



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

**Case Reference** : **LON/00AG/LSC/2020/0035  
P: PAPERREMOTE**

**Property** : **Garden Flat, 25a Nassington Road,  
London NW3 2TX**

**Applicant** : **Lucy Scott-Moncrieff**

**Representative** : **Scott-Moncrieff & Associates  
Limited**

**Respondent** : **Christine Guignabaudet**

**Representative** : **Bishop & Sewell LLP Solicitors**

**Type of Application** : **Section 20C Landlord and Tenant  
Act 1985  
Rule 13(1)(b) of the Tribunal  
Procedure (First-tier Tribunal)  
(Property Chamber) Rules 2013**

**Tribunal Member** : **Judge Donegan**

**Date of Paper  
Determination** : **15 September 2020**

**Date of Decision** : **22 September 2020**

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**DECISION**

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**This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was P: PAPERREMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined on paper. The documents that I was referred to are in an electronic determination bundle, the contents of which I have noted.**

## **Decision of the Tribunal**

- (a) The Tribunal makes no order on the application made under section 20C(1) of the Landlord and Tenant Act 1985 ('the 1985 Act').**
- (b) The application for a costs order under rule 13(1)(b) (ii) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules') is refused.**

## **The background and procedural history**

1. The respondent is the freeholder of 25 Nassington Road in Hampstead ('the Block'), which contains four flats. She is also the long leaseholder of two of the upper flats. The applicant is the long leaseholder of the Garden Flat ('Flat A').
2. The applicant purchased Flat A in or about 1998 and there has been a long-running dispute over her service charges. On 24 December 2019, the respondent's solicitors, Bishop & Sewell LLP ('BSL') sent a letter of claim to the applicant's solicitors, Scott-Moncrieff & Associates Limited ('SCAL'). This referred to previous correspondence in June 2019 and demanded service charges of £12,155.80 plus interest. The letter also threatened County Court proceedings unless payment was made within 14 days.
3. Following the Christmas break, the parties corresponded regarding the service charges. The applicant then submitted an application to the Tribunal dated 20 January 2020, pursuant to s.27A of the 1985 Act. She sought a determination of service charges for the years 2008-2025 and orders under s.20C of the 1985 Act and paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'). At panel 9 of the application form, she named Elizabeth West and Olivier Guignabaudet as other persons to be included in the s.20C application. The Tribunal assumes that Ms West is the leaseholder of the fourth flat at the Block and Mr Guignabaudet is related to the respondent.
4. Directions were issued by Judge Dutton at a case management hearing on 20 February 2020, attended by counsel for both parties. It was agreed that service charges would be determined for the period 2008 to 2020 and the claim for later years was discontinued. The parties filed statements of case in accordance with the directions and the case was listed for a two-day hearing on 9 and 10 July 2020.
5. On 30 May 2020 the applicant filed notice of withdrawal pursuant to r.22 of the 2013 Rules. She withdrew her case, save for the s.20C

application and requested directions on the latter. Judge Vance consented to the withdrawal and gave directions on 03 June 2020.

6. BSL objected to the withdrawal and sought reinstatement in letters to the Tribunal dated 03 and 09 June, asserting that the withdrawal deprived the respondent of a determination of the 2008-20 service charges. They also sought a costs order under r.13 of the 2013 Rules. Judge Vance refused to reinstate the s.27A application and issued further directions on 11 June 2020. These included provision for a paper determination, which neither party has objected to.
7. The respondent filed an electronic determination bundle (in three parts and totalling 441 pages) in accordance with the 11 June directions and the paper determination took place on 15 September 2020.

### **The law**

8. The only matters to be decided by the Tribunal are the applications under s.20C of the 1985 Act and r.13 of the 2013 Rules. The s.27A and paragraph 5A applications have been withdrawn.
9. The applicant contends there is no contractual entitlement to recover the costs of the s27A application under her lease, in which case s.20C has no application. Alternatively, it would be just and equitable to make a s.20C order in the circumstances of the case. The Tribunal has a wide and unfettered discretion; ***The Tenants of Langford Court v Doren Ltd LRX/37/2000*** and should consider “*what will be the financial and practical circumstances for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make*”: ***Conway v Jam Factory Ltd [2013] UKUT 592 (LC)***.
10. The respondent seeks a costs order under r.13(1)(b) of the 2013 Rules, based on unreasonable conduct. She does not seek an order for wasted costs under rule 13(1)(a).
11. Rule 13(1)(b) is engaged where a party has acted “...*unreasonably in bringing, defending or conducting proceedings...*”. The Tribunal’s power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007 (‘the 2007 Act’), which provides:  
“(1) *The costs of and incidental to –*  
*(a) all proceedings in the First-tier Tribunal, and*  
*(b) all proceedings in the Upper Tribunal,*  
*shall be in the discretion of the Tribunal in which the proceedings take place.”*

It follows that any r. 13(1)(b) order must be limited to the costs of and incidental to the proceedings before this Tribunal, namely the

applications under s.27A and s.20C of the 1985 Act and paragraph 5A of schedule 11 to the 2002 Act.

12. 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.
13. At paragraph 20, the UT referred to the leading authority on wasted costs, ***Ridehalgh v Horsefield [1994] Ch***, where Sir Thomas Bingham MR considered the expressions "*improper, unreasonable or negligent*" and said:

*"Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalties. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."*

*"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is 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 judgment, but is not unreasonable."*

14. 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* 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?”

15. At paragraph 26, the UT went on to say:

*“We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation and to discourage obstruction, pettiness and gamesmanship.”*
16. The withdrawal of claims was addressed at paragraphs 35-37 with the UT saying *“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 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”* (paragraph 35).
17. At paragraph 43 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.”*
18. The relevant legal provisions are set out in the appendix to this decision.

## **The lease**

19. The applicant's lease is dated 18 July 1982 and was granted by Gibson Properties Limited ("*the Lessor*") to Peter Ernest Razell ("*the Lessee*") for a term of 99 years from 31 July 1983. The Lessee's covenants are at clause 2 and include:

*"(10)(a) To pay to the Lessee from time to time a part computed as hereinafter mentioned of all expenditure or liability incurred by the Lessor in complying with the covenants on the part of the Lessor and in execution of his powers contained in in the sub-clauses (b) (c) (d) and (e) of Clause 3 of these presents within twenty-eight days of the demand therefore by the Lessor and each such part if not so paid shall forthwith be recoverable by action and shall carry interest at a rate equal to four per centum per annum above the base lending rate of National Westminster Bank Limited from time to time until payment and meanwhile the Lessees shall on account of such expenditure pay such reasonable sum as the Lessor may specify by equal half yearly payments on the dates hereinbefore provided for payment of rent*

...

*(c) The part of such expenditure or liability as aforesaid shall be one Fourth of the cost or estimated cost of such expenditure or liability"*

20. The Lessor's covenants are at clause 3. Sub-clauses (b), (c), (d) and (e) deal with maintenance, repairs and renewals, the cleaning, lighting and decoration of the internal common-ways, the decoration of external parts and the insurance of the Block, respectively. Sub-clause (g) obliges the Lessor:

*"To cause to be contained in every lease of a flat in the said building hereafter granted similar terms and regulations to be observed by the Lessee thereof as are herein contained and if so required by the Lessee to enforce the covenants and conditions similar to those contained herein on the part of the Lessee entered into or to be entered into by the Lessees of other flats in the said building so far as they affect the demised premises the Lessee indemnifying the Lessor against all the costs and expenses of such enforcement and giving reasonable security for such costs and expenses"*

## **The section 20C application**

21. The grounds of this application were briefly set out in the applicant's statement of case dated 23 July 2020. Her starting point is that sub-clauses 3(b), (c), (d) and (e) of the lease make no reference to the recovery of legal costs and the respondent is not entitled to recover the

costs of the s.27A application as a service charge. If this is the case then s20C has no application.

22. Alternatively, a s.20C order should be made as the s.27A application “*was successful in identifying, ventilating and narrowing the issues between the parties*”. Further, it would be neither just nor equitable for the other leaseholders (apart from the respondent) to be liable for 25% of the respondent’s costs.
23. The respondent’s case was detailed in a reply dated 13 August 2020. The ability to recover legal costs is a question of construction. The lease clause must be clear and unambiguous but need not specifically mention lawyers, proceedings or legal costs. The respondent relies on sub-clauses 2(10)(a) and 3(g) and referred to various authorities; ***Arnold v Britton [2015] UKSC, Geyfords v O’Sullivan and Others [2015] UKUT 0683 (LC), Assethold Ltd v Watts [2014] UKUT 0537 (LC)*** and ***Bretby Hall Management Company Ltd v Pratt [2017] UKUT 70 (LC)***.
24. The respondent contends that her legal costs are a “*liability incurred in complying with*” sub-clause 3(g). She (as leaseholder) and the other leaseholder require her (as “*Lessor*”) to enforce the covenants and conditions in the applicant’s lease. “*Liability*” is broader than the language used in ***Geyfords*** and ***Assethold*** and is clear, ambiguous and all encompassing. It “*ought to include the costs of recovering service charges from a lessee who does not pay.*”
25. The respondent submits that it would not be just or equitable for the Tribunal to make a s20C order, given the s27A application was withdrawn. The application did not benefit the other leaseholders at the Block, as there was no determination of the disputed service charges and the other leaseholder supports her position that the charges should be paid in full.
26. The respondent also rejects the suggestion that the s.27A application identified, ventilated or narrowed the issues, as there has been no determination of these issues and no agreement between the parties.
27. The applicant addressed these points in a reply dated 28 August 2020. She contends that the word “*liability*” in 2(10)(a) does not amount to a clear and unambiguous clause that legal costs may be recovered through the service charge account and the s.27A application does not come within 3(g). She also referred to several additional authorities; ***Sinclair Gardens Investments (Kensington) Ltd v Avon Estates (London) Ltd [2016] UKUT (LC), Francis v Phillips [2014] EWCA Civ 1395, Cannon v 38 Lambs Conduit LLP [2016] UKUT 372 (LC)*** and ***United Pension Trustees v Slavia [2015] UKUT 103 (LC)***.

## The Tribunal's decision

- 28. The Tribunal makes no order on the s.20C application, as the respondent's costs of the s.27A application are not contractually recoverable under the lease.**

## Reasons for the Tribunal's decision

29. Clause 2(10)(a) covers “*all expenditure or liability incurred in complying with the covenants on the part of the Lessor...*”. One of those covenants is the mutual enforceability covenant (‘MEC’) at 3(g), which is conditional upon the Lessee paying the Lessor’s costs. It follows that costs incurred in complying with the MEC are recoverable, as “*expenditure or liability*”, to the extent they cannot be recovered from the leaseholder/s who required enforcement.
30. The Tribunal finds that legal costs incurred in complying with the MEC come within 2(10)(a). However, the respondent was not “*complying with*”3(g) in defending the s.27A application.
31. Clause 3(g) contains two obligations. Firstly, all leases shall contain similar terms and regulations. Secondly, there is the MEC; the Lessee can require the Lessor to enforce covenants and conditions in the other leases that affect the demised premises, subject to a costs indemnity and giving reasonable security for those costs.
32. The respondent says she has been required to take enforcement action by the other leaseholders at the Block and her costs are recoverable under 3(g). There are several flaws in this argument, many of which were highlighted in the applicant’s reply. These include:
- (a) the other leases have not been disclosed and there is no evidence they contain MECs in similar terms to those at 3(g);
  - (b) there is no documentary evidence that Ms West supported the service charge claim or required the respondent to take enforcement action against the applicant;
  - (c) if the other leaseholders required enforcement then they should have provided indemnities and reasonable security for the respondent’s costs, so she should not be out of pocket;
  - (d) the s.27A application was made by the applicant, rather the respondent;
  - (e) the respondent was not taking positive action to enforce covenants and conditions in the lease, rather she was resisting proceedings initiated by the applicant; and
  - (f) the respondent has not explained how the service charge covenant in the applicant’s lease affects the other flats at the Block.



33. The respondent's costs of the s.27A application are not contractually recoverable under 3(g) and this means s.20C has no application. It is unnecessary for the Tribunal to decide whether it is just and equitable to make a s.20C order and it declines to do so.

### **The rule 13 application**

34. The grounds of this application are to be found in the respondent's statement of case dated 03 July 2020 and her reply of 13 August 2020. By way of background, she points out that applicant is a solicitor and was represented throughout. The applicant should understand the litigation process and the need to engage with pre-action correspondence.

35. As to conduct, the respondent made the following specific complaints:

(a) Relevant background and context

The applicant's general behaviour is unreasonable. She is a lawyer and was able to pursue the case via the firm in which she is a director, at limited or no cost. There has been previous litigation between the parties, which has left the respondent out of pocket and the applicant's history of late payment goes back nearly 20 years. These historic issues are relevant, as they give context to the dispute.

(b) Failure to engage pre-action

The applicant failed to admit or dispute any part of the service charge claim or give reasons for her non-payment, despite pre-action correspondence inviting her to discuss and narrow the issues. Rather, she unreasonably and prematurely issued the s.27A application. Further, she had rebuffed earlier attempts to obtain payment in 2015.

(c) False statements in the applicants' statement of case

This relates to her statement of case served in the substantive s.27A application, dated 18 March 2020. At paragraph 5.2 the applicant referred to Mr Guignabaudet as the "tenant" of the top flat and at paragraph 12 she referred to him as the "lessee" of this flat. The applicant knew the respondent was the leaseholder of this flat, as evidenced by previous communications and could not reasonably believe these statements to be true.

(d) The s.27A application did not significantly narrow the issues or resolve the dispute

In her reply, made in the substantive case, the applicant conceded a duplicated set-off for the cost of constructing of a porch for the Flat and admitted two insurance contributions. The total sum admitted was £2,710.74, which is considerably less than sum claimed by the respondent (£12,503.17 plus interest). The balance remains in dispute and has not been paid. Further, her statement

of case did not address some of the withheld service charges and the porch set-off is not a service charge issue and is outside the Tribunal's jurisdiction.

The applicant gave no reason for the withdrawal of the application and most of the issues remain in dispute, as they were not specifically admitted. The withdrawal deprives the respondent of a determination for which she had prepared. New proceedings will duplicate costs and waste Tribunal time. The parties cannot simply rely on the statements of case served previously, as the disputed balance will need to be proved.

(e) The applicant already had answers to issues raised in the s.27A application

Numerous issues had been covered in extensive correspondence between the parties, going back a number of years. One example being the porch set-off (and an additional set-off for damp treatment in Flat A), which was addressed in an email exchange in October 2013. It was unnecessary to issue proceedings to narrow the issues, as the applicant already had answers to her queries.

(f) Set-off claims

The applicant alleged breach of covenants on the part of the respondent and claimed set-offs that are outside the Tribunal's general jurisdiction.

(g) The notice of withdrawal was served shortly before the hearing listed for 09 and 10 July 2020

The applicant withdrew the s.27A application a few weeks after serving her reply. If the decision to withdraw was based on the respondent's statement of case then a reply was unnecessary.

36. The respondent contends that this conduct was unreasonable and did not permit of a reasonable explanation. The applicant was represented throughout and should be judged by the standards of a reasonable person with her knowledge and access to advice. A costs order should be made, given the seriousness and effect of her conduct. The proceedings have been a waste of time, as they have not advanced the dispute. The respondent will have to issue separate proceedings for the disputed balance of the service charges, which could have been resolved at the hearing on 09 and 10 July. The appropriate rule 13 order is that the applicant should pay the respondent's costs of the "*wasted proceedings*".

37. Costs schedules, invoices and fee notes were appended to the respondent's statement of case. Initially, she sought a total sum of £34,665 including VAT and counsel's fees. This figure was reduced to £31,185.60 in her reply and covers the period from 15 October 2018 to date. The original figure incorrectly included two invoices that do not relate to the s.27A application. The respondent contends that her costs are both reasonable and proportionate given the applicant's conduct

and the amount in dispute. The applicant pays 25% of the total service charge expenditure at the Block so the relevant figure, when considering proportionality is close to £50,000 (4 x £12,155.80).

38. The parties arguments on quantum are briefly addressed at paragraphs 44 and 45, below.
39. The applicants' case was set out in her reply. The starting point in the Tribunal is that each party bears their own costs. R.13 orders should be the exception, rather than the rule and the onus is on the respondent to demonstrate unreasonable conduct. The test is an objective one and should be the same for represented and unrepresented parties. The applicant is a mental health and human rights solicitor, rather than a litigator or property specialist and her legal knowledge and experience are not relevant to this application. Further, the allegations of professional misconduct are untrue.
40. The applicant submits that withdrawals and concessions should be encouraged, relying on paragraph 35 of **Willow Court**. She also referred to paragraph 142 where the UT said, of a withdrawn case:

*“It therefore seems to us that the FTT’s conclusion that it was unreasonable for Mr Stone not to withdraw sooner than he did could only be justified if the withdrawal of his remaining claims is treated as an acknowledgement that they should never have been brought. But, as the Court of Appeal made clear in McPherson v BNP Paribas, in tribunal proceedings there should be no imputation that a claim which is discontinued was doomed to fail or ought never to have been commenced. Such an imputation is only required where it is necessary to identify a successful party so that liability for the costs it has incurred may be shifted on to the unsuccessful party. Where, as in tribunal proceedings, there is no general rule that the winner will be entitled to an order for payment of their costs by the loser, the withdrawal of a claim should not be stigmatised as an admission of defeat or as unreasonable. To allow such a stigma to be attached to withdrawal creates an unhelpful obstacle to the making of sensible concessions.”*
41. The applicant also points out that most of the respondent’s complaints relate to historic issues that pre-date the s.27A application. These are denied and are not directly relevant, as r.13 is concerned with unreasonable behaviour in “*bringing, defending or conducting proceedings*”.
42. The applicant’s responses to the specific complaints, as set out at paragraph 35 above, can be summarised as follows:
  - (a) The complaints of unreasonable pre-action conduct are not relevant.

- (b) The s.27A application was prompted by the letter of claim, sent on Christmas Eve and giving 14 days for payment.
  - (c) The applicant reasonably believed the statements at paragraph 5.2 and 12 of her statement of case. In any event, they were irrelevant to the issues in the s.27A application.
  - (d) The application was not pointless, as it significantly narrowed the issues and the applicant now understands the issues and the respondent's position. This led to her agreeing and paying part of the claim (£2,710.74).
  - (e) If the respondent makes her own s.27A application then work done on the withdrawn case can be utilised for that application, as stated by Judge Vance in his directions dated 11 June 2020.
  - (f) The applicant did not already have answers to the issues raised in the application.
  - (g) It is not admitted that the set-off argument was outside the Tribunal's general jurisdiction and this complaint does not meet the high threshold for unreasonable conduct.
  - (h) The withdrawal was not unreasonably late. The applicant was only able to reassess the s.27A application once the statements of case crystallised the issues.
43. The applicant submits there has been no unreasonable behaviour. If the Tribunal finds there has, it should not exercise its discretion and make a r.13 order. The s.27A application was prompted by the letter of claim and reasonably made. It enable the issues to be identified, ventilated and narrowed and the decision to withdraw was sensible and pragmatic,
44. As to quantum, the costs claimed by the respondent are neither proportionate not reasonable. The applicant also made the following specific challenges:
- the hourly rates mostly exceed the relevant guideline rates;
  - the use of two Grade A fee earners cannot be justified;
  - the matter could have been dealt with by less experienced fee earners (with supervision);
  - emails/letters in and correspondence with the Tribunal are not chargeable inter-partes;
  - the costs appear to relate to general work for the Block and it is difficult to identify costs relating to the s.27A application;
  - counsel's fees for work before 20 January 2020 cannot relate to the s.27A application;
  - time spent on research should be disallowed; and

- costs should only be allowed up to the date of withdrawal of the s.27A application.
45. The respondent addressed these challenges in her reply, submitting;
- the guideline and are not helpful in determining current rates, as they are 10 years old; ***Ohphen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2504***;
  - there has been no duplication of fee-earner time and a grade A fee earner was appropriate, given the nature and history of the dispute;
  - the applicant was represented by a grade A fee earner, Mr Mark Tunstill (admitted 1991);
  - non-routine emails/letters in are recoverable inter-partes, as is correspondence with the Tribunal;
  - work relating to non-service charge issues has been separated out;
  - counsel advised on pre-action protocol correspondence and this was pertinent to the s.27A application;
  - the research related to novel points and should be allowed; and
  - costs should be allowed for the entire period, as the applicant continued with her s.20C application and the costs arguments are incidental to her s.27A application.

### **The Tribunal's decision**

46. The application for a r.13(1)(b) costs order is refused.

### **Reasons for the tribunal's decision**

47. 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.”
48. The Tribunal first considered whether the applicant had acted unreasonably in bringing or conducting the s.27A application. When doing so, it focused on the period 20 January to 30 May 2020, being the duration of that application. Pre-action conduct is largely irrelevant save that it may establish her reasons for pursuing the application.
49. There was insufficient evidence to establish that the applicant's pre-action conduct was unreasonable or relevant. There has been a long-running service charge dispute and previous litigation but this does not establish an improper motive for the s.27a application. The applicant

did not act unreasonably in making the application, given the terms of BSL's letter before action, threatening Court proceedings. This was sent on 24 December yet demanded payment of £12,155.80 plus interest, within 14 days. This was unreasonably short, given the 6-month hiatus in correspondence (since June 2019) and the impending Christmas break. The respondent complains of a failure to engage in pre-action correspondence yet has not disclosed the correspondence from 2015, June 2019 or January 2020. Based on the letter before action and the threat of Court proceedings, it was reasonable for the applicant to take the initiative and seek a Tribunal determination.

50. The factual errors, regarding ownership of the top flat, were consistent with the original section 20C application which referred to Ms West and Mr Guignabaudet. The applicant says she reasonably believed her statement of case to be true, which the Tribunal accepts. These errors did not amount to unreasonable conduct.
51. The s.27A application did advance the case and narrow the issues in dispute, as both parties exchanged statements of case and set out their respective arguments. The application made two concessions (totalling £2,710.74) and the respondent offered a compromise on the entry phone handsets. The other items have not been agreed but the statements of case have crystallised and narrowed the issues and may assist the parties in resolving this dispute. If not, they can be utilised on a future service charge application.
52. There is insufficient evidence to determine whether the applicant had answers to all issues, pre-action. In her statement of case, the respondent said "*There has been extensive correspondence and engagement on numerous matters over the years, the sum total of which would not be appropriate to include as part of these submissions*". The Tribunal cannot assess whether the issues had been fully ventilated, without seeing all relevant correspondence. It notes that the applicant's statement of case served in the s.27A application ran to 10 pages and the respondent's reply ran to 19 pages, which suggests there were many unresolved issues.
53. The s.27A application was withdrawn before determination. The Tribunal cannot decide the issues arising in that application, including the general jurisdiction point, or assess their merits. The respondent has indicated that she will make her own application. The Tribunal in the second case will have to decide these issues, having heard full legal argument.
54. The notice of withdrawal was filed on 30 May 2020. Arguably, this was late as the respondent's statement of case had been served on 16 April 2020. This set out the respondent's arguments on the disputed charges and crystallised most of the issues. The applicant should have been able to obtain legal advice and assess these issues within a few weeks,

yet did not withdraw her case until the end of May (following service of her reply). However, it is clear from the respondent's costs schedules that the parties corresponded during May. The only relevant document disclosed in the bundle was an email from the applicant's solicitor dated 16 May. This invited the respondent to agree to the withdrawal, with no costs orders and no costs added to the service charge account. The Tribunal does not know what followed but the notice of withdrawal was unilateral, which suggests this offer was rejected.

55. Following the guidance at paragraphs 35 and 142 of ***Willow Court***, the Tribunal finds that the applicant did not conduct the proceedings unreasonably in withdrawing the claim on 30 May. The Tribunal has already found that she acted reasonably in making the s.27A application and that the proceedings advanced the case and narrowed the issues. This was not a hopeless case that should never have been brought. The proceedings were withdrawn after the issues had been crystallised and approximately six weeks before they were due to be heard, which avoided the substantial costs of a two-day hearing. The parties corresponded during May and the applicant offered to withdraw, on a no costs basis, on 16 May. In the light of this decision, that offer was eminently reasonable. In these circumstances, the unilateral withdrawal of the application and the timing of the withdrawal were not unreasonable.
56. The respondent has not established any unreasonable conduct of the part of the applicant. For the sake of completeness, the Tribunal also finds that the applicant acted reasonably in pursuing her successful s.20C application. It follows that the respondent has not satisfied the first stage of the ***Willow Court*** guidance and it is unnecessary for the Tribunal to go on and consider the second and third stages.

### **The next steps**

57. This decision disposes of the two costs applications. However, there is the prospect of another s.27A application. The Tribunal encourages the parties to try and agree the disputed service charges, possibly via mediation, before embarking on further, costly litigation.

**Name:** Tribunal Judge Donegan      **Date:** 22 September 2020

## **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).



## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **Section 20C**

- (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 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 that tribunal;
  - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property 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.

#### **Section 27A**

- (1) An application may be made to the appropriate 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 the appropriate 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.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## **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) 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 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.