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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/29UH/LSC/2017/0028
Property	:	Flats 12 and 11, Meridian Court, 47 Buckland Road, Maidstone, Kent ME16 0SH
Applicants	:	(1) Mens-Sana Tamakloe (Flat 12) (2) Mark Curry (Flat 11)
First Applicant's Representative	:	Lina Matson of counsel, instructed by Bonnalack & Bishop Solicitors
Second Applicant's Representative:	:	N/A.
Respondent	:	Sanctuary Housing Association (landlord)
Representative	:	N Grundy QC of counsel, instructed by Bevan Brittan LLP solicitors
Type of Application	:	Landlord and Tenant Act 1985 s.27A (service charges)
Tribunal Member(s)	:	Judge Mark Loveday Richard Athow FRICS MIRPM
Date and venue of hearing	:	Written representations
Date of Decision	:	28 February 2018

DETERMINATION (RULE 13 COSTS)

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1. The substantive application was under s.27A of the Landlord and Tenant Act 1985 ("LTA 1985") and sought to determine liability to pay service charges under leases of flats at Meridian Court Maidstone, Kent ME16 0SH. The Applicants are lessees of two flats. The Respondent landlord is a registered Housing Association.

2. A hearing took place on 14 November 2017 and the Tribunal sent its decision to the parties by post on 5 December 2017. By an application dated 3 January 2018, the First Applicant sought his costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The application was prepared by counsel and accompanied by a detailed statement of costs.

3. The Respondent made written representations dated 6 February 2018. The Second Applicant has played no part in the Rule 13 application.

4. The first issue is whether the application was in time or not. As explained above, the decision was sent to the parties on 5 December 2017. Rule 13(5) states that "*An application for an order under for costs claimed must be made within 28 days after the date of which the Tribunal sends-... a decision notice recording the decision which finally disposes of all the issues in the proceedings ...*". In the present context, that required the application to be "made" on or before 3 January 2018. It appears that on 3 January 2018, an attempt was made to file the costs application with the Tribunal. By an email from counsel's clerk timed at 16:06, a copy of the costs application was sent to an email address used by the London Regional Office of the Tribunal (London.rap@rpt.gsi.gov.uk). On 8 January 2018, the email was forwarded by the London office to the London Regional office of the Tribunal. Later that day, the application was eventually emailed by the Eastern Regional office to the Southern Regional office and received there at 13:17.

5. The Tribunal notes that the requirement of Rule 13(4) is for an applicant to "send or deliver an application to the Tribunal". Unlike some other rules (such as an application for a direction under Rule 7(2)(a)), there is no specific requirement for the application to be in writing. Moreover, a Rule 13(1)(b) application is not a "document" covered by the service provisions of Rule 16. The email was sent to the wrong Regional office. There is an interesting argument to be had as to whether an email sent to the wrong Regional Office of the Tribunal satisfies the requirements of Rule 13, and whether the application was one or more days late (although the Tribunal has not been addressed on the matter). In any event, the application seeks an extension of time for filing the application by 1 day and the Respondent does not oppose this (it "makes no comment" about the application, save to state that no copy was given to it under Rule 13(4)(5): see para 2 of the written submissions).

6. The Tribunal makes the order extending time. The period of delay was short, the application for an extension made promptly, the reason for the lateness appears to have been a mistake by the legal representatives for the First Applicant, the application is not opposed and there is no suggestion of any prejudice caused to the Respondent.

7. Turning to the costs application itself, we note the invitation to be brief given by the Upper Tribunal in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (LC) at para 43:

> *"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. 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."*

We accept that invitation.

8. Here, the gist of the application is as follows:
   (a) There was history of the Respondent not answering legitimate enquiries about the disputed charges.
   (b) It behaved unreasonably during the course of a mediation.
   (c) The basis of the Respondent's case changed during the course of the hearing. At lunchtime, leading counsel handed the First Applicant's counsel a spreadsheet which contradicted the previously supplied accounting documentation. That had not been provided before the hearing, even though the Respondent's witness (Ms Shynn) had had this from the previous Thursday.
   (d) Ms Shynn was unable to answer even basic questions in cross-examination at the hearing.
   (e) The Respondent made significant concessions at the 'door of the court'.

9. The First stage identified in *Willow Court* at *inter alia* para 24, is for the Tribunal to consider whether the Respondent's conduct was unreasonable. In relation to the behaviour alleged in (a), (b), (d) and (e), it rejects the contention that the Respondent's conduct met this threshold test, for the following reasons:
   (a) The Tribunal accepts the Respondent's submission that the focus of the Rule 13(1)(b) consideration should be on the conduct of the parties during the proceedings themselves. The wording of Rule 13(1)(b) expressly refers to conduct "during the course of the proceedings". We do not accept (as suggested by the Respondent in its costs submissions) that "the course of the proceedings" is necessarily limited strictly to the time after an application to the Tribunal is made. However, we do find that "pre-application" conduct is of limited relevance to Rule 13. In this case, the Respondent engaged with the application itself prior to the hearing. It provided some documentation, two Position Statements, a Statement of Case dated 8 February 2017 and a witness statement of Ms Shynn dated 1 September 2017. The Respondent's counsel produced a skeleton argument. Any alleged default prior to or outside the application itself was balanced by the Respondent's active participation in the application itself and the provision of documents as part of that process.
   (b) As to alleged conduct during mediation, it is surprising that the matter was raised at all. Mediations are almost invariably confidential and without prejudice, although we have not been shown any mediation agreement to support this. In any event, the Tribunal will not generally attach weight to the alleged conduct of parties during a mediation, particularly when that alleged conduct is disputed and undocumented.
   (d) The conduct of witnesses in evidence will, again, rarely be unreasonable behaviour. Ms Shynn's greatest difficulty in evidence at the hearing was that on a number of issues she was not the person who made day to day decisions about the service charges. This does not even amount to "poor memory or an incomplete or confused understanding of events, management structures, or

legal documents", let alone lying to a tribunal: see *Willow Court* at para 98.

(e) The Respondent made significant concessions at the 'door of the court'. Again, we do not consider that the concessions made amount to unreasonable conduct. We note the comment at para 35 of *Willow Court* that "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".

10. The only issue of substance in relation to unreasonable behaviour relates to (c), and in this respect we give some greater detail for reaching our conclusions. The background to the issues involved, and the late production of the Respondent's spreadsheet of relevant costs are set out in the substantive determination at paras 15-24. Having regard to that history, the Tribunal is satisfied that the Respondent's conduct met the threshold test for unreasonableness in *Willow Court*. During the earlier course of the proceedings, the Respondent produced particulars of relevant costs, supported by audited accounts. No notice was given to the Tribunal or the Applicants that a different case would be advanced at the hearing. Bundles were prepared, counsel was instructed (on both sides), and the Tribunal pre-read the papers on the basis of the erroneous case. Irrespective of whether the change in the Respondent's case ought to have been reflected in statements of case at an even earlier stage, the new argument differed very substantially from the case at the outset of the hearing. The change in the Respondent's case went far beyond the kind of "sensible concession" referred to in *Willow Court* at paragraph 35. It is also a material consideration that the Respondent was legally represented in the run up to the hearing. The Respondent was in a position to provide details of its proper case at an earlier stage, and did not do so.

11. The Respondent's arguments on this issue appear at paragraph 11 of its costs submissions:

(a) It is said the spreadsheet was a document produced as part of the Respondent's preparation for the hearing, "to assist it in understanding its own position", and that the spreadsheet was therefore not a document which the Respondent was obliged to disclose. The Tribunal rejects this explanation. The spreadsheet was the only statement of the relevant costs which the Respondent said it had actually incurred during the service charge years which were under consideration. The substance of that evidence ought to have been provided at an earlier stage.

(b) It is also suggested the failure to produce the document falls short of the "common law definitions" of unreasonable behaviour/conduct. The Tribunal rejects that point as well. *Willow Court* gives guidance on the stage 1 test to be applied. The Respondent was the only party with access to the underlying evidence of the relevant costs incurred. It chose not to provide that

material until the hearing had actually started. Despite a substantial bundle of documents, the crucial information was omitted. This can only be described as unreasonable behaviour within the *Willow Court* test.

12. In short, the first stage test is met in relation to the non-production of the spreadsheet of relevant costs until lunchtime on the day of the hearing.

13. As to the second stage, the Tribunal has considered the exercise of its discretion. The nature of the unreasonable conduct was a failure to reveal a key part of the Respondent's case, so that the nature of the argument on the key issues in dispute changed part way through the hearing. The seriousness of the conduct was a fairly dramatic change in the case. It was a serious default, in that no explanation (or no satisfactory explanation) was given, and the change in case went to the very heart of the issues which were before the tribunal. The behaviour caused serious prejudice to the First Applicant, whose counsel had to meet a change in the case at short notice. There is no doubt that this a serous default. However, the Tribunal also has to consider the effect of the unreasonable behaviour. In this instance, both sides were represented at the hearing by experienced counsel. Changes in case, even significant ones at a late stage, are something which is a common feature of service charge litigation. In this instance, counsel was given an opportunity to consider the spreadsheet and did not oppose it being admitted in evidence and there was no suggestion that the First Applicant was prejudiced. Indeed, counsel was able to make detailed and able submissions about the new spreadsheet evidence at short notice. The effect of the Respondent's behaviour, no matter how unreasonable, did not prevent the Tribunal from dealing with the application fairly and justly, in accordance with Rule 3 of the Tribunal Rules. On the other hand, the effect of the unreasonable behaviour did waste the time of all the parties and the Tribunal in preparing for a case which focussed on the wrong issues. Overall, the nature and seriousness of the default suggests the Tribunal ought to exercise its discretion in favour of making an order. The Tribunal was, with the assistance of counsel, able to mitigate any unfairness that might have resulted from the default, but at a cost to all the parties. Overall, the Tribunal considers that the nature, seriousness and effect of the Respondent's behaviour support the making of a Rule 13(1)(b) order.

14. Before turning to the third stage, the Respondent has quite properly drawn attention to paragraph 43 of *Willow Court*, where the Upper Tribunal 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"*. However, in this instance, the change in the Respondent's case, and the nature and timing of that change, were exceptional.

15. As to the third stage in *Willow Court*, what order should be made? The First Applicant seeks the entire legal costs he has incurred in connection with the Application. A costs schedule was produced, which suggested the First Applicant incurred legal costs of £12,630 (inclusive of counsel's fees for the hearing of £3,000 + VAT). The First Applicant argued that the whole of these fees should be paid by the Respondent, with an order for reimbursement of the hearing fee of £300. The Respondent argues that the First Applicant would in any event have incurred costs, including those of counsel, since the issues covered by the spreadsheet were discrete issues. It is said the First Applicant would have still required representation at the hearing.

16. In *Willow Court*, the Upper Tribunal dealt with causation as part of the third stage test at paragraphs 38-42. It stressed that a Rule 13(1)(b) costs order was not penal in nature. However, it found that it was not necessary to establish a "casual nexus" before the Rule 13(1)(b) power could be invoked and cited the judgment of Mummery LJ in *McPherson v BNP Paribas* [2004] EWCA Civ 569:

> *"In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred."*

And:

> *"It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct."*

17. The Tribunal accepts it is difficult to see any direct causation between the costs incurred, and the late production of the spreadsheet. Most of the costs set out in the Cost Schedule relate to matters before the hearing, and in connection with the mediation, preparation for the hearing etc. Moreover, it has not been suggested the First Applicant would not otherwise have been represented at the hearing itself. Indeed, counsel pursued extensive arguments against the relevant costs claimed, notwithstanding the change in the Respondent's case. It seems at least possible that these arguments would have been raised had the spreadsheet been produced at an earlier stage. Nevertheless, there has been a significant waste of costs in this matter, not least in the preparation of extensive hearing bundles (which focussed on the wrong issues), and in the wasted preparation by counsel and the Tribunal for the hearing itself.

18. The clear guidance given by the Upper Tribunal is that Rule 13(1)(b) costs, whilst not penal, need not be confined to the costs attributable to the unreasonable conduct. In the Tribunal's view, the seriousness, nature and effect of the default in this matter would be reflected in an order under Rule 13(1)(b) for the Respondent to pay 50% of the costs of counsel's attendance at the hearing, 50% of the solicitors' costs of the preparation of the hearing bundle, and 100% of the costs application. We do not exercise our discretion to order any other costs to be paid under Rule 13(1)(b), since those costs would have been incurred in any event, and/or they have no clear link with the default concerned.

19. Turning to the particular figures in the Costs Schedule:
    (a) Counsel's brief fee is given as £3,000 + VAT. We consider this was not unreasonably incurred for specialist landlord and tenant counsel, especially where the Respondent engaged leading counsel. 50% of this is £1,500 + VAT = £1,800.
    (b) Solicitor's preparation of trial bundle is given as 2 hours by Grade A fee earner @£250/hr + VAT. The tribunal considers the rate and time to be reasonably incurred. 50% of this is £250 + VAT = £300.
    (c) Solicitor's preparation of costs application trial bundle 2 hours by Grade A fee earner @£250/hr + VAT. The Tribunal considers the rate and time to be reasonably incurred. This is therefore £500 + VAT = £600.
    (d) The total Rule 13(1)(b) costs order is therefore £2,250 + VAT = £2,700.

20. The First Applicant also claims reimbursement of hearing fees under Rule 13(2). The Tribunal has a wider discretion in respect of reimbursement of the whole or part of fees under Rule 13(2). For largely the same reasons set out above, the Tribunal orders reimbursement of 50% of the hearing fee of £300. The total Rule 13(2) costs order is therefore £150.

Conclusions

21. The Respondent shall pay the First Applicant's costs of £2,250 + VAT (£2,700) under Rule 13(1)(b).

22. The Respondent shall reimburse £150 of fees paid by the First Applicant under Rule 13(2).

Judge Mark Loveday
28 February 2018

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX I: MATERIAL LEASE TERMS

1(2) The following expressions have where the context admits the following meanings [by reference to the Particulars on the first page of the Lease] :-

- Estate — Meridian Court 47 Buckland Road, Maidstone ...
- Building — MERIDIAN COURT
- Premises — 12 [or 11] Meridian Court 47 Buckland Road Maidstone ...
- Specified Proportion of Service Provision: — One Twelfth

5. THE Landlord HEREBY COVENANTS with the Leaseholder as follows:-
...
(2) That the Landlord will at all times ... keep the Building insured against loss or damage by fire and such other risks as the landlord may from time to time reasonably determine or the Leaseholder or the Leaseholder's Mortgages may reasonably require ...
(3) That ... the Landlord shall maintain repair and redecorate and renew:
(a) the roof foundations and structure of the Building and all external and load-bearing walls the windows and doors on the outside of the flats within the Building (save the glass in any such doors and windows and the interior surface of walls) and all parts of the Building which are
not the responsibility of the Leaseholder under this Lease or of any other Leaseholder under a similar Lease of other premises in the Estate PROVIDED ALWAYS the Landlord shall redecorate as necessary the outside doors of the Premises and the Landlord will make good any defect affecting the said structure
(b) the pipes sewers drains wires cisterns and tanks and other gas electrical drainage ventilation and water apparatus and machinery in under and upon the Building (except such as belong to the British Telecom or any public utility supply authority)
(c) the Common Parts and boundary walls and fences of the Estate
(4) ... so far as practicable the Landlord will:-
(a) keep the Common Parts of the Building adequately cleaned and lighted
(b) tend keep clean and tidy the Common Parts of the Estate
(c) keep the gardens and grounds of the Estate cultivated and in good order

7(2) The Leaseholder HEREBY COVENANTS with the Landlord to pay the Service Charge during the term by equal payments in advance at the times at, which and in the matter in which rent is payable under this Lease PROVIDED ALWAYS all sums paid to the Landlord in respect of that part of the Service provision as relates to the reserve referred to in the sub-clause 4(b) hereof shall be held by the Landlord in trust for the Leaseholder until applied towards the matters referred to in sub-clause 4(5) hereof ...

7(4) The Service Charge shall consist of a sum comprising
(a) the expenditure estimated by the Surveyor as likely to be incurred in the Account Year by the Landlord upon the matters specified in sub-clause
(5) of this Clause together with
(b) an appropriate amount as a reserve for or towards such of the matters specified in sub-clause (5) as are likely to give rise to expenditure after such Account Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the decoration of the exterior of the Building and Garages (the said amount to be computed in such manner as far as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year) but
(c) reduced by any unexpended reserve already made pursuant to paragraph (b) of this sub-clause in respect of any such expenditure as aforesaid
(5) The relevant expenditure of the Landlord in connection with the repair management maintenance and provision of services for the Estate and shall include (without prejudice to the generality of the foregoing):-
(a) the costs of and incidental to the performance of the Landlord's
covenants contained in Clauses 5(2) 5(3) and 5(4) ...
(b) the costs of an incidental to compliance by the Landlord with every notice regulation or order kof [sic] any competent local or other authority in respect of the Estate

(c) all fees charges and expenses of the Surveyor (of if the Surveyor is an employee of the Landlord a reasonable allowance for the Landlord) in connection with the management and maintenance of the Estate including the computation and collection of rent (if any) and includes the completion and collection of the Service Provision (but not including any fees charges or expenses in connection with the effecting of any letting or sale of any premises)
(d) all fees charges and expenses payable to any Solicitor Accountant Surveyor Valuer or Architect whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Estate including the computation and collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an Employee of the landlord then a reasonable allowance for such work
(e) Any rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial local or of any other description assessed charged imposed or payable on or in respect of the whole of the Building or on the whole or any part of the Estate

7(8) of the Lease provides as follows:
(8)(a) if in the reasonable opinion of the Surveyor it shall at any time become necessary or equitable to do so he may increase or decrease the Specified Proportion.
(b) the Specified Proportion increased or decreased in accordance with sub-clause 7(a) above shall be endorsed on this Lease and shall hereafter be substituted for the Specified Proportion set out in Clause 7(i)(c) of this Lease

APPENDIX II: LEGISLATION REFERRED TO IN DECISION

LANDLORD AND TENANT ACT 1985

18 Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a [dwelling] as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

...

19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

20C.— Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.