



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

Case reference : **BG/LON/00AZ/OLR/021/0578
P: PAPERREMOTE**

Property : **2A Leland Road, London SE12 8DU**

Applicant : **Mr Pijush Sen**

Representative : **Cook Taylor Woodhouse Solicitors**

Respondent : **GHL (Leegate) Limited**

Representative : **Howard Kennedy LLP**

Type of application : **Costs - rule 13(1)(b) of the Tribunal
Procedure (First-tier Tribunal)
(Property Chamber) Rules 2013**

Tribunal member : **Judge Donegan**

**Date of paper
determination** : **03 August 2022**

Date of decision : **04 August 2022**

DECISION

This has been a remote determination on the papers which has not been objected to by the parties. The form of remote determination 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 of 954 pages, the contents of which I have noted.

Decision of the tribunal

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

The background

1. The Costs Application arises from a lease extension claim for 2A Leland Road, London SE12 8DU ('the Flat') under the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'). The Flat forms part of the land and buildings on the south side of Eltham Road, London ('the Estate'). The applicant is the long leaseholder of the Flat. The respondent purchased the freehold of the Estate from St Modwen Developments Limited ('SMDL') on 31 March 2022. This purchase is yet to be registered and the freehold title is still registered in SMDL's name.
2. The applicant served a section 42 notice of claim on SMDL on 02 December 2020, seeking a new lease of the Flat and proposing a premium of £18,400. SMDL served a counter-notice on 25 January 2021, admitting the claim but seeking a higher premium of £28,000.
3. On 31 March 2021 SMDL wrote to the applicant stating they had sold the Estate to the respondent and that all further rent payments should be made to the respondent. The determination bundle includes a copy of the transfer deed and a ground rent demand for the Flat for the period 29 September to 24 December 2021, naming the respondent as the landlord.
4. The applicant's solicitors, Cooke Taylor Woodhouse ('CTW') wrote to SMDL's solicitors, Collins Benson Goodhill ('CBG') on 13 April 2021, asking for confirmation of the freehold sale. CBG responded on 15 April, stating they had not acted on the sale and were not instructed in on the lease extension by the purchaser. In a follow-up email dated 26 April they stated, "*We have no further instructions and we are therefore unable to assist with your further enquiry in this matter.*"
5. CTW wrote to the respondent direct on 21 April. The respondent's solicitors, Howard Kennedy LLP ('HKL') replied in an email dated 05 May 2021, in the following terms:

"Further to your attached letter dated 21 April 2021, we confirm we are instructed by the Freeholder of the above Property, GHL (Leegate) Limited.

Please may you therefore direct correspondence to us going forward."

CTW and HKL subsequently exchanged valuers' details, but the parties failed to agree terms and an application to determine these terms ('the

s48 Application’) was submitted to the tribunal on 01 July 2021. This was made by CTW and named GHJ (Leegate) Limited as the respondent.

6. The respondent’s purchase of the freehold is yet to be registered at HM Land Registry. At the date of the s48 Application, the registered freeholder was (and still is) SMDL. HKL wrote to CTW on 19 August 2021, stating that the application had “*been issued against the wrong entity, as you will note the registered landlord of the Property is not GHJ (Leegate) Limited.*” They also asked CTW to “*discontinue the application immediately.*”
7. HKL expanded on these grounds in a letter to the tribunal dated 18 October 2021, explaining their client only had an equitable interest in the freehold, pending registration and SMDL should have been named as the respondent. They suggested the s48 Application was void and should be withdrawn. CTW rejected these submissions in a letter to the tribunal dated 04 November 2021, enclosing copies of the correspondence and ground rent demand referred to at paragraphs 3-5, above.
8. The tribunal issued directions on 04 November and further directions on 09 November. The latter directed a paper determination of whether the s48 Application had been validly made. Both parties filed detailed statements of case on this preliminary issue, with the respondent inviting the tribunal to strike out the s48 Application. The applicant acknowledged that SMDL was the competent landlord in his statement of case and TCW made an application to substitute SMDL as the respondent, in a letter to the tribunal dated 02 December 2021. This application was opposed by the respondent in a reply dated 09 December.
9. The tribunal issued further directions on 15 December and the application to substitute SMDL was listed for a video hearing on 09 February 2022. CBG made detailed representations in a letter dated 19 January 2022, opposing this application, and supporting the proposed strike-out. They also suggested a stay of the s48 Application, pending registration of the freehold transfer, if the strike-out was refused.
10. On 07 February 2022 CTW filed an application to withdraw the s48 Application. This was opposed by HKL, but the tribunal consented to the withdrawal on 08 February and vacated the hearing on 09 February.
11. In a letter dated 22 February, HKL notified the tribunal the respondent wished to apply for a costs order under Rule 13. The Costs Application was made on 04 March 2022.
12. Directions were issued on the Costs Application on 03 May 2022. The case was allocated to the paper track, to be determined upon the basis of written representations. Neither party has objected to this allocation or

requested an oral hearing. The paper determination took place on 03 August 2022.

13. HKL filed a determination bundle in accordance with paragraphs 6 and 7 of the directions. This runs to 954 pages and includes the directions and statements of case from the s48 Application, as well as the directions and statements of case from the Costs Application. The tribunal considered all the documents in the bundle, when deciding the Costs Application.
14. The relevant legal provisions are set out in the Appendix to this decision.

The law

15. The respondent seeks a costs order under Rule 13(1)(b), based on the applicant's conduct of the s48 Application.
16. 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 s48 Application.

17. Not surprisingly, the Costs Application referred to the decision of the Upper Tribunal ("UT") 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.
18. At paragraph 20 of ***Willow Court***, 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.”

19. 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?”

20. 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.”

21. 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).
22. 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.”*

The Costs Application

23. The Costs Application comprises ten pages of grounds and a supporting bundle of authorities and documents, including a statement of costs. The respondent expanded on these grounds in a four-page statement of case dated 20 May 2022 and a further bundle, including an updated costs statement. They also rely on a three-page reply (to the applicant’s statement of case) dated 16 June 2022.
24. The grounds of the Costs Application are summarised below.
 - (a) The applicant was legally represented throughout the s48 Application, and their conduct must be judged in this context.
 - (b) The s48 Application should never have been brought against the respondent, as they were not the registered freehold freeholder or the ‘competent landlord’ for the purposes s40(4) of the 1993 Act. There was no reasonable explanation for the applicant’s failure to undertake a proper investigation, including downloading the freehold title, before making the application.
 - (c) The applicant did nothing to remedy this error, following receipt of the HKL letter of 19 August 2021. There was no reasonable explanation for this failure.
 - (d) The applicant still failed to address this error, following HKL’s letter of 18 October 2021 which identified the correct landlord. Rather, they continued to assert a hopeless case without reasonable explanation.

- (e) The applicant finally conceded that SMDL was the correct respondent on 02 December 2021 but tried to keep the s48 Application alive, rather than withdrawing it. There is no reasonable explanation for continuing with application. The application was only withdrawn at 4:50pm on 07 December, by which time the respondent has incurred the hearing costs.
 - (f) It was unreasonable for the applicant to submit a hopeless claim that was bound to fail and to continue with that claim when the certainty of failure was made clear.
25. The respondent submits that a costs order should be made, having regard to the Overriding Objective at Rule 3 and the applicant's conduct in bringing a hopeless claim and continuing with that claim, despite the flaws being pointed out, until 36 hours before the 09 February hearing. They seek total costs of £9,198, including counsel's fees and VAT, as detailed in their updated statement.
26. The applicant opposes the Costs Application and relies on a four-page statement of case dated 10 June 2022. The grounds of opposition are summarised below.
- (a) The s48 Application was made against the respondent, as they had acquired the freehold and notified the applicant they were the freeholder.
 - (b) The applicant felt he had no choice but to continue the application against the respondent, based on the correspondence from CBG (who were no longer instructed) and the registration gap.
 - (c) The freehold transfer completed on 31 March 2021 but registration was still pending, with no indication of a completion date, on 07 February 2022. The applicant reluctantly decided to withdraw the s48 Application and start again once the transfer was registered. It was clear from CBG's letter of 22 January 2022 that completion was unlikely, even if SMDL was substituted as the respondent. Further it was clear the respondent would not agree a stay of proceedings, pending registration.
 - (d) The applicant has suffered financially as he will have to wait 12 months before serving another s42 notice. The premium will inevitably be higher, as the lease will be shorter, and the respondent will benefit from this increase.
 - (e) The applicant feels he has been put under pressure to sell the Flat to the respondent, who has made repeated offers to buy.
 - (f) The Costs Application should be refused. Alternatively, the respondent's costs should be substantially reduced, based on duplication and/or excessive time. Further, some of the costs are irrecoverable and the involvement of counsel was unnecessary. The maximum sum that should be allowed is £2,165 plus VAT for solicitors' fees with nothing for counsel.

The tribunal's decision

27. The application for a Rule 13(1)(b) costs order is refused.

Reasons for the tribunal's decision

28. 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.”
29. The tribunal first considered whether LBE had acted unreasonably in bringing or conducting the s48 Application. When doing so, it only considered the period from 01 July 2021 (the date the application was made) until 08 February 2022 (the date the application was withdrawn). Anything outside this period cannot be considered as it did not involve ‘bringing or conducting’ proceedings.
30. At the date of the s48 Application, SMDL was the registered freeholder and the competent landlord. This means the application should have been brought against them. The tribunal accepts that CTW genuinely believed that GH (Leigate) Limited was the correct respondent. There was a reasonable explanation for this mistaken belief. The respondent has purchased the freehold three months earlier, SMDL has notified the applicant of the transfer, CBG had informed CTW they were no longer acting and HKL and CTW had corresponded regarding the lease extension claim. Given these facts, it is unsurprising that CTW mistakenly believed that GH (Leigate) Limited was the correct respondent.
31. There was also a reasonable explanation for continuing with the s48 Application against the respondent, after HKL’s letter of 19 August 2021. Had the application been withdrawn at that stage, the applicant would only have had a few days to make a fresh application against SMDL as the six-month deadline at s48(2) was fast approaching. Further, the applicant would not have known that registration would take so long. The only reason the respondent was not the competent landlord was the delay in registration. This would be remedied as soon as the transfer was registered. It is highly likely that registration will have retrospective effect with the date of registration being the date of the original Land Registry application. If so, the respondent will become the competent landlord from that date (before the s48 Application) and the question of standing would have fallen away.
32. For the same reasons, it was reasonable for the applicant to continue the claim throughout the autumn of 2021. He and his solicitors were in an invidious position due to the registration gap. Arguably, he should have

applied to substitute (or add) SMDL earlier, but he was not to know that registration would take so long.

33. There was a reasonable explanation for the application to substitute SMDL as the respondent on 02 December 2021. This was a pragmatic solution to the point taken by the respondent and the continuing delay in registration. The tribunal has considered the statements of case on the preliminary issue and CBG's letter of 22 January 2022. Having regard to wide ranging nature of Rule 10 of the 2013 Rules, this application had reasonable prospects of success. Had the applicant proceeded with the hearing on 09 February, the tribunal may well have made an order substituting (or adding) SMDL as the respondent.
34. The tribunal accepts the applicant's reasons for withdrawing the s48 Application. There was a reasonable explanation for the withdrawal, being the ongoing delay in registration, the potential difficulties in completing the lease extension and the respondent's reluctance to agree a stay. Given these difficulties, it was reasonable to withdraw the application and then wait 12 months before starting the process again. Hopefully, the freehold transfer will be registered in the interim. If so, the respondent will be the competent landlord and the standing issue will fall away.
35. Arguably, the s48 Application could have been withdrawn slightly earlier. The applicant would have learned of SMDL's stance when he received CBG's letter of 22 January 2022 but did not withdraw until 07 February. However, he would have needed time to consider the contents, including the suggestion of a stay, with his solicitor and (possibly) counsel. He would also have required advice on the consequences of withdrawal and there may have been communications, with HKL, regarding the possible stay. The gap between the letter and the withdrawal was only 16 days and was reasonable.
36. This was not a hopeless claim that should never have been brought. Rather, CTW made a genuine and understandable mistake in bringing the claim against the wrong party. This mistake would have been rectified as soon as the freehold transfer was registered. Further, CTW acted reasonably in applying to substitute SMDL as the respondent and subsequently withdrawing the s48 Application.
37. The respondent has not established any unreasonable conduct on the part of applicant. He 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.

Name: Judge Donegan

Date: 04 August 2022

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.

Appendix of relevant legislation

The Tribunals, Courts and Enforcement Act 2007

Section 29 Costs or expenses

- (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.
- (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
- (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
- (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—
 - (a) disallow, or
 - (b) (as the case may be) order the legal or other representative concerned to meet,the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
- (5) In subsection (4) “wasted costs” means any costs incurred by a party—
 - (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
 - (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.
- (6) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.
- (7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

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

Overriding objective and parties’ obligation to co-operate with the Tribunal

3. -
- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
 - (2) Dealing with a case fairly and justly includes –
 - (a) 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;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and

- (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it –
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must –
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

...

Addition, substitution or removal of parties

- 10.-** (1) The Tribunal may give a direction adding, substituting or removing a person as an applicant or respondent.
- (2) If the Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.
- (3) A person who is not a party may apply to the Tribunal to be added or substituted as a party.

...

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.

...

- (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. The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

...

Rule 22
Withdrawal

- 22.-** (1) Subject to paragraph (2), a party may give notice of the withdrawal of its case or any part of it –
- (a) orally at a hearing, or
 - (b) by sending or delivering to the Tribunal a written notice of withdrawal
- (2) A written notice of withdrawal must –
- (a) be signed and dated;
 - (b) identify the case or part of the case which is withdrawn;
 - (c) state whether any part of the case, and if so what, remains to be determined;
 - (d) confirm that a copy of the notice of the withdrawal has been provided to all other parties and state the date on which this was done;
 - (e) include the written consent of any of the other parties who have consented to the withdrawal.
- (3) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.
- (4) The Tribunal may make such directions or impose such conditions on withdrawal as it considers appropriate.

...