12967

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AC/LSC/2018 0208**
Property	:	**10a Thyra Grove, London N12 8HB**
Applicant	:	**Abbeytown Limited**
Representative	:	**Ms C Charles – Martyn Gerrard – Managing agents**
Respondent	:	**Ms Sharon Judith Mallerman**
Representative	:	**None**
Type of Application	:	**Rule 13(1)(b) - costs** **Rule 13(2) - fees**
Tribunal Members	:	**Judge John Hewitt** **Mr Kevin Ridgeway MRICS**
Date of Decision	:	**24 September 2018**

DECISION

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The issue before the tribunal and its decision

1. The issue before the tribunal was an application by the applicant Landlord for a costs order pursuant to rule 13(1)(b). The application dated 12 July 2018 sought a total of £1,929.24 inclusive of VAT.

   The sum of £1,929.24 included a claim for reimbursement of the fees of £300 paid by the applicant to the tribunal in connection with these proceedings. We deem that part of the claim to have been made under rule 13(2). The rule 13(1)(b) claim is thus reduced to £1,629.24

2. The tribunal determines that:
   1. The application under rule 13(1)(b) shall be refused; and
   2. The application under rule 13(2) shall be granted and that the respondent shall by **5pm 31 October 2018** pay to the applicant the sum of £150 by way of reimbursement of one half of the fees paid to the tribunal.

3. The reasons for our decisions are set out below. This decision ought to be read in conjunction with our decision dated 7 August 2018 on the substantive application. It will be noted that the applicant landlord sought a determination on two sets of service charges – routine service charges and major works. The application failed on the former and was part successful on the latter – in that the service charge would be payable upon the landlord giving a compliant demand to the respondent tenant.

4. It may also be noted that the costs application was made prior to the applicant seeing the substantive decision dated 7 August 2018.

Procedural background

5. The application for costs was not brought to the attention of the members of the tribunal at the hearing on 18 July 2018.

6. The substantive decision was sent to the parties under cover of a letter dated 7 August 2018. That letter made reference to the application for costs and set out directions in relation to it. Those directions were for the respondent to file and serve representations or points of objection by 5pm 21 August and for the applicant to reply by 5pm 4 September 2018.

7. The tribunal is informed that neither party has filed any representations pursuant to those directions.

The application for costs

8. The basis of the application is that the respondent failed to:
   1. Engage with the applicant in relation to the s20 consultation notices given concerning the major works;
   2. Give any reason why she should not pay the service charges;
   3. Comply with the direction of the tribunal to serve a Scott Schedule giving her objections to the sums claimed;

4. Reply to letters sent to her by the applicant's solicitors dated 21 June and 9 July 2018.

9. The applicant submits that such failures to engage amount to unreasonable conduct within the meaning of rule 13(1)(b) and, in particular says:
   1. Viewed objectively, and given that there has been no reasonable explanation given by the respondent, her conduct must be unreasonable;
   2. If the tribunal decides that the conduct is unreasonable, then it should make an order for costs in accordance with the overriding objective to deal with cases fairly and justly. The applicant argues that the respondent has failed to engage both before and after the claim was issued and that the applicant had no alternative but to issue the claim and it should not be penalised in costs for doing so.

10. The costs claimed are based on a charge-out rate of £235 per hour for a Grade A fee-earner. The amount claimed for correspondence amounts to £688.55 and the amount claimed for work on documents such as preparing the application, considering the directions, preparing the trial bundle and preparing the costs application amounts to £655.65. There are modest expenses of £16.20 and VAT. Thus in summary the claim is for:

Solicitors costs:	£1,344.20
Expenses:	£ 16.20
VAT:	£ 268.84
Total	£1,629.24

The rule 13(1)(b) application

11. The provisions of s29 Tribunal, Courts and Enforcement Act 2007 and the provisions of rule 13 are set out in full in the Schedule to this decision.

12. Our starting point is that as regards leasehold cases the tribunal is a 'no costs' jurisdiction, such that save in exceptional circumstances each side will bear their own costs. Rule 13(1)(b) may embrace such exceptional circumstances.

13. We consider that the first stage in any consideration of an application for rule 13(1)(b) costs is whether the conduct complained of can be regarded as unreasonable. It is important here to bear in mind the wording of the rule: "if a person has acted unreasonably in bringing, defending or conducting proceedings." This seems to indicate that both the manner in which the application has been conducted and the view of the merits of an application (or a decision to resist an application) may be unreasonable. In both circumstances the behaviour complained of must be out of the ordinary. In *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd* LRX/130/2007, HHJ

Huskinson sitting in the Lands Tribunal considered the provisions of paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and the meaning of the words "otherwise unreasonably". He concluded that they should be construed "*ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10, behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour".

13. In that case HHJ Huskinson adopted the analysis of Sir Thomas Bingham MR in *Ridehalgh v Horsfield* [1994] 3 ALL ER 848 which concerned the approach to the making of a wasted cost order under section 51 of the Supreme Court Act 1981, where dealing with the word "unreasonable" he said as follows:

"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 judgement, but it is not unreasonable"

14. Further guidance on the approach tribunals should adopt is set out in *Willowcourt Management Company (1985) Limited v Mrs Ratna Alexander* [and other parties] [2016] UKUT 0290 (LC);

So far as material:

"Unreasonable behaviour

22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in Ridehalgh. We therefore restrict ourselves to mentioning Cancino v Secretary of State for the Home Department [2015] UKFTT 0005 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). Cancino provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.

23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in Ridehalgh on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. 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 given in Ridehalgh 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 in the position of the party 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?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. 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.

The element of discretion in rule 13(1)(b)

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only ... if a person has acted unreasonably...." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those

rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes 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." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.

The position of unrepresented parties
31. One circumstance which may often be relevant is whether the party whose conduct is criticised has had access to legal advice. It was submitted on behalf of the respondents in each appeal that no distinction should be drawn between represented and unrepresented parties in the context of rule 13(1)(b). In support of those submissions reference was made to the decision of the Court of Appeal in Tinkler v Elliott [2012] EWCA Civ 1289 which concerned an application under CPR 39.3(3) to set aside a judgment entered after a party had failed to attend a hearing. Such a judgment may only be set aside if, amongst other things, the applicant has acted promptly. At paragraph 32 Morris Kay LJ considered the relevance of the fact that the applicant was unrepresented:

"I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that the litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence."

We entirely accept that there is only one set of rules which applies both to represented and to unrepresented parties but we do not consider that Tinkler v Elliott has any relevance to these appeals. Whether a person has acted promptly involves a much more limited enquiry than whether a person has acted unreasonably.

32. In the context of rule 13(1)(b) we consider that the fact that a party acts without legal advice is relevant at the first stage of the inquiry. When considering objectively whether a party has acted reasonably

or not, the question is whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way in which that party acted. In making that assessment it would be wrong, we consider, to assume a greater degree of legal knowledge or familiarity with the procedures of the tribunal and the conduct of proceedings before it, than is in fact possessed by the party whose conduct is under consideration. The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings.

33. We also consider that the fact a party who has behaved unreasonably does not have the benefit of legal advice may be relevant, though to a lesser extent, at the second and third stages, when considering whether an order for costs should be made and what form that order should take. When exercising the discretion conferred by rule 13(1)(b) the tribunal should have regard to all of the relevant facts known to it, including any mitigating circumstances, but without either "excessive indulgence" or allowing the absence of representation to become an excuse for unreasonable conduct.

34. At paragraph 26 of Cancino the tribunal considered the balance which is required to be struck when considering application for costs against unrepresented parties:
"First, the conduct of litigants in person cannot normally be evaluated by reference to the standards of qualified lawyers. Thus the same standard of reasonableness cannot
generally be applied. On the other hand the status of unrepresented litigants cannot be permitted to operate as a carte blanche to misuse the process of the tribunal. The appropriate balance must be struck in every case. In conducting this exercise, tribunals will be alert to the distinction between pursuing a doomed appeal in the teeth of legal advice and doing likewise without the benefit thereof... Stated succinctly, every unrepresented litigate must, on the one hand be permitted appropriate latitude. On the other hand, no unrepresented litigate can be permitted to misuse the process of the tribunal. The overarching principle of facts sensitivity looms large once again."

We agree with these observations. We also find support in Cancino for our view that rule 13(1)(a) and (b) should both be reserved for the clearest cases and that in every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable.

The withdrawal of claims
35. In one of the appeals with which we are now concerned (Stone), costs were awarded under rule 13(1)(b) on the grounds that the applicant had delayed in withdrawing proceedings until after a time when it should have been clear to him that he had achieved as much

by concession from the management company as he could realistically expect to obtain from the FTT by proceeding to a hearing. 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 the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs.

36. In this regard our attention was drawn to the decision of the Court of Appeal in McPherson v BNP Paribas [2004] EWCA Civ 569, which concerned rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (permitting the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably). Having noted that in civil litigation under the CPR the discontinuance of claims was treated as a concession of defeat or likely defeat, Mummery LJ went on, at paragraph 28:

"In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for Employment Tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss MacAtherty appearing for the Applicant, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the Tribunal should not adopt a practice on costs which would deter applicants from making sensible litigation decisions."

37. The views of the tribunal in Cancino were to similar effect, at paragraph 25(i):

"Concessions are an important part of contemporary litigation, particularly in the overburdened realm of immigration and asylum appeals.... Occasionally a concession may extend to abandoning an appeal (by the appellant) or withdrawing the impugned decision (by the respondent). We consider that applications for costs against the representative or party should not be routine in these circumstances. Rule 9 cannot be invoked without good reason. To do otherwise would be to abuse this new provision.""

15. The first stage we have to decide is whether the conduct complained of has been unreasonable. We have to apply an objective standard applicable to the facts. In this case the applicant does not complain of any positive adverse or unreasonable conduct, but rather negative

conduct being a failure to engage, failure to reply to correspondence and a failure to comply with directions of the tribunal.

16. We readily accept that it would have been helpful both to the applicant and to the tribunal if the respondent had engaged and taken an interest and participation in the proceedings. Why she did not do so, we do not know. We do not know whether the resides at the property and what her circumstances and state of her health are.

17. The guidance given to us is to the effect that a rule 13(1)(b) costs order is to be made in those exceptional cases where conduct is so unreasonable that the threshold is crossed. We are not persuaded that in this case the negative failures complained of meet that test.

18. We also bear in mind that the substantive application was only partially successful and then only subject to the applicant serving a compliant demand. It was clear to us that the applicant and its solicitors had not followed the procedures laid down in the lease documents which were put before us.

19. Thus, even if we had concluded that there was unreasonable conduct on the part of the respondent such that rule 13(1)(b) was engaged, we would not have made a costs order in the full amount claimed. As made clear in *Willow Court* even if the threshold is met costs do not follow the event as they do in civil proceedings or pursuant to the CPR regime, but separate considerations and discretions apply.

The rule 13(2) application

20. Different considerations apply to this application. The tribunal has a discretion from the outset and it is not constrained in the same manner as applies to the rule 13(1)(b) applications.

21. The fees of £300 are made up as to £100 application fee and £200 hearing fee.

22. We accept that these fees were incurred because the respondent failed to engage with the applicant and put forward any explanation or challenge to the service charges claimed.

23. We again take into account that one of the claims failed and the success in the other was conditional.

24. Taking all of these matters in the round we conclude that justice will be served if the respondent reimburses the applicant one half of the fees incurred. We have thus made a determination to that effect.

Judge John Hewitt
24 September 2018

The Schedule

The statutory provisions are as follows:

Tribunal, Courts and Enforcement Act 2007

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) ...

Rule 13

13.— Orders for costs, reimbursement of fees and interest on costs

(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.

(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.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(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 is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 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.

ANNEX - 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.