FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/HPO/2017/0009 and LON/00BE/HML/2017/0017**
Property	**:**	**Flat 2, 185-186 Grange Road, London SE1 3AA**
Applicants	**:**	**David Lowrie** **Julia Lowrie** **Oliver Lowrie**
Representative	**:**	**Julia Lowrie**
Respondent	**:**	**London Borough of Southwark**
Representative	**:**	**Mr Beglan of counsel**
Type of application	**:**	**An application in respect of costs under Rule 13 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in relation to an appeal against a Prohibition Order (0009) and an appeal against a licence decision (0017)**
Tribunal	**:**	**Judge Pittaway** **Ms S Coughlin**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of determination	**:**	**17 July 2018**

DECISION

Decision of the tribunal

The tribunal declines to make an order pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Background

(1) The applicants had appealed against a Prohibition Order dated 19 September 2017 (replacing an earlier Prohibition Order dated 13 July 2017) prohibiting use of the basement forming part of Flat 2 185-186 Grange Road, London SE1 3AA (the "**Property**") for sleeping accommodation or residential purposes, so that it could only be used for storage.

(2) The applicants also appealed against a condition attached to a HMO licence dated 25 July 2017 that the basement rooms were prohibited from habitation and might only be used for storage.

(3) The appeal against the Prohibition Order and the condition attached to the HMO licence are referred to collectively in this decision as the **"appeals"**.

(4) The appeals were listed to be heard by a tribunal, together with an application for costs to be heard by the tribunal on 9 April 2018.

(5) On 2 March 2018 Julia Lowrie wrote to the tribunal advising that the appeals had been compromised but that the issue of costs was not resolved and the tribunal indicated to the parties that the issue of costs would be dealt with at a hearing at 10 a.m. on 9 April, with bundles having been supplied and exchanged by 29 March 2018.

(6) The bundles provided to the tribunal by the applicants contained the applicants' statement of case in relation to the appeals rather than in relation to the costs. The latter was provided to the tribunal at the hearing.

(7) The respondent did not provide any bundles to the tribunal. At the hearing Mr Beglan provided the tribunal with a copy of the decision in *Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC)* (the "***Willow Decision***"), having provided a copy to Ms Lowrie immediately before the hearing.

(8) At the hearing it became apparent that while the applicants had not withdrawn the appeals before the hearing it was clear that both parties anticipated that once the applicants was satisfied that the two Prohibition Orders had been revoked by the respondent (and the respondent stated to the tribunal that they had been) and that the respondent had varied the HMO licence, as agreed by the parties, the applicants would be in a position to give notice to the tribunal of withdrawal of both appeals as contemplated by Rule 22 of Tribunal

Procedure (First-tier Tribunal) (Property Chamber Rules) 2013 (the "**Rules"**)

(9) On the separate application by the applicants for the tribunal to make an order for costs under Rule 13 (1) (b) (ii) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Rule 13(1)(b) Costs**") the tribunal heard the submissions of both parties but considered that in the interests of dealing with the application fairly and justly the applicants should be given the opportunity of making further written representations on the respondent's case, but only insofar as it relates to the *Willow Decision* before the tribunal made its decision. The tribunal accordingly directed that the applicants had until 23 April 2018 to make written representations to the tribunal and the respondent on the relevance of the *Willow Decision* to their application for Rule 13(1)(b) Costs. The tribunal indicated that it would determine the application in respect of costs following the determination or withdrawal of the appeals (as the case may be).

(10) The tribunal received no representations on the *Willow Decision* from the applicants.

(11) On 8 June 2018 the applicants applied to withdraw the appeals and the tribunal consented to their withdrawal on 4 July 2018.

The applicants' case

1. In their written submissions to the tribunal and at the hearing the applicants submitted that the respondent had acted unreasonably in relation to the appeals; in particular

1.1 By failing to take account of the existence of a Building Regulations certificate in respect of the conversion works undertaken to the flat; and

1.2 By maintaining that it had not received the original application in respect of the appeal against the condition attached to the HMO licence

2. At the hearing the applicants further submitted that the need for an adjournment of the hearing set down for 24 November 2017, by reason of the respondent not having prepared its case in relation to the appeal against the condition attached to the HMO licence, was unreasonable and had resulted in them incurring further costs.

3. As to the costs claimed the applicants attached a schedule of costs to their written submissions, setting out fees in the sum of £11,874.40 including VAT. The schedule listed the number of hours spent by different grades of solicitor on the appeals (without breaking these totals down), and set out a counsel's brief fee and the fees of Glazebrook Associates Limited as disbursements.

The respondent's case

4. The respondent did not make written submissions but at the hearing Mr Beglan supplied the tribunal and the applicants with a copy of the *Willow Decision* and made oral submissions. He submitted that the respondent had not acted unreasonably.

4.1 Information that the respondent had requested and received after the issue of the Prohibition Notices had influenced its decision to revoke these, while reserving its position on Category 1 hazards.

4.2 The existence of a Building Regulation certificate is not evidence that hazards do not exist. For example, such a certificate does not cover the necessity for natural lighting.

4.3 Further the respondent had to contemplate that there might have been further alterations to the Property since the Building Regulations certificate was issued in 2016.

4.4 This had been a case of experts reasonably disagreeing.

5. In relation to the *Willow Decision*

5.1 Mr Beglan directed the tribunal to paragraph H7 of the decision which requires the tribunal to adopt a sequential approach to applications under Rule 13 (1)(b) as follows

(i) Has the person acted unreasonably;

(ii) If unreasonable conduct has been found should the tribunal make an order for costs or not; and

(iii) The terms upon which the tribunal should make any order for costs.

5.2 Mr Beglan then referred the tribunal to the decision in the third appeal which related to the timing of the withdrawal of a claim.

5.3 Finally Mr Beglan referred to paragraph 30 of the decision, submitting that if the tribunal found that there had been unreasonable conduct it was still necessary for the tribunal to exercise judicial discretion in deciding whether it should make an order for costs and the terms upon which such an order should be made.

6. As to the level of costs claimed by the applicants Mr Beglan submitted that it was unsatisfactory for the applicants to refer only to invoices, as the Rules require a summary to show what is being claimed and the applicants had not provided this. He invited the tribunal to use its own judgement in this regard.

The Law

Rule 13 of the 2013 Rules provides as follows:

(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 land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

Reasons for the tribunal's decision.

1. As set out in the *Willow Decision* for the applicants' claim for costs to succeed the tribunal must first determine whether the respondent has acted unreasonably in defending or conducting the proceedings.

2. Clarification as to how this tribunal should approach a Rule 13(1)(b) costs application is provided in the *Willow Decision*. While not specifically referred to by either party paragraph 24 of that decision approved the guidance given in *Ridehalgh v Horsefeld [1994] Ch 205* which described "unreasonable" conduct as including conduct that is *"vexatious, and designed to harass the other side rather than advance the resolution of the case"*. It was not enough that the conduct led, in the event, to an unsuccessful outcome.

3. The tribunal accept that the applicants found the process from the issue of the first Prohibition Notice until the matter was eventually resolved and the appeals withdrawn frustrating and time consuming but that does not of itself amount to unreasonable conduct by the respondent satisfying the test set out in the *Willow Decision*.

4. The tribunal do not consider the initial failure of the respondent to appreciate the existence of the Building Regulations certificate to amount to vexatious conduct or designed to harass the other side. From the evidence before it, it accepts Mr Beglan's submission that the issue of the certificate is not of itself approval of the use of the basement for habitation, and accepts that on balance it was reasonable for the respondent to consider that there may have been alterations subsequent to the issue of that certificate in 2016.

5. From the directions that the tribunal issued on 24 November 2018 it appears that the respondent had understood the earlier directions of 12 October 2017 to intend to link appeals in respect of the two Prohibition Orders. In fact the directions sought to link the Prohibition Order of 19 September 2017 and the appeal against the condition attached to a HMO licence dated 25 July 2017. The tribunal consider this to have been a genuine mistake on the part of the respondent, not unreasonable conduct, as enunciated in the *Willow Decision*.

6. Accordingly the tribunal do not find that the respondent acted unreasonably in the defence or conduct of the proceedings in connection with the appeals. They accept that the action that the respondent took is a course of action that a reasonable person in the respondent's position might have adopted, and that the respondent had a reasonable explanation for the conduct that it adopted.

7. In the tribunal's view this application fails at the first stage of the test in *Willow Case*; it does not consider that the respondent has acted unreasonably, having regard to the guidance in that case.

8. Even if the tribunal had found that the respondent's conduct was unreasonable it would not in any event exercise its discretion to make a costs order (the second of the sequential stages outlined in the *Willow Decision*). Paragraph 62 of the *Willow Decision* confirms that, *"the residential property division of the First-tier Tribunal is a costs shifting jurisdiction by exception only and the parties must usually expect to bear their own costs"*. It was the applicants' decision to appeal against the Prohibition Order and the conditions attached to the HMO Licence (with inevitable cost to them), and it is understood that the appeals were eventually withdrawn because the applicants had reached an acceptable compromise with the respondent. This is not a case were the applicants' appeals were successful before the tribunal. The tribunal do not consider the circumstances sufficiently exceptional to justify ordering the respondent to bear the applicants' costs.

9. Having considered the facts of the tribunal is satisfied that it is not appropriate to make a costs order.

Name: Judge Pittaway **Date:** 17 July 2018

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).