for costs against the Applicants under rule 13(1)(b)(iii) of the Tribunal Procedure (Property Chamber) (First-tier Tribunal Regulations 2013. This provides:

*The Tribunal may make an order in respect of costs only ... if a person has acted unreasonably in bringing, defending or conducting proceedings in ... a leasehold case ...*

3. On 03 September 2018, the Applicants replied to the application for costs.
4. The jurisdiction to award costs under rule 13 has been examined recently by the Upper Tribunal in Willow Court Management (1985) Ltd v Alexander [2016] UKUT 290 (LC), [2016] L&TR 34.
5. The head note in L&TR reads as follows:

*(1) The Court of Appeal guidance on what constitutes "unreasonable" conduct in the context of wasted costs applies in FTT proceedings for the purposes of r.13(1)(b), rather than this term having a wider interpretation, Ridehalgh v Horsefield [1994] Ch 205 applied. The test for unreasonable conduct 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, is there a reasonable explanation for the conduct complained of?*

*(2) A systematic or sequential approach to applications under r.13(1)(b) should be adopted. At the first stage the question is whether the person has acted unreasonably. At the second stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the terms of the order should be. At both the second and third stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. Whether the party whose conduct is criticised has had access to legal advice is relevant at the first stage of the enquiry, as the behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice; it may also be relevant, though to a lesser degree, at the second and third stages, without allowing it to become an excuse for unreasonable*

conduct. At the third stage, a causal connection with the costs sought is to be taken into account, but the power is not constrained by the need to establish causation.

- (3) Applications under r.13(1)(b) 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 dealt with summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. Those submissions are likely to be better framed in light of the tribunal's substantive decision rather than in anticipation of it, and applications at interim stages or before the substantive decision should not be encouraged.

6. Turning to the actual words used by the Upper Tribunal, the following paragraphs are germane:

24. ... "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 v Horsefield* [1994] Ch 205]: is there a reasonable explanation for the conduct complained of?
28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.
29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes 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.' It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.*

30. *At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.*
7. Under the lease the Applicants were liable to pay a service charge relating to the usual expenditure spent on providing services to the Applicants and maintaining the building and the grounds in which the flat is situated. An unusual feature of this case is that, in addition, the Applicants covenanted to pay the costs of the gas used in the communal heat exchange system.
8. A communal heat exchange system is governed by the Heat Network (Metering and Billing) Regulations 2014 ("the regulations"). This is the first case in which we have had to consider a communal heat exchange system and the regulations. There was no expert evidence before us as to how a communal heat exchange system works, and we had to do our best from what the parties told us.
9. Contrary to the Respondent's submissions, we accepted that in their application to the Tribunal, in a document headed "Particulars of Claim", the Applicants did raise two issues concerning the communal heat exchange system. One issue was a factual one pertinent to just this case. This was an assertion that the gas being charged to the Applicants was almost double the appropriate rate. The other issue was a general one applicable to all communal heat exchange systems. This was an assertion that the Respondent was in breach of the relevant regulations, thereby disentitling it to recover anything in respect of the gas charges.
10. The other matters in issue before us were more routine. They consisted of allegations concerning:
- (1) the accuracy of the way in which the service charges have been particularised.
  - (2) the lack of functioning of the security gates for one month;
  - (3) the lift ceasing to work for two months;
  - (4) a failure of the boiler system to provide hot water.

11. In our view, in arguing the points that the Applicants took at the hearing, their conduct comes nowhere near the threshold required for it to be characterised as unreasonable. The issues raised in paragraph 10 above were routine service charge matters. Raising these issues cannot be regarded as unreasonable conduct.
12. Although the Applicants were unsuccessful in respect of the issues raised in paragraph 9 above, we are not aware of either the First-tier Tribunal or the Upper Tribunal having had to deal with these arguments. Although the arguments did not succeed, it was not unreasonable for them to be argued.
13. In the Respondents' submissions on costs we were taken to a number of meetings between the parties and correspondence exchanged between the parties after the adjourned hearing on 24 April 2018 until very shortly before the adjourned hearing on 24 July 2018.
14. We accept the Respondents' submissions that whilst the meeting on 16 May 2018 was without prejudice, the Applicants waved that privilege by sending an email on 19 July 2018 to the Tribunal referring to what took place at the meeting.
15. We have also seen a number of letters and emails exchange between the parties during the period between the two hearings. They are either marked "without prejudice save as to costs" or as being "Calderbank" letters<sup>1</sup>.
16. We can only describe the attitude taken by the Applicants in these exchanges as being well outside of that which could properly be described as reasonable. Primarily, the Applicants asked for a pay-out of £15,000, later dropped to £10,000, in order to settle the matter. Even this sum was over twice the amount that the Applicants would have recovered had their application succeeded.
17. The Applicants also threatened the Respondents with pursuing either a public or a private prosecution of the Respondents for allegedly being in breach of the regulations. We regard this as an unattractive way in which to conduct a civil case.
17. Moreover, the Applicants, contrary to the directions order made on 24 April 2018, just days before the reconvened hearing, purported to serve a second witness statement of the First Applicant, together with a skeleton argument, raising matters which had not been raised before.
18. We have reached the clear conclusion that the conduct of the Applicants between the two hearings was unreasonable. Moreover, it is only right for the Applicants to pay the costs of the letters written and the emails exchanged between the two hearings. This does not include the costs, if any, of without

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<sup>1</sup> This is a reference to the decision of the Court of Appeal in Calderbank v Calderbank [1975] 3 All ER 333 in which the rule was established that a letter marked "without prejudice save as to costs" was admissible in deciding a costs order.

prejudice meetings. But it does include, contrary to the normal rule, that the recovery of the cost of "letters in". This is because such letters included the matters of which we have made complaint above.

19. The Respondents intend to recover any costs not made the subject of a cost order directly from the Applicants pursuant to paragraph 7.1 of Schedule 4 to the lease. This paragraph contained a covenant by the Applicants to pay on demand the cost and expensive of the Respondents in connection with the enforcement of the covenants by the Applicants to pay the service charge and costs of the gas supplied.
20. These are administration charges. The Applicants asked the Tribunal to reduce or extinguish their liability for these administration charges pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. We see no reason to reduce or extinguish of these administration charges.
21. We are not persuaded that paragraph 2.1.2 of Schedule 7 to the lease entitles the Respondents to pass the costs of these proceedings onto the service charges payable by all the lessees. Accordingly, the provisions of s.20C Landlord and Tenant Act are not engaged.
22. The Respondents are to provide to the Applicants and the Tribunal within 14 days of receiving this decision a schedule of their costs in accordance with paragraph 18 above. The Applicants must within 14 days of receiving such a schedule provide any objections or representations to the Tribunal and the Respondent. The Respondent must within 14 days of receiving any objections or representations from the Applicants provide to the Applicants and the Tribunal any response to the objections or representations made by the Applicants.

**Name:** Simon Brilliant

**Date:** 12 October 2018

#### **ANNEX - RIGHTS OF APPEAL**

- i. 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.
- ii. 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.
- iii. 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.

- iv. 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.