



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

Case reference : **LON/00AM/LSC/2019/0473**
LON/00AM/LSC/2020/0290

Property : **137 Fawcett Estate Clapton Common**
London E5 9DQ

Applicant : **IMYH Ltd**

Representative : **Mr Mendel Rozner**

Respondent : **London Borough of Hackney**

Representative : **Mr John Wenham LLM, Litigation**
Paralegal

Type of application : **Rule 13 application for costs**

Tribunal members : **Mr C Norman FRICS, Valuer Chairman**
Mr S Johnson MRICS

Date of Decision : **10 April 2022**

DECISION

Decision of the Tribunal

(1) The application for a costs order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules') is refused.

Reasons

The background

1. This application arises from two connected service charge cases heard together over three days with a tribunal decision promulgated on 20 August 2021. In that decision the applicant was wholly unsuccessful. An application for permission to appeal on three grounds was made. The tribunal determined that two of the grounds should be refused and that the third amounted to an application for costs under rule 13. Directions were therefore issued in connection with that application.
2. The directions specifically directed the applicant to set out its case having regard to the three stage test in *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT (LC).

The applicant's case

3. The applicant's case may be summarised as follows. The respondent had acted unreasonably in bringing defending and conducting the proceedings because it repeatedly gave wrong information by advising that no section 20 works were upcoming or outstanding. It did not clearly follow legal process by giving the full 30 day period for the section 20 [consultation period]. It did not make the claim for dispensation prior to the tribunal proceedings. The respondent repeatedly delayed hearings and missed deadlines, causing higher fees for the leaseholder.
4. An initial respondent's reply was two days late; the first witness statement was five days late for which an extension was granted by the tribunal. A final hearing was set for 7 September 2020 but on the day of the hearing the respondent requested more time to prepare, and the hearing was adjourned to January 2021.
5. On 17 November 2020 the CMC for the second case took place and the respondent argued that as they had been hacked, they would not be able to meet a hearing date, but the judge set a date for 28 January 2021. The bundle for the January hearing was served late. Further documents were required to be sent by 19 March 2021, following the hearing of 28 January 2021 but these were sent late. The same applied

to additional witness statements. The tribunal made some unfavourable remarks about the respondent's evidence.

6. Costs of £7950 were claimed together with a further fee of £385 respect of the witness and director of the applicant. This was based on charges of Mr Mendel Rozner at £550 per hearing including three CMC's together with preparation time of five days' for each of those hearings also at £550 each. A claim was also made for disbursements of renting a desk and printing of £2450.

The respondent's case

7. The respondents case may be summarised as follows. The applicant had failed to comply with the rule 13 directions and failed to deal with the three stage test in *Willow Court Management Company*. The respondents exhibited an email from the applicant to the respondent dated 24 February 2019 agreeing to an extension of time. With reference to a witness statement required by 12 August 2020 this was served in time as per exhibit 2. The hearing of 17 November 2020 was only a CMC and the final hearing date 28 January 2021. It was unusual for the respondent to be directed to produce the bundles and this was only done because of the complex, difficult to follow and paper heavy bundles previously prepared by the applicant. The respondent in taking on this obligation has assisted the tribunal.
8. The respondent accepts that it did not comply with the time provisions in further directions of 28 January 2021, but this was owing to the vast documentation this case ultimately required and the impact of the cyber-attack, which the landlord suffered in October 2020 (see below). The respondent does not accept that any such delays had any impact on the applicant.
9. The applicant itself failed to fully comply with the further directions of the tribunal requiring it to reissue the Scott schedule in relation to the non-major works for the years 2017/18 2018/19 and 2019/20, giving reasons. The result was confusing. The landlord invited the tenant to clarify these responses ahead of the resumed hearing, but this was not forthcoming.
10. In October 2020 the landlord suffered from serious cyber-attack, which was reported by the BBC. The UK national cyber security centre has taken over the investigation. Consequently the landlord had great difficulty in obtaining some of the documents as promptly as it would have liked.

The law

11. The applicant seeks a costs order under Rule 13(1)(b), based on the respondent's unreasonable conduct. It does not seek an order for wasted costs under Rule 13(1)(a).
12. 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, 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 Rule 13(1)(b) order must be limited to the costs of and incidental to the proceedings before this Tribunal, namely the two Section 27A Applications.

13. The directions on the Costs Application referred to the Upper Tribunal's decision *Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC)*, which outlined a three-stage test for deciding Rule 13 costs 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.
14. At paragraph 24 of *Willow Court* the UT said “*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 43, the UT emphasised that Rule 13(1)(b) applications “*...should not be regarded as routine...*” and “*...should not be allowed to become major disputes in their own right.*”

Reasons for the Tribunal's decision

16. 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.*”

17. The Tribunal first considered whether the respondents had acted unreasonably in defending or conducting the Section 27A Application. When doing so, it only considered the period from the date the application was received by the Tribunal until the decision was issued on 2 August 2021. The respondents' conduct outside this window not relevant, as the Tribunal is only concerned with the conduct of the proceedings.
18. Short delays in compliance with directions would not amount to unreasonable conduct and longer delays might permit a reasonable explanation, such as difficulties obtaining instructions or special circumstances.
19. In the Tribunal's judgment, the respondent was placed in a difficult position because of the effect of the cyber-attack. Although the respondent decided not to call a second expert, this was on account of the cost and was therefore not unreasonable conduct.
20. Therefore, the applicant has not established any unreasonable conduct of the proceedings, on the part of the respondent and has not satisfied the first stage of the *Willow Court* test.
21. Should the Tribunal be wrong about that, under the second stage it would have exercised its discretion against the making of an order because the applicant failed to fully comply with directions and the scale of the dispute and volume of documentation meant that the case was always likely to require three hearing days. It is unnecessary for the Tribunal to go on and consider the third stage.

Name: Mr Charles Norman Date: 10 April 2022
FRICS

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

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

Rule 13

Orders for costs, reimbursement of fees and interest on costs

- 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.

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