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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/OC9/2017/0259**
Property	**:**	**61 Queens Gate, London SW7 5PJ**
Applicant	**:**	**Queensbridge Investments Limited**
Representative	**:**	**Forsters LLP, solicitors**
Respondent	**:**	**61 Queens Gate Freehold Limited**
Representative	**:**	**Swabey & Co, solicitors**
Type of application	**:**	**Application for costs under rule 13 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member	**:**	**Judge Amran Vance**
Date of decision	**:**	**2 October 2018**

DECISION

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Decision of the Tribunal

1. The respondents' application for an order for costs is refused.

Introduction

2. This is an application by the respondent seeking an order for costs against the applicant under the provisions of Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"). The respondent initially sought an order under rule 13(1)(a) of the 2013 Rules but that application, which was made in a letter from its solicitors, Swabey & Co, dated 26 March 2018 was followed by a request from Swabey & Co, in a letter dated 26 June 2018, to amend the respondent's application so that it was to stand as an application under rule 13(1)(b).

3. The application is made following a decision made by the tribunal dated 8 March 2018 in which it determined that the statutory costs payable by the respondent to the applicant under section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") was £31,610.37 plus VAT where applicable. The tribunal reviewed that decision and in its reviewed decision, dated 31 May 2018, decided that that the statutory costs payable by the respondent amounted to £24,814.58 plus VAT where applicable.

4. Directions were issued by the tribunal on 31 July 2018, which treated the application as one made under rule 13(1)(b). As it was not specifically addressed in my directions of 31 July 2018, and for the avoidance of doubt, I grant retrospective permission to the respondent for the amendment of its application and to rely upon rule 13(1)(b) in place of rule 13(1)(a).

5. My directions of 31 July 2018 required the respondent to send to the applicant a statement of case setting out:

   (a) the reasons why it is said that the applicant has acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule, dealing with the issues identified in the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC), with particular reference to the three stages that the tribunal will need to go through, before making an order under rule 13;

   (b) any further legal submissions;

   (c) full details of the costs being sought, including:

   - a schedule of the work undertaken;

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- the time spent;
- the grade of fee earner and his/her hourly rate;
- a copy of the terms of engagement with respondent;
- supporting invoices for solicitor's fees and disbursements;
- counsel's fee notes with counsel's year of call, details of the work undertaken and time spent by counsel, with his/her hourly rate; and
- expert witness's invoices, the grade of fee earner, details of the work undertaken and the time spent, with his/her hourly rate.

6. Directions were also given for the applicant to send the respondent a statement in response and for the respondent to be able to provide a short reply. The tribunal indicated that it would determine the matter based on the written representations received unless either party requested an oral hearing. No request for an oral hearing was received and the tribunal therefore determined the application on the papers on 2 October 2018.

7. Following issue of the directions of 31 July 2018, Swabey & Co provided written submissions in support of the rule 13 application dated 15 August 2018. Forsters submitted a written statement in response dated 30 August 2018 and Swabey & Co provided a statement in reply dated 6 September 2018. By letter to the tribunal dated 20 September 2018, Forsters objected that the statement dated 6 September 2018 was not a short reply as had been directed but contained extensive new evidence. At seven pages I consider it is reasonably short and I do not agree that it contains extensive new evidence. It does not, in my view, add much to the contents of Swabey & Co's statement dated of 15 August 2018 and I do not see any reason to exclude the respondent from relying on it.

The Respondents' Case

8. The grounds on which the respondent appears to be asserting that the applicant acted unreasonably in bringing or conducting these proceedings distil down to the following:

   (a) the applicant's demand for statutory costs was deliberately overstated;

   (b) the applicant omitted relevant details in its application to the tribunal and made highly repetitious assertions in its submissions with the result that there was a risk that the tribunal might have been misled as to the merits of its claim; and

   (c) the applicant failed to comply with the tribunal's directions by providing insufficient information for a summary assessment of costs to take place and failed to provide sufficient documents to establish its claim, necessitating further directions from the tribunal and the incurring of additional costs by the respondent.

9. In support of those assertions the respondent contends that:

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(a) the applicant could have made a demand for its statutory costs immediately following the grant of a vesting order on 31 October 2015 or approval of the terms of a transfer by the county court on 8 January 2016, but did not do so because an application to this tribunal for determination as to the costs payable might have been heard by the same tribunal judge involved in earlier decisions of the tribunal issued on 29 October 2012 and 28 March 2013 (see paragraphs 7 and 8 of the tribunal's decision of 8 March 2018);

(b) the subsequent schedule of costs sent to the respondent in September 2017 unreasonably overstated the costs payable under section 33 of the 1993 Act;

(c) any complexity in the collective enfranchisement claim was of the applicant's own making given that it did not complete the freehold transfer voluntarily, necessitating the making of a vesting order;

(d) assertions made by the applicant in its application to the tribunal were incorrect, namely: (a) its portrayal of the respondent as unreasonable for refusing to agree proposed lease terms; (b) that a mortgage with Lloyds Bank over the freehold had to be moved on to three individual flats; and (c) they ignored the fact that court proceedings were necessitated because the applicant failed to complete the enfranchisement voluntarily and unreasonably sought to argue that there had been a deemed withdrawal of the enfranchisement claim by the respondent;

(e) the applicant claimed costs that were outside the ambit of s.33 of the 1993 Act.

10. As to the second stage of the *Willow Court* test, the respondent asserts that the tribunal ought to make an order for costs because the applicant acted unreasonably despite having the benefit of legal advice from specialist solicitors and despite previously having been ordered to pay costs of £500 for unreasonable conduct in the 28 March 2013 tribunal decision and costs of £9,950.40 ordered by the county court in respect of the application for the vesting order.

11. The amount of costs sought by the respondent amounts to £7,109, inclusive of VAT. Supporting invoices have been provided.

The Applicant's Case

12. The applicant's position is that the respondent has failed to provide any relevant or coherent submissions establishing that it acted in an unreasonable manner. It contends that:

(a) all the costs claimed by the applicant have been certified by the applicant's solicitors and paid by the applicant and the assertion that they were overstated is refuted;

(b) it complied fully and correctly with the tribunal's directions and the respondent has not explained what additional supporting documents should have been provided to the tribunal;

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(c) the applicant was entitled to seek its costs under section 33 at a time of its choosing;

(d) the respondent has not come anywhere near to the threshold for the making of an order under rule 13(1)(b).

The Law

13. 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.*

14. Rule 13(1)(a) is not relevant to this application as it concerns costs incurred by legal representatives. Clarification as to how this tribunal should approach a rule 13(1)(b) costs application has been provided in the detailed decision of the Upper Tribunal in *Willow Court*. At paragraph 24 of its decision, it 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.

15. It then went on to set out a three-stage test for rule 13 costs orders. The first stage is whether a person has acted unreasonably. This is an essential pre-condition of the power to award costs under the rule. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable. This requires the application of an objective standard of conduct to the facts of the case. The second and third stages involve the exercise of discretion on the part of the tribunal. At the second stage the tribunal must consider whether, in the light of the unreasonable conduct identified, it ought to make an order for costs. The third stage is what the terms of the order should be.

Decision and Reasons

16. In my view this application fails at the first stage of the test in *Willow Court*. I agree with the applicant that the respondent has failed to identify conduct that comes

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anywhere close to constituting unreasonable conduct as described in *Ridehalgh v Horsefield.*

17. The contention made by Forsters, the applicant's solicitors, that it has billed its client for the full amount of the costs initially demanded from the respondent is not challenged by the respondent and nor does the respondent assert that this work was not, as a matter of fact, carried out by the applicant's solicitors. In fact, at paragraph 8 of the respondent's submissions dated 26 January 2018 it stated that *"There is no dispute about whether the costs have been paid [to the applicant's solicitors], the issue is whether they were reasonably incurred and are properly within section 33".*

18. That being the case, the applicant was entitled to seek payment from the respondent for the full amount of the costs incurred and I reject the suggestion that in doing so the applicant overstated its claim to the respondent and to the tribunal. All the applicant was doing was seeking full costs recovery for costs incurred. It was perfectly entitled to do so and when agreement was not reached with the respondent, it was entitled to issue this application. In my judgment, there is no evidence to suggest that the applicant has in any way acted unreasonably in the *bringing* of these proceedings.

19. Nor do I consider the applicant has acted unreasonably in its *conduct* of these proceedings. Its application was accompanied a schedule of costs, and schedule of work done on documents, in the form commonly used for summary assessment of costs in the county court (Form N260). Also included was a two-page statement of case in support of the application. I accept that this was a complex collective enfranchisement claim, as stated in the first sentence of the applicant's statement of case. This is self-evident given the amount of time it took for the collective enfranchisement claim to reach conclusion and the litigation background that preceded the s.33 application. I see nothing offensive or misleading in the initial statement of case that accompanied the application. It simply provides brief background information concerning the enfranchisement claim and the costs incurred by the applicant.

20. The respondent also complains that the copies of Forsters' invoices to its client included in the hearing bundle omitted the accompanying narrative which gave details of the work carried out. I do not consider the omission of the narrative amounted to unreasonable conduct in circumstances where the Forsters' provided a detailed breakdown of time spent by its fee earners and confirmation that the costs sought had been certified and paid by its client. I see no reason to go behind the solicitors' certification of the accuracy of the costs claimed. If the respondent doubted the accuracy and considered that disclosure of the narratives was required for that or some other reason it could have, but did not, make an application for specific disclosure of those documents.

21. Nor do I accept the respondent's submission that the applicant has made highly repetitious assertions in its submissions to the tribunal. Such submissions have not been identified by the respondent and I consider the assertion to be without

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foundation. In my assessment, Forsters' submissions have been concise and focused.

22. I reject the submission that the applicant failed to comply with the tribunal's directions. It is correct that after hearing oral evidence from the parties at the hearing on 13 December 2017, I gave directions for a more detailed breakdown of costs from the applicant prior to the tribunal issuing its final determination. However, the need for this was not because of any failure by the applicant to comply with the tribunal's previous directions, issued on 17 October 2017, which required it to provide a schedule of costs sufficient for summary assessment and copies of the invoices substantiating the claimed costs. Rather, it was because after hearing oral submissions from counsel for both parties we considered that the amount of costs in issue, and the complex background to the enfranchisement claim necessitated provision of a more detailed costs breakdown than that previously directed by the tribunal in order for the tribunal to carry out a fair assessment of costs payable, albeit that the assessment was to remain a summary assessment of costs rather than a detailed assessment.

23. I do not consider the suggestion that the applicant delayed in making its application for statutory costs to have merit. No prejudice to the respondent is identified and in my judgment, none has occurred. The suggestion that the application was delayed because it might he heard by the same tribunal judge involved in earlier decisions o\f the tribunal issued is fanciful, especially given that those determinations were issued as long ago as 29 October 2012 and 28 March 2013.

24. The respondent complains that the applicant has made incorrect assertions in its written submissions to the tribunal. However, it seems to me that the reference in the applicant's initial statement of case to the respondent "refusing to agree the to the proposed lease terms" is simply a statement of fact rather than assertion of unreasonable behaviour. As to the suggestion that the applicant incorrectly stated that that a mortgage with Lloyds Bank over the freehold title had to be moved on to the titles for three individual flats, this statement was simply an assertion as to the applicant's reasons for acting in the way that it did. It was for the tribunal to determine whether the costs of moving the mortgage were payable by the respondent and I concluded that they were not (see paragraphs 7-18 of the decision dated 31 May 2018). None of these suggested incorrect assertions in any way come close to unreasonable litigation conduct for the purposes of a rule 13(1)(b) order.

25. Nor does the submission that the applicant claimed costs that were outside the ambit of s.33 of the 1993 Act. As stated above, the applicant was entitled to seek to recover all the costs it incurred. The respondent was entitled to challenge those costs and, to a significant extent, it has succeeded in doing so given that the amount the tribunal determined as payable was assessed as £24,814.58, plus VAT compared to the amount of £44,681.74 plus VAT originally sought from it. However, it does not follow that the fact that the respondent has achieved this reduction means that the amount sought by the applicant was overstated. The initial figure reflected the incurred costs which were then reduced on assessment.

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26. Nor does it follow that the respondent's success justifies the making of an order for costs. As the Upper Tribunal said at paragraph 62 of its decision in *Willow Court,* this tribunal is a costs shifting jurisdiction *by exception only* and parties must usually expect to bear their own costs. That, in my judgment, is the case with this application which I consider to be fundamentally misguided.

Amran Vance

Date: 2 October 2018

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ANNEX 1 - 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.

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