FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BK/LSC/2017/0296** **LON/00BK/LDC/2017/0091**
HMCTS code (paper, video, audio)	**:**	**P: PAPER**
Property	**:**	**Ivor Court, Gloucester Place, London, NW1 6BJ**
Applicant	**:**	**Ivor Court Freehold Limited**
Representative	**:**	**Brethertons LLP**
Respondent	**:**	**Mr Mansing Moorjani (Flat 67)**
Representative	**:**	**N/A**
Type of application	**:**	**Costs - Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member	**:**	**Judge Amran Vance**
Date of decision	**:**	**21 September 2020**

DECISION
Clerical errors corrected on 4 December 2020)
Costs Addendum added 23 March 2021

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NB: Typographical corrections in red are made pursuant to Rule 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Decision

1. Mr Moorjani is ordered to pay to the applicant:

   (a) £1,750 in respect of the attendance of Mr Byers, the applicant's expert, at the hearing on 5 November 2018; and

   (b) 20% of the reasonable costs of: (a) the applicant's costs of preparing for the hearing on 5 and 6 November 2020; and (b) the applicant's costs of attendance at the hearing itself, including counsel's fees. (to be summarily assessed after compliance with the directions below).

Background

2. At a hearing of these two applications, which took place on 5 and 6 November 2018, Mr Bates, counsel for the applicant, applied for an order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "2013 Rules") against Mr Moorjani, the leaseholder of Flat 67 Ivor Court. An order was sought on the basis of Mr Moorjani's conduct in respect of:(a) the landlord's application for a determination as to the costs payable by leaseholders at Ivor Court for Major Works, pursuant to s.27A Landlord and Tenant Act 1985; and (b) the landlord's application dispensation from the landlord's statutory consultation obligations, brought under s.20ZA of the 1985 Act. The tribunal made its decisions in respect of both of those underlying applications on 8 January 2019, subsequently issuing a corrected and amended decision dated 15 April 2019.

3. I gave initial directions in respect of the applicant's Rule 13 application on 8 January 2019, following which, Mr Moorjani made representations in respect of the application on 14 March 2019.

4. On 18 February 2019, the tribunal received an application from Mr Moorjani seeking permission to appeal the decision of 8 January 2019 to the Upper Tribunal (Lands Chamber). Following receipt of that application, the tribunal decided to review its 8 January 2019 decision, under Rule 55 of the 2013 Rules in respect of one issue only, namely, whether costs incurred in respect of works to apartment doors were payable by leaseholders.

5. On 22 March 2019, I stayed directions in respect of the Rule 13 costs application until after the outcome of the review being carried out under Rule 55. That review led to the tribunal issuing its corrected and amended decision dated 15 April 2019.

6. I then indicated, on 8 May 2019, that I was minded to stay the Rule 13 costs application until the final outcome of any application by Mr Moorjani for permission to appeal the tribunal's reviewed and corrected determination. As expected, Mr Moorjani sought permission to appeal the tribunal's reviewed decision on 30 May 2020. That application was refused by the tribunal on 11 June 2019 and Mr Moorjani's subsequent application to the Upper Tribunal seeking permission to appeal was refused by Judge Cooke on 15 July 2019. On 1 August 2019, Mr Moorjani lodged an application in the High Court seeking permission to commence judicial review proceedings in respect of Judge Cooke's refusal.

7. Although there was no provision to do so in my original directions, Mr Moorjani submitted further representations in respect of the Rule 13 costs application on 5 August 2019.

8. On 20 August 2019, I directed that the Rule 13 costs application should be stayed pending the outcome of Mr Moorjani's judicial review application.

9. Permission to commence judicial review proceedings was refused by Her Honour Judge Karen Walden-Smith on 20 November 2019. Mr Moorjani has applied to the Court of Appeal for permission to appeal that refusal, which is still awaiting determination on the papers.

10. My initial directions of 8 January 2019 stated that the Rule 13 application would be determined on the papers unless either party requested an oral hearing by 5 February 2019. Neither party made such a request. Mr Moorjani suggested a possible oral hearing when he wrote to the tribunal on 30 December 2019, in which he stated that "if the court [sic] decides to deal with the costs application now, I request a hearing so as to not shut out the appeal";

11. On 13 March 2020, I lifted the previous stay granted in respect of the Rule 13 application, and directed that if Mr Moorjani wanted the Rule 13 costs application be determined at an oral hearing that he must confirm this by 23 March 2020. He did not provide that confirmation in his emails to the tribunal dated 23 March 2020, 11 May 2020, 13 May 2020, and 14 May 2020, instead raising a series of questions to which he asked the tribunal to respond, as well as describing difficulties he was experiencing due to the current Covid-19 pandemic, which prevent him from clarifying whether or not he wanted an oral hearing of the application.

12. On 12 May 2020, I had directed that Mr Moorjani must, by 15 May 2020, unequivocally confirm whether or not he was requesting an oral hearing of this application. As the tribunal was working entirely remotely at that time (using documents supplied digitally) I also requested that the applicant's solicitors provide a copy of their determination bundle in electronic format, which was supplied on 26 May 2020.

13. On 29 May 2020, I directed that even though Mr Moorjani had already had the opportunity to make representations in respect of this application, given his status as an unrepresented person, I would allow him a final opportunity to make any remaining submissions he wished to make in respect of the Rule 13 application by 19 June 2020, with the applicant to send any final submissions in reply by email, by 10 July 2020. I also directed that unless, by 3 July 2020, either party requested an oral hearing the tribunal would make its determination on the Rule 13 application on the papers, using the electronic documents provided.

14. Mr Moorjani submitted further representations on 15 June 2020. The applicant did not make any further submissions in reply, and neither party requested an oral hearing. The Rule 13 application has therefore been determined using the documents provided electronically by the parties.

The Law

15. Rule 13(1) 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.

16. Rule 13(1)(a) is not relevant to this application. 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 Management Company (1985) Ltd v Ms Ratna Alexander* [2016] UKUT (LC). 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.

17. The Upper Tribunal then went on to set out a three-stage approach to assist in decision making in Rule 13 costs applications. 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.

The Applicant's Case

18. The applicant contends that Mr Moorjani acted unreasonably in alleging that he was entitled to a significant set-off against service charges on grounds that the applicant had delayed in carrying out necessary works at Ivor Court ("the historic neglect argument"), but then abandoning that argument just before the hearing of the applications. By raising that argument, the applicant asserts that it was put to additional expenditure:

    (a) in commissioning expert evidence on the feasibility of doing the work in question at an earlier time and, if it had been feasible, what impact any delay would have had on the final costs;

    (b) in commissioning expert evidence on the possible quantum of any damages owed to Mr Moorjani by reference to the impact of the delay on the notional rental value of his flat;

    (c) in respect of additional legal expenditure by solicitors and counsel to consider and advise on these complex points, including at the costs of the final hearing.

19. The applicant does not contend that resisting the application, or seeking to withdraw his case, amounts, in itself, to unreasonable behaviour. Instead, it seeks an order that Mr Moorjani contribute towards the additional costs that arose exclusively out of his abandoned arguments.

20. It also contends that if it had not been for Mr Moorjani raising a historical neglect argument, it would have been unnecessary for it to have instructed counsel of 15-years call, and could, instead, have instructed counsel of, say, 7-years call. It seeks to recover the difference between the notional fees of counsel of 7-years call and the actual fees incurred.

21. As to the first stage of the approach in *Willow Court*, the applicant contends that Mr Moorjani behaved unreasonably by putting it to the cost of responding to his historic neglect argument, but then failing to commission any alternative expert evidence, or any witness evidence in support of his contentions. He then indicated that he wished, as he described it, to "drop out" of the application on 29 October 2018, but only made a firm request for withdrawal on the last working day before the hearing.

22. The applicant argues that not only was this withdrawal wholly inconsistent with his previous stance in the applications, it also came

too late for the applicant to avoid the costs of commissioning its expert evidence to respond to his arguments. The applicant submits that a reasonable person would not challenge almost every item of expenditure in a very detailed specification of works, causing a landlord substantial expense, and then seek to withdraw his case one day before the hearing. Such behaviour, it says, was a waste of the tribunal's time and resources, at odds with the obligation on parties under the tribunal's 2013 Rules, to co-operate with each other and the tribunal, and harmful to the applicant, and ultimately, to other leaseholders in Ivor Court who will have to bear the costs occasioned by his behaviour.

23. Turning to the second stage of the approach in *Willow Court*, the applicant contends that the tribunal should exercise its discretion to make the order sought as there is no other way of compensating it for Mr Moorjani's unreasonable behaviour. As a leaseholder-owned company it would not, it says, be fair for the leaseholders to have to pay the costs in issue through the service charge.

24. As to the third stage, the applicant's position is that it has carried out the sort of assessment that it would expect the tribunal to undertake at this stage, and has identified the costs that it considers it would be unjust for it, and the leaseholders, to have to bear. Those costs are identified in the witness statement of Mr Roger Hardwick, a partner at Brethertons LLP, the applicant's solicitors. The total costs for which a Rule 13 order is sought amount to £19,554.60, including VAT.

Mr Moorjani's Case

25. Much of the contents of Mr Moorjani's submissions in response to this Rule 13 costs application are irrelevant to the application under consideration. Many of the points made rehearse arguments raised by him in the substantive underlying applications, which were rejected by the tribunal in its final decision. The relevant points he raised in connection with this Rule 13 costs application appear, to me, to be the following:

    (a) he had not, in fact, sought damages, by way of set-off, within this application, and had specifically excluded this in his letter dated 29 March 2018. He argues that entitlement to a set-off was not raised in his reply to the substantive application, nor in his Scott Schedule. It appears to be his position that what he was in fact seeking was a *"reduction in Pavehall's* [the contractor overseeing the Major Works] *bill….due to delay in carrying out the works"* (see Mr Moorjani's reply dated 14 March 2019, para 8). He was not, he says, seeking damages for inconvenience or discomfort as a consequence of the delayed works, because that was to be claimed against the applicant in High Court proceedings (see his letter of 29 March 2018, paragraph three);

(b) four other leaseholders had concurred with the points made in his Scott Schedule, and so it was unfair to pursue a Rule 13 costs application against him alone;

(c) the costs sought are excessive for the work undertaken, with work concerning the 'historic neglect' argument not clearly identified in the supporting documents provided by the applicant. Mr Hardwick's hourly rates are challenged, as is the need for the experts' reports commissioned by the applicant;

(d) the applicant's counsel, Mr Bates, had been instructed from the outset of these applications, and before he had served his Scott Schedule. As such, there was no merit to the suggestion that less senior counsel would have been instructed if it had not been for his historic neglect challenge;

(e) although he has requested that he be permitted to withdraw from the applications, this request was refused by the tribunal, who went on to determine the historic neglect argument, so his request to withdraw should not be regarded as unreasonable behaviour; and

(f) failing on an issue in an application is not unreasonable conduct.

Decision and Reasons

26. Mr Moorjani was the respondent in this application, so the first question to address is whether he acted unreasonably in defending or conducting these proceedings. As stated in paragraph 6 of the applicant's Rule 13 costs application, drafted by Mr Bates, the applicant is not suggesting that resisting these applications constitutes unreasonable behaviour by Mr Moorjani. Nor does the applicant appear to be suggesting that raising the historic neglect challenge was unreasonable conduct. I agree on both of those points. When viewed objectively, I do not consider this was a fanciful challenge by Mr Moorjani, or on which he knew was bound to fail. Nor do I consider it was pursued solely to frustrate, or cause expense and inconvenience to the respondent. Rather, it was Mr Moorjani's subsequent conduct of the proceedings that leads me to conclude that it is appropriate to make a Rule 13 costs order in the applicant's favour.

27. I am not, however, persuaded, as the applicant suggests, that failing to commission alternative expert evidence, or witness evidence in support of his historic neglect defence constitutes unreasonable litigation conduct by Mr Moorjani. I remind myself that in *Willow Court* the Upper Tribunal said, at paragraph 24:

> "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?

28. At paragraph 25 it said:

> "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."

29. Further, at paragraph 26 it said:

> "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."

30. This is not a case where Mr Moorjani has been dilatory in complying with the tribunal's directions. Judge Andrew recorded in paragraph 5 of his directions of 14 May 2018 that the tribunals previous directions (dated 19 September 2017) had been largely complied with. As described in paragraph 22 of the tribunal's substantive decision I have been heavily involved in the case management of these applications and whilst Mr Moorjani has been very active in terms of the frequency of his correspondence to the tribunal, and in the number of procedural applications he has made, I am not aware of any significant non-compliance by Mr Moorjani with the tribunal's directions.

31. It is correct that no expert evidence was adduced by Mr Moorjani following Judge Andrew's direction that he had permission to rely on such evidence, and my decision of 23 July 2018, extending the deadline for him to serve any such evidence. I also note that in a reply to the tribunal on 29 October 2018, Mr Moorjani stated that he had made it clear to Judge Andrew at the case management hearing ("CMH") that he would not "be providing any witness statement or testimony for the trial".

32. However, the directions made in respect of both expert evidence and witness evidence were permissive. There was no direction from the tribunal that obliged Mr Moorjani to secure such evidence. In my judgment, a tribunal should be very slow to conclude that electing not to rely upon expert evidence, or witness evidence as to fact, amounts to unreasonable conduct, sufficient to justify a Rule 13 costs order.

33. This is particularly the case where the alleged defaulting party is unrepresented in the proceedings. As the Upper Tribunal in *Willow Court* identified in paragraph 32 of its decision, 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. Mr Bates suggests that Mr Moorjani is "no ordinary litigant in person", having fought a case before the Court of Appeal, and pursued his own proceedings before the High Court. He also points out that he has previously indicated that he "has some experience as a legal academic".

34. Whilst there is no doubt that Mr Moorjani has been a very active litigant, I do not consider his legal expertise is comparable with that of a professional adviser or advocate. He was successful before the Court of Appeal in *Moorjani v Durban Estates Ltd* [2015] EWCA Civ 1252, but he has been largely unsuccessful in these proceedings, and his subsequent requests for permission to appeal, and to commence judicial review proceedings have all been refused. I understand that his High Court application for damages for disrepair was also struck out, with permission to appeal that decision refused. In the tribunal's substantive decision in these proceedings it considered Mr Moorjani's challenge of virtually all heads of expenditure in issue as unmeasured and lacking in focus (paragraph 67). It also decided that his "historic neglect" arguments were unmeritorious and unsupported by evidence (paragraph 128).

35. I am unaware if Mr Moorjani has any background as a legal academic, but in my assessment, the way he has conducted these proceedings accords with that of a lay person who is unfamiliar with the substantive relevant law, and with limited knowledge of tribunal procedure. His challenge to virtually all heads of the Major Works expenditure in issue, and his pursuit of a misguided "historic neglect" argument, are in my clear examples of a lay litigant who to fails to properly appreciate the strengths or weaknesses of their own, or their opponent's, case.

36. I do however, consider that Mr Moorjani's late attempt to withdraw from these proceedings constituted unreasonable conduct for the purposes of Rule 13. The relevant background is set out at paragraphs 30 to 33 of the tribunal's substantive decision. In summary, Mr Moorjani wrote to the tribunal on 29 October 2018 stating that as he was now pursuing a claim in the High Court that he was "dropping out of FTT litigation".

37. In response to my directions seeking clarification as to whether he wished the tribunal to have regard to his previous written representations Mr Moorjani wrote on 1 November 2018, again indicating that he had "dropped out" of these proceedings but that as far as "disregarding my Scott Schedule etc" was concerned other leaseholders in his 'group', Mrs Dasani and Ms Dexter had "accepted

and concurred with them". It was, he said, therefore "for the tribunal to decide".

38. Mr Moorjani then emailed the tribunal at 11:15 on 2 November 2018, the last working day before the start of the hearing of the applications, stating that he had emailed his "withdrawal from the FTT proceedings". The applicant's solicitor objected to the removal of Mr Moorjani as a party to these proceedings stating that Mr Moorjani had contested almost every single item of expenditure in the Major Works final account, to which the applicant had been compelled to respond, at considerable expense, and that the tribunal's overriding objective entitled the applicant to have the benefit of the tribunal's determination on the challenges raised.

39. Mr Moorjani emailed the tribunal at 23:08 on Sunday 4 November 2018, in response to the applicant's solicitors' email of 2 November 2018, stating that as he had issued High Court proceedings any decision by this tribunal would be 'overruled' by a decision of the High Court. He repeated his intention of withdrawing from the tribunal proceedings.

40. However, as recorded in paragraph 41 of the tribunal's decision, it refused to give consent to Mr Moorjani to withdraw his case at such a late stage, concluding that to do so would not be in accordance with the tribunal's overriding objective to deal with a case justly and fairly given the substantial costs incurred by the applicant in preparing for the final hearing of the application.

41. I am conscious that in *Willow Court* the Upper Tribunal disagreed with a decision of the first-tier tribunal who had held concluded that a party, Mr Stone, had acted unreasonably by not withdrawing his application until a day or so before the hearing of his application. At paragraph 143 of its decision the Upper Tribunal stated that:

> *"It is legally erroneous to take the view that it is unreasonable conduct for claimants in the Property Chamber to withdraw claims or that, if they do, they should be made liable to pay the costs of the proceedings. Claimants ought not to be deterred from dropping claims by the prospect of an order for costs on withdrawal, when such an order might well not be made against them if they fight on to a full hearing and fail."*

42. However, what distinguishes Mr Stone's case from that of Mr Moorjani's, is that Mr Stone's decision to withdraw his application was made following advice from LEASE that he had little chance of success. Mr Stone had therefore decided to withdraw his application so as "to not waste the tribunal's time". Mr Moorjani however, did not seek to withdraw his objections to these applications because he had recognised the weakness, of lack of prospect of success of his arguments. Nor did he concede that the sums in dispute were payable by him. Rather, he sought to disengage from the tribunal proceedings to instead pursue his historic neglect challenge before the High Court,

thereby seeking to sidestep a determination by the tribunal. As recorded in paragraph 29 of the tribunal's decision, in his High Court claim, Mr Moorjani had repeated the historic neglect argument he had run before the tribunal, namely that delay in carrying out repairs to Ivor Court had led to a huge increase in the cost of the repairs forming the Major Works programme.

43. Such intention is also evidenced in his letter of 29 October 2018 to the tribunal in which he states that he was "dropping out of FTT litigation" as he was now pursuing a claim in the High Court, and in his email of 4 November 2018, to the tribunal, in which he stated that as he had issued High Court proceedings any decision by this tribunal would be 'overruled' by a decision of the High Court.

44. I conclude that to seek to withdraw on the last working day before a three-day hearing, after the applicant had incurred substantial cost in responding to his very extensive challenges, constituted unreasonable conduct. By such conduct, Mr Moorjani, rather than seeking to assist resolution of the tribunal proceedings was, instead, seeking to avoid a determination by the tribunal, so that he could run his historic neglect arguments in his High Court litigation. This was a misuse of these proceedings and, when viewed objectively, I can identify no reasonable explanation for such conduct.

45. Mr Moorjani suggestion that he had not sought damages, by way of set-off, within this application, is misguided. He clearly sought a reduction in the Major Works costs, by way of set-off, based on alleged historic neglect of the building by the applicant. To award such a set-off the tribunal would first need to assess damages to which he was entitled because of the alleged failure by the landlord to comply with its repairing obligations. Mr Moorjani's assertion that he was not seeking damages for inconvenience or discomfort because of the delayed works, is therefore irrelevant.

46. Also irrelevant is his submission that it was unfair to pursue a Rule 13 costs application against him alone. It is his conduct that is in issue, not that of other leaseholders. Nor do I accept his submission that as the tribunal refused his application to withdraw, and went on to determine his historic neglect argument, his conduct cannot be considered unreasonable. What is relevant is whether his conduct was unreasonable, not what action the tribunal took after the conduct in question.

47. Having found unreasonable conduct, the second stage suggested in *Willow Court* is to decide whether to make an order for costs. In considering this question I have borne in mind the tribunal's overriding objective in Rule 3, to deal with cases fairly and justly, which includes dealing with a 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."

48. I have also had regard to the fact that Mr Moorjani has largely been unrepresented in these proceedings. However, he has previously had legal advice in respect of the applications, having been represented by counsel at the CMH before Judge Andrew on 14 May 2018, when counsel confirmed that Mr Moorjani was pursuing a "historic neglect" challenge.

49. On balance, I am satisfied that it appropriate to make a costs order in the applicant's favour. I accept Mr Bates' submissions that there is no other way to compensate the applicant for Mr Moorjani's unreasonable behaviour, and that it would not be fair or just for costs arising out of that behaviour to fall to be paid by the leaseholders via the service charge, given that the applicant is a lessee-owned company. No mitigating circumstances, explaining his conduct, have been advanced by Mr Moorjani and I cannot identify any.

50. I now turn to the third stage of the *Willow Court* guidance, namely what costs order to make. I remind myself that at paragraph 40 in *Willow Court* the Upper Tribunal stated that the exercise of the power to award costs is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned.

51. In his witness statement, Mr Hardwick, seeks an order for payment of the costs incurred in respect of:

    (a) an expert report from Mr John Byers, of Langley Byers Bennet, addressing Mr Moorjani's historic neglect argument, including whether the costs of the Major Works could have been avoided if the work had been carried out at an earlier time. The costs sought include Mr Byers carrying out a site inspection, attending various conferences, and attending the first day of the hearing. His two invoices total £9,000 plus VAT.

    (b) counsel's fees of Mr Bates; and

    (c) solicitors' costs incurred by Mr Hardwick as well as costs incurred by trainee solicitors.

52. The applicant argues that Mr Moorjani's late abandonment of his historic neglect challenge means that *all* costs incurred by the applicant in meeting that challenge were unnecessarily incurred, and that an order for payment of all such costs should be made against Mr Moorjani. Whilst I recognise that I have discretion to make an order in those terms, I decline to do so. Given my conclusion that Mr Moorjani did not act unreasonably in raising a historic neglect defence, or in his conduct of this litigation, up until his attempt to withdraw from the proceedings, I consider the costs order to be made should be limited to costs unnecessarily incurred by the applicant, after 29 October 2018, when Mr Moorjani indicated his intention to "drop out" of the proceedings. In effect, this means the applicant's costs of responding to

the historic neglect defence in its preparation for, and at the hearing of the applications.

53. If these applications had proceeded in a costs-shifting jurisdiction, such as in the county court, then the applicant may well have been entitled to an order in its favour for the entire costs it incurred in resisting a defence that was abandoned shortly before trial. However, they did not, and the approach to assessment of costs in the civil courts is distinct from the approach to be taken by a tribunal when assessing costs under Rule 13.

54. In my view, a tribunal should be slow to make a Rule 13 costs order regarding costs incurred when an opponent was acting reasonably, on the basis that a subsequent unreasonable act rendered what was previously reasonable conduct, unreasonable. There may be situations when such an order might be appropriate, for example, where a tenant had defended a s.27A service charge application by relying on 20B Landlord and Tenant Act 1985, arguing that he had not received a valid, in-time service charge demand, but shortly before a final hearing his evidence was found to be untrue. In that scenario, the tenant's conduct throughout the period he maintained his defence would constitute unreasonable conduct, because it was founded on an untruth. However, that is distinct from this case, where the applicant is not contending that Mr Moorjani acted unreasonably up until the point that he sought to withdraw from the proceedings.

55. I have considered, but cannot identify, any mitigating circumstances, in Mr Moorjani's favour, that would justify a different costs order. It is true that after Mr Moorjani emailed the tribunal on 2 November 2018 confirming his wish to withdraw from the proceedings, Mr Hardwick objected to that request, arguing that the applicant was entitled to have the benefit of the tribunal's determination on the challenges raised. It is also the case that at the start of the hearing on 5 November 2018, Mr Bates, submitted that that the applicant wanted the tribunal to make a merits decision on all the points Mr Moorjani had raised in his Scott Schedule, as the applicant did not wish to relitigate those issues in the High Court.

56. However, there was nothing unreasonable in those requests, and whilst the tribunal's determination of Mr Moorjani's historic neglect defence may well have benefited the applicant when resisting his High Court claim, I do not consider that warrants a different Rule 13 costs order, then would otherwise be made if no determination had been made as to the historic neglect defence. In my determination Mr Moorjani's unreasonable conduct in these proceedings justifies a costs sanction irrespective of whether the tribunal's determination benefited the applicant in the High Court proceedings.

57. Turning to the amount of costs to be ordered, in the grounds of support of this Rule 13 application Mr Bates concedes that "the tribunal should not assume that *all* the costs claimed should be paid", although it

should does not follow that there needs to be a direct causal link between Mr Moorjani's unreasonable behaviour and the award made. He states that that "...the applicant has already done the sort of assessment process that it would expect the Tribunal to carry out", and that it has "identified what costs it considers it would be unjust for it (and the leaseholders to bear...".

58. That assessment appears at paragraphs 9 to 14 of Mr Hardwick's witness statement. Exhibited to his statement are copy invoices from Brethertons to the applicant, Mr Byers' invoices, counsel's fee note, and a 10-page detailed computer-generated ledger of time spent, and costs incurred by the applicant's solicitors. The ledger provided appears to contain details of all the costs incurred by Brethertons throughout this litigation. Mr Bates' fee note also appears to cover his entire involvement with these applications from October 2016 to January 2019.

59. I do not consider the applicant is entitled to a costs order in respect of those costs identified at paragraphs 9 and 10 of Mr Hardwick's statement as such costs were incurred prior to 29 October 2018. The costs in question being the costs of instructing the two experts, a conference with counsel on 2 May 2018, a site visit, and telephone conferences with counsel in May 2018.

60. As to paragraph 12, whilst it was clearly not unreasonable for the applicant to incur the cost of Mr Byers' report, given that the tribunal gave permission for it to do so, I do not consider Mr Moorjani should be ordered to pay the cost of preparing that report. This is because the costs were incurred prior to 29 October 2018. However, I consider an order should be made in respect of the costs of his attendance on the first day of the hearing. Mr Byers' invoice for doing so amounts to £1,500 plus VAT. Although his hourly charge out rate is stated to be £295 per hour, he limited his fees to £1,500. That is not an unreasonable sum for attendance for the whole of the first day of the hearing, and nor do I consider it unreasonable for Mr Byers to attend the hearing even though, as it turned out, there was no need for him to provide oral evidence in respect of his written report. It was possible that Mrs Grimshaw or the tribunal members may have had questions to ask of him.

61. Mr Hardwick has not exhibited an invoice from Mr Smith of Essex Fire Safety, and nor does he refer to his fees in paragraphs 9 to 14 of his witness statement. It appears therefore, that the applicant is not seeking an order for payment of his costs. In any event, permission to rely upon a report from Mr Smith was sought by the applicant to establish that works were necessary to comply with its duties under the Regulatory Reform (Fire Safety) Order 2005. Mr Smith's report was not therefore commissioned to address Mr Moorjani's historic neglect defence the costs incurred cannot, therefore, be included in the Rule 13 costs order.

62. I do not accept the argument raised at paragraph 14 of Mr Hardwick's witness statement, that if no historic neglect claim had been raised by Mr Moorjani, there would have been no need for the applicant to have instructed such experienced counsel as Mr Bates. As Mr Moorjani points out, and as is evidenced by his fee note, Mr Bates has been heavily involved throughout these proceedings, including settling the applicant's statement of case in October 2016, long before the applicant's applications were received by the tribunal on 9 August 2017.

63. I do not consider it likely that the applicant would have switched from using a barrister with such background experience in the case if Mr Moorjani had not raised a historic neglect defence, especially given that such defence was only one aspect of the challenge raised by Mr Moorjani, who has also argued against the need for virtually every head of Major Works expenditure, as well as the cost incurred. This would, in my view, still have been a dispute warranting the instruction of experienced junior counsel, given the scale of Mr Moorjani's challenge, as demonstrated by the 46-page Scott Schedule he relied upon.

64. I do, however, consider that a costs order should be made in respect of a proportion of the costs incurred by the applicant in preparation for, and at the hearing of these applications. The historic neglect challenge was dealt with fairly quickly at the hearing, in comparison to the amount of time spent dealing with the very large number of challenges to the payability of individual heads of Major Works expenditure. Mr Bates dealt with the issue in four paragraphs of his skeleton argument for the hearing, and the tribunal's decision on the subject amounts to 11 paragraphs of its final decision.

65. On balance, having regard to the amount of time taken at the tribunal hearing in dealing with the historic neglect defence, and the likely time it would have taken the applicant's solicitor and counsel, to prepare for responding to that defence at the hearing, I determine that an order should be made for Mr Moorjani to pay 20% of the reasonable costs of: (a) the applicant's costs of preparing for the hearing on 5 and 6 November 2020; and (b) the applicant's costs of attendance at the hearing itself, including counsel's fees.

66. I am, regrettably, unable to quantify the costs relating to the hearing as Mr Hardwick has not included these in his witness statement, and I find the ledger printout provided unclear. For example, an entry dated 23 October 2018 concerns: telephone conferences with the experts; a conference with counsel; bundle preparation and preparing for hearing; attendance at hearing; correspondence with FTT and associated email correspondence. However, also included is work in respect of Mr Moorjani's High Court application which clearly cannot be the subject of a Rule 13 costs order. In addition, the costs incurred appear to be £5,785 plus £10,062.40 disbursements, but I am unclear if that is correct and how those disbursements break down.

67. For that reason, I make the following directions, which include provision for the parties to make representations as to the amount reasonably payable by Mr Moorjani, following which I will summarily assess the costs, and make a Rule 13 costs order.

<u>DIRECTIONS</u>

1. By **9 October 2020** the **applicant** must send to the tribunal, and to Mr Moorjani, by email, a breakdown of the applicant's costs incurred in preparing for the hearing on 5 and 6 November 2018, and the costs of attendance at the hearing. The breakdown should be in the form set out in County Court Form N260 to enable me to carry out a summary assessment of those costs (on the basis that 20% of the reasonable costs are to be paid by Mr Moorjani, with Mr Byers' costs of attendance allowed in full). Any disbursement vouchers not already included in the hearing bundle should also be provided.

2. By **23 October 2020 Mr Moorjani** may send to the tribunal, and to the applicant, any written representations he wishes to make in response to the breakdown referred to in the previous direction.

3. The **applicant** may respond to **Mr Moorjani's** representations by **6 November 2020**, again sending these to the tribunal and to Mr Moorjani.

4. I will then determine the amount of costs that Mr Moorjani is ordered to pay by way of an addendum to this decision. Mr Moorjani's challenge to the solicitors' hourly rates will form part of that decision, so the parties should address that challenge in their representations.

5. The time for either party to apply for permission to appeal this decision will start to run from the date the tribunal issues its final decision (including the addendum). Notification of appeal rights will be included in that final decision.

Name: Amran Vance **Date: 21 September 2020**

ADDENDUM TO DECISION

Reasons for corrected decision and decision on costs payable by Mr Moorjani

68. Mr Hardwick was slightly late in complying with the first of the directions above. He provided a schedule of costs in form N260 on 14 October 2020. The costs identified total £27,931.

69. Mr Moorjani responded on 23 November 2020. On 4 December 2020, at my request, the tribunal notified the parties that after reading Mr Moorjani's representations I had identified that the decision above contained clerical errors regarding date. Reference to "19 October 2018" in paragraphs 21, 52, 59, and 60 should have read "29 October 2020". As stated in paragraph 30 of the tribunal's substantive decision of 7 November 2018 (reviewed on 15 April 2019) it was on 29 October 2018 that Mr Moorjani wrote to the tribunal stating that he was "dropping out of FTT litigation." The clerical errors have been corrected above, with the corrected decision issued to the parties with the tribunal's letter of 4 December 2020.

70. As I was uncertain as to whether the correction impacted on the Schedule of Costs submitted by Brethertons I directed that Mr Hardwick should either confirm that no amendments were needed to the form N260 previously submitted, or send a revised form N260 to the tribunal and to Mr Moorjani.

71. On 12 December 2020, Mr Hardwick provided a revised statement of costs in form N260, excluding work undertaken with the preparation of the trial bundle and index, such costs having been incurred prior to 29 October 2018. The total amount of costs incurred was reduced to £20,542.

72. Under cover of an email dated 22 December 2020, Mr Moorjani provided copies of the following documents concerning his High Court High Court claim seeking damages for disrepair (HT/2018/0003); namely: (a) Mr Bates skeleton argument for a hearing on 2 April 2019; (b) two statements of costs in form N260 in respect of Ivor Court Freehold Limited's costs dated 29 March 2019 and 26 July 2019; and (c) the Court's subsequent order dated 31 July 2019 in which Mr Moorjani was ordered to pay Ivor Court Freehold Limited's costs summarily assessed in the sum of £11,000. In his email, Mr Moorjani argues that the costs that the Applicant now seeks were duplicated in the High Court claim, in which the Applicant repeated historic neglect arguments pursued before this tribunal. He argues that as the Applicant recovered its costs in the High Court claim that it is not entitled to Rule 13 costs in these proceedings. He also disputes that 20% of the time spent at the hearing of this application was spent dealing with his historic neglect challenge, and that the any assessment of costs should be referenced to the actual time spent on the issue, which will be

apparent when a transcript of the hearing is made available. Mr Moorjani also disputed Mr Hardwick's hourly rate.

73. On 8 January 2021, I directed that by 22 January 2021, Mr Moorjani must send any further representations he wished to make regarding the amount of costs he is to be ordered to pay to the tribunal, and to Brethertons, with any representations in response from the Applicant to be sent to the tribunal and to Mr Moorjani by 5 February 2021. I would then make my decision. I also stated that if Mr Moorjani wished to request a transcript of the hearing that took place on 5th and 6th November 2018, he may do so by submitting a completed form EX107 to the tribunal. However, I concluded that there was no reason to delay compliance with my directions pending production of any transcript because Mr Moorjani did not need to have sight of a transcript to prepare his written representations. This was because:

> "in my decision, I determined that Mr Moorjani must pay (a) £1,750 in respect of the attendance of Mr Byers, the applicant's expert, at the hearing on 5 November 2018; and (b) 20% of the reasonable costs of: (i) the applicant's costs of preparing for the hearing on 5 and 6 November 2020; and (ii) the applicant's costs of attendance at the hearing itself, including counsel's fees. Mr Moorjani suggests that any award of costs must be confined to the actual time spent on dealing with his 'historic neglect' arguments at the hearing. I do not agree. As stated by the Upper Tribunal at paragraph 40 of the decision in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC) once unreasonable conduct has been identified the exercise of the tribunal's power is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned. The figure of 20% was my assessment of the appropriate award having regard to the seriousness and effect of Mr Moorjani's unreasonable conduct. Whilst the amount of time taken at the tribunal hearing in dealing with the historic neglect defence, and the likely time it would have taken the Applicant's solicitor and counsel, to prepare for and to respond to that defence at the hearing were relevant factors when determining the amount of costs to be ordered, I do not agree that the award must be constrained in the way Mr Moorjani suggests. It was permissible, when exercising my discretion, for the amount of the award to be determined on a 'broad-brush' basis, and I was not confined to make an order based solely on the exact time spent dealing with the issue at the hearing"

74. Mr Moorjani provided his further representations on 22 January 2021. There is no indication that he has applied for a transcript of the hearing. He argues that:

(a) any costs order must be confined to actual costs incurred in respect of the historic neglect challenge and that the decision to award 20% of costs incurred was arbitrary and disproportionate;

(b) Mr Hardwick's hourly rate should be assessed at £217 per hour and the amount claimed for travel was excessive;

(c) all time spent on personal attendances on the Applicant, including letter/emails out should be disallowed as they are not evidenced on Brethertons' time ledger. Further, personal attendance of 1-hour 8m on the Applicant was excessive;

(d) the attendance of Mr Kasu, a grade D fee earner, on the second day of the hearing was inappropriate;

(e) time spent on letters/emails to him were disputed as he cannot recall receiving such correspondence;

(f) Mr Bates' fees should be limited £2,000 for the first day of the hearing (but disallowing time spent visiting the Building); and a refresher of £1,000 for the second day of the hearing;

(g) Mr Hardwick and Mr Bates were paid for the same work in the High Court claim; and

(h) no work on preparation of bundles is allowable;

(i) time identified as being work on documents was already accounted for in "attendance at hearing"

75. No representations in response were received from the Applicant.

Decision and Reasons

76. In the decision above, I determined that Mr Moorjani must pay (a) £1,750 in respect of the attendance of Mr Byers at the hearing on 5 November 2018; and 20% of the reasonable costs of: (i) the applicant's costs of preparing for the hearing on 5 and 6 November 2020 (this should have read "2018"); and (ii) the applicant's costs of attendance at the hearing itself, including counsel's fees.

77. For the reasons stated in my directions of 8 January 2021, as identified at paragraph 73 above, I do not agree with Mr Moorjani that my Rule 13 costs order must be confined to actual costs incurred in respect of the historic neglect challenge. I therefore reject the assertion that the decision to award 20% of the reasonable costs referred to in the previous paragraph was arbitrary or disproportionate.

78. Nor do I accept that there is evidence that the costs that the Applicant incurred in this application, whether by its solicitors or counsel, were duplicated in the High Court claim. It is clear from Mr Bates' skeleton argument for 2 April 2019 High Court hearing, that the strike out application that led to the High Court costs order against Mr Moorjani was pursued on the basis that he was seeking to relitigate issues already determined by this tribunal. The two sets of proceedings are entirely distinct, and my examination of the N260's in the High Court does not to support the assertion that costs have been duplicated. This suggestion appears to be no more than speculation by Mr Moorjani and is rejected.

79. Turning to the costs sought by the Applicant in this application, as specified in the form N260 dated 26 December 2020, the hourly rates for the three fee earners is as follows:

    Roger Hardwick, Grade A, £350 plus VAT

    Gulsabaah Kasu, Grade D, £110 plus VAT

    Amy Evans, Grade D, £120 plus VAT

80. Most of the work has been carried out by Mr Hardwick. This has, from the outset, been a service charge dispute of considerable complexity concerning a major works project to a large Central London mansion costing in the region of £2 million. The application was strenuously opposed by Mr Moorjani. As such, I do not consider it unreasonable for a Grade A partner to have carried out most of the work on the case. Nor has Mr Moorjani taken this point.

81. Mr Moorjani suggests that Mr Hardwick's hourly rate should be assessed at £217 per hour. Brethertons are based in Oxfordshire. The current guideline figures for carrying out a summary assessment published by HMCTS place Oxfordshire in National Band 1. The guideline rates are £217 for a grade A fee earner, and £118 for a grade D. However, the guideline rates have not been updated since 2010, and in January 2021, the Civil Justice Council recommended increases in rates that are currently the subject of a consultation exercise ending in March 2021. They recommended an increase in the National Band 1 rates to £261 for a Grade A fee earner and £126 for a Grade D.

82. I mention the current consultation for background information only, and as I have not drawn this to the attention of the parties, I pay no regard to the proposals when reaching my decision. What I do consider relevant, however, is firstly that the guidelines are only guidance and are not binding on me, and, secondly, that the rates have not been updated since 2010.

83. Given that the rates have not increased for over 10 years, and bearing in mind inflation increases, I consider it reasonable to allow an hourly rate of £250 for Mr Bretherton and £120 for Ms Evans, a grade D fee earner. The other fee Grade D earner, Mr Kasu, I allow at £110.

84. Mr Moorjani's suggestion that Brethertons' time ledger does not refer to time spent on attendances is incorrect. It refers to a bill being produced on 23 November 2018 which included costs of attending a telephone conference with Mr Barclay and Mr Jacobs, and a separate telephone conference with counsel. Also included in that bill are the costs of preparing the hearing bundle, preparing for the hearing, meetings before, during and after the hearing, as well as other costs including associated email correspondence.

85. The form N260 is signed (electronically) by Mr Hardwick, a partner at Brethertons. I see no reason to doubt that the costs itemised in the N260 were incurred and billed to his client. Mr Hardwick, a partner in Brethertons, will be aware of the serious professional consequences that may flow from a claim being made for costs that were not incurred. There is no evidence to suggest that this has happened in this case. I consider the personal attendances on the Applicant of 1.2 hours by Mr Hardwick, and 0.50 hours by Mr Kasu, leading up to the final hearing, to be reasonable. Also reasonable are the 0.60 hours spent by Mr Hardwick on letters/emails to the Applicant, and the 1.30 hours spent on telephone calls to the Applicant.

86. No time is claimed on attendances on others or, contrary to his suggestion, with Mr Moorjani. As to preparation for the final two-day hearing, I consider it entirely reasonable for Mr Hardwick to have spent 1.5 hours in doing so. No other time appears in the schedule of work done on documents, and I do not understand why Mr Moorjani suggests that time has been claimed for work spent on bundle preparation. Nor have these costs also been claimed as costs of attendance as Mr Moorjani suggests.

87. Turning to attendance at the hearing, I allow as reasonable the five hours spent by Mr Hardwick for attending the first day of the hearing. I appreciate that the Applicant was represented by counsel at that hearing but given the complexity of this litigation and the last-minute attempt to withdraw pursued by Mr Moorjani, I consider it reasonable for him to have attended the first day of the hearing. He did not attend the second day, and Mr Kasu's attended in his place. I reject Mr Moorjani's suggestion that Mr Kasu's costs of attendance should be disallowed. It was perfectly appropriate for him, a Grade D fee earner, to attend to support counsel. The amount of time spent on travelling and waiting is reasonable but, in my view, at 50% of the fee earners hourly rates, as other work could have been undertaken during that time.

88. Turning to counsel's fees of £9,000 plus VAT, I see no reason to disallow any of the costs incurred. Mr Bates is very experienced in this area of the law and he had to consider a great deal of documentation in a very large hearing bundle to prepare for the final hearing. Costs of £6,500 for his brief fee and a £2,500 refresher for the second day of the hearing are not, in my view excessive given the complexity of this litigation. Contrary to Mr Moorjani's suggestion, these fees do not

include a site visit. Fees for a site visit were billed by Mr Bates on 15 May 2018, and are therefore irrelevant to this assessment.

89. I disallow the £200 claimed for the tribunal hearing fee as this would have been incurred in any event.

90. Having regard to the adjustments mentioned above, the costs I consider to have been reasonably incurred, for the purposes of the Rule 13 Order, are as follows:

Attendances on Applicant

Personal Attendances				Total
Grade A	1.2	hours at	£250.00	£300.00
Grade D	0.5	hours at	£110.00	£55.00
Letters out/emails	0.6	hours at	£250.00	£150.00
Telephone	1.3	hours at	£250.00	£325.00
Attendances at Hearing				
Grade A	5	hours at	£250.00	£1,250.00
Grade D	5	hours at	£110.00	£550.00
Travel and waiting				
Grade A	3	hours at	£125.00	£375.00
Grade D	3	hours at	£55.00	£165.00
Work on Documents	1.5	hours at	£250.00	£375.00
		Total Solicitors costs		£3545.00
		VAT	20%	£709.00
Disbursements				
Counsels fees				£9,000.00
		VAT	20%	£1,800.00
			TOTAL	**£15,054.00**

91. The amount that Mr Moorjani is ordered to pay is 20% of £15,054, namely £3,010.80, plus £1,750 in respect of the attendance of Mr Byers at the hearing on 5 November 2018. The total sum payable by him is therefore **£4,760.80** which should be paid by him to the Applicant within 28 days of issue of this decision.

ANNEX - RIGHTS OF APPEAL

Appealing against all of the above tribunal's decisions

1. 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 date this decision is sent to the parties.

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 state the grounds of appeal, and state the result the party making the application is seeking.