



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

Case reference : **LON/00AK/LDC/2020/0162
P: PAPERREMOTE**

Property : **Dover House, Bolton Road, N18
1HR
Jacksons House, Highview
Gardens, N11 1SH
Swinson House, Highview Gardens,
N11 1SJ
Walmer House, Bury Street, N9
9LH**

Applicant : **London Borough of Enfield**

Representative : **Ms Ludmilla Iyavoo, Legal Services
(ref: LS/C/LI/161308)**

Respondent : **Various long leaseholders at Dover
House, Jacksons House, Highview
Gardens, Swinson House and
Walmer House, including Dr R
Jamal who makes this application**

Representative : **In person**

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

Tribunal member : **Judge Donegan**

**Date of paper
determination** : **25 January 2022**

Date of decision : **26 January 2022**

DECISION

This has been a remote determination on the papers which has not been objected to by the parties. The form of remote determination was P: PAPERREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined on paper. The documents that I was referred to are in an electronic determination bundle of 339 pages, the contents of which I have noted.

Decision of the tribunal

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

The background

1. The Costs Application arises from proceedings under section 20ZA of the Landlord and Tenant Act 1985 ('the 1985 Act'). The applicant ('LBE') is the freeholder of Dover House, Jacksons House, Swinson House and Walmer House. The Costs Application is pursued solely by Dr Jamal, who is the long leaseholder of 123 Dover House.
2. On 29 September 2020, LBE submitted a s20ZA application to the tribunal, seeking retrospective dispensation from the consultation requirements at s20 of the 1985 Act ('the Dispensation Application'). The grounds of the application were detailed in four-page document accompanied by various appendices. In brief, the applicant had undertaken a project of lift modernisation in the four blocks but there had been various defects in their s20 notices and consultation procedure.
3. Directions on the Dispensation Application were originally issued on 20 January 2021 but subsequently varied on several occasions. The application was listed for a hybrid hearing on 12 and 13 July 2021. Three leaseholders, Dr Jamal, Ms Caceres and Ms Koukoulli, contested the application, all acting in person.
4. At 4:31pm on Friday 09 July, Ms Iyayoo, a senior solicitor in LBE's legal services department, sent the following email to the tribunal:
"RE: Urgent – notice of withdrawal
We write further to the above matter listed for a hearing on 12th and 13th July 2001.
We can confirm that the London Borough of Enfield has decided not to pursue its application for dispensation. We have therefore decided to withdraw the case and would ask you that the hearing is vacated.
We also confirm that we do not oppose any s.20C applications made by the leaseholders.
The relevant leaseholders have been copied in to this email."

5. The tribunal consented to the withdrawal in a letter of the same date and Judge Hawkes made orders under s20C of the 1985 Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, in favour of Dr Jamal, Ms Caceres and Ms Koukoulli on 13 July.
6. On 05 August 2021, Dr Jamal submitted the Cost Application. This took the form of a 21-page document dated 02 August 2021, alleging unreasonable conduct on the part of LBE and claiming total costs of £2,242.09. Dr Jamal subsequently clarified the grounds of his application in emails to the tribunal dated 15 September and 23 October 2021.
7. Directions were issued on the Costs Application on 26 October 2021. The case was allocated to the paper track, to be determined upon the basis of written representations. Neither party has objected to this allocation or requested an oral hearing. The paper determination took place on 25 January 2022.
8. Dr Jamal produced a determination bundle in accordance with paragraphs 6 and 7 of the directions. The tribunal considered the documents in that bundle together with the original Dispensation Application and Dr Jamal's position statement in response, when deciding the Costs Application.
9. The relevant legal provisions are set out in the Appendix to this decision.

The law

10. Dr Jamal seeks a costs order under Rule 13(1)(b), based on LBE's conduct of the Dispensation Application. He does not seek an order for wasted costs under Rule 13(1)(a).
11. Rule 13(1)(b) is engaged where a party has acted "*...unreasonably in bringing, defending or conducting proceedings...*". The Tribunal's power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007, which provides:
 - “(1) *The costs of and incidental to –*
 - (a) *all proceedings in the First-tier Tribunal, and*
 - (b) *all proceedings in the Upper Tribunal,**shall be in the discretion of the Tribunal in which the proceedings take place.”*

It follows that any rule 13(1)(b) order must be limited to the costs of and incidental to the proceedings before this tribunal, namely the Dispensation Application.

12. Not surprisingly, both parties referred to the decision of the Upper Tribunal ('UT') in ***Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC)***, which outlined a three-stage test for deciding rule 13 applications. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order. The second and third stages both involve the exercise of judicial discretion, having regard to all relevant circumstances and there need not be a causal connection between the unreasonable conduct and the costs incurred. Given the requirements of the three stages, rule 13 applications are fact sensitive.
13. At paragraph 20 of ***Willow Court***, the UT referred to the leading authority on wasted costs, ***Ridehalgh v Horsefield [1994] Ch***, where Sir Thomas Bingham MR considered the expressions "*improper, unreasonable or negligent*" and said:
- "'Improper' means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalties. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."*
- "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but is not unreasonable."*
14. At paragraph 24 of ***Willow Court***, the UT said "An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance in *Ridehalgh v Horsefield* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person have

conducted themselves in the manner complained of? Or Sir Thomas Bingham’s “acid test”: is there a reasonable explanation for the conduct complained of?”

15. At paragraph 26, the UT went on to say:

*“We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; **typically** those who find themselves before the FTT are **inexperienced in formal dispute resolution**; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation and to discourage obstruction, pettiness and gamesmanship.”*
16. The withdrawal of claims was addressed at paragraphs 35-37 with the UT saying *“It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and to abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged, by fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs”* (paragraph 35).
17. At paragraph 43 the UT emphasised that Rule 13(1)(b) applications *“...should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right.”*
18. Dr Jamal drew support from various other authorities, including ***Distinctive Care Ltd v Commissioners for HM Revenue and Customs [2018] UKUT 0012 (TCC)***, ***Tarafdar v Commissioners for HMRC [2014] UKUT 0362 (TCC)***, ***BPP Holdings Ltd & Ors v Commissioners for HMRC [2017] UKSC 55*** and ***HMRC v Smart Price Midlands Ltd & Anor [2019] EWCA Civ 841***. LBE also referred to ***Matier v Christchurch Gardens (Epsom) Ltd [2017] UKUT 56 (LC)***. However, the parties principally relied on ***Willow Court***, which remains the leading authority on Rule 13 costs.

The grounds of the Costs Application

19. Dr Jamal's case was detailed in the 21-page Costs Application and his emails dated 15 September and 23 October 2021. It is unnecessary to recite these grounds at great length and it would be disproportionate to do so, given the sum claimed is just over £2,000.
20. The grounds are summarised below.
 - (a) LBE acted unreasonably in failing to explain their decision to withdraw the Dispensation Application or provide any grounds for doing so. From this silence, it can be inferred the application lacked any merit and should not reasonably have been brought at all.
 - (b) LBE acted unreasonably in prolonging the Dispensation Application and withdrawing it so late in the day (the last half an hour of the last working day before the hearing), without explanation.
 - (c) Dr Jamal and the other active respondents had no alternative but to resist the Dispensation Application and should not be penalised in costs, for doing so.
 - (d) LBE acted unreasonably in failing to comply with the tribunal's directions. On 31 March 2021, Regional Judge Powell directed disclosure of estimates by 23 April 2021. This deadline was subsequently extended to 07 May and then 14 May 2021. LBE failed to disclose the actual estimates received, rather they produced "*Instructions to Tenderers*". This was willful disobedience of the Tribunal's mandatory order and cannot be justified on the basis the documents were commercially sensitive or prejudicial to commercial interests. The SRA Code of Conduct for Solicitors includes obligations to comply with court order and not to waste the court's time. Viewed objectively, LBE's non-compliance can be seen as "*conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case*" (**Ridehalgh**).
21. Dr Jamal stressed that LBE were legally represented throughout the Dispensation Application and obtained advice from counsel, Ms Victoria Osler, who also drafted their reply. He also highlighted their responsibilities as a public authority.
22. Dr Jamal contends that stages one and two in **Willow Court** are made out. As to stage three, he seeks all his costs of the Dispensation Application and the 21-page application included a breakdown of his time between 07 October 2020 and 03 August 2021. He claims a total of 115 hours at £19 per hour (£2,185), being the litigant in person rate in the County Court (paragraph 3.4 of Practice Direction 45 to the Civil Procedure Rules). He also claims document/printing costs of £57.09.

The total sum being claimed is £2,242.09 and he suggested this be paid to two charities, as he does not wish to profit from any costs order.

LBE's grounds for opposing the Costs Application

23. LBE contend their conduct does not come within Rule 13(1)(b) and rely on a reply 19 November 2021. Their grounds are summarised below.
- (a) Dr Jamal's is wrong to assume the Dispensation Application was withdrawn due to a lack of merit. Counsel advised the application had good prospects of success and drafted a robust reply, rejecting arguments advanced by Dr Jamal and Ms Koukoulli.
 - (b) The decision to withdraw the Dispensation Application was largely motivated by LBE's wish to maintain a good relationship with their leaseholders. Following exchange of witness statements on 02 July 2021, they recognised irregularities in their s20 consultation. They decided to withdraw, as it was the fair thing to do.
 - (c) The leaseholders have benefitted from the decision to withdraw, as their contributions to the lift modernisation works have been capped at £250 per flat.
 - (d) LBE did not willfully disobey the direction of Regional Judge Powell. There were good reasons for not disclosing the estimates, as they contained sensitive commercial data, and this was explained to Dr Jamal.
24. LBE contend that stages one and two of **Willow Court** are not met. As to stage three, they challenge both the hourly rate and time claimed by Dr Jamal. They contend he has not produced evidence of financial loss, has produced unnecessarily long documents and generated additional work by being unreasonable and obstructive.

The tribunal's decision

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

Reasons for the tribunal's decision

26. The threshold for making a Rule 13(1)(b) costs order is a high one. As stated at paragraph 24 of **Willow Court** "*...the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level.*"
27. The tribunal first considered whether LBE had acted unreasonably in bringing or conducting the Dispensation Application. When doing so, it only considered the period from 29 September 2020 (the date the application was made) until 09 July 2021 (the date the application was

withdrawn). Anything outside this period cannot be considered as it did not involve 'bringing or conducting' proceedings.

28. It was not unreasonable for LBE to issue the Dispensation Application, given there were acknowledged failings in the s20 consultation. This was natural step to take, as the tribunal could (potentially) have dispensed with the s20 requirements.
29. The tribunal has considered the grounds accompanying the Dispensation Application, Dr Jamal's position statement and LBE's reply. Based on these documents, the application had reasonable prospects of success. Had LBE proceeded with the hearing on 12 and 13 July, they may well have obtained dispensation (either with or without conditions). It follows they did not act unreasonably in continuing with the application.
30. LBE did not give reasons for withdrawing the Dispensation Application in their email dated 09 July 2021 but there is no requirement to give reasons in a notice of withdrawal (see Rule 22(2) of the 2013 Rules). The tribunal accepts the application was withdrawn as LBE considered it the fair thing to do, in the light of the s20 irregularities. This was reasonable and benefitted all parties, as it avoided their attendance at the hearing on 12 and 13 July. It also meant a substantial reduction in the leaseholders' contributions to the lift works. Arguably, LBE could have withdrawn earlier. They were aware of flaws in the s20 procedure when they issued the application. The tribunal also accepts the full extent of these flaws became apparent on exchange of witness statements (Friday 02 July 2021). This was only seven days before the withdrawal. LBE would have needed a few days to consider the statements and decide whether to proceed or withdraw. They did not act unreasonably in withdrawing the Dispensation Application at 4:31pm on 09 July.
31. The tribunal finds that LBE did not act unreasonably in failing to disclose the estimates. A failure to comply with directions can certainly amount to unreasonable conduct. However, it is necessary to consider the reason/s for non-compliance. The tribunal accepts LBE genuinely believed the estimates to be commercially sensitive, withheld the estimates on these grounds and explained their reasons. If Dr Jamal was dissatisfied with their explanation, then he could have asked the tribunal to exercise their case management powers (see paragraph 26 of ***Willow Court***).
32. Dr Jamal has not established any unreasonable conduct on the part of LBE. He has not satisfied the first stage of the ***Willow Court*** guidance and it is unnecessary for the tribunal to go on and consider the second and third stages.

Name: Judge Donegan **Date:** 26 January 2022

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

The Tribunals, Courts and Enforcement Act 2007

Section 29 Costs or expenses

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

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

Rule 13

Orders for costs, reimbursement of fees and interest on costs

- 13.-** (1) The Tribunal may make an order in respect of costs only –
- (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
 - (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
 - (i) an agricultural and land drainage case,
 - (ii) a residential property case, or
 - (iii) a leasehold case; or
 - (c) in a land registration case.
- (2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

...

- (7) The amount of costs to be paid under an order under this rule may be determined by –
 - (a) summary assessment by the Tribunal;
 - (b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the “receiving person”);
 - (c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment to be on the standard basis or, if specified in the costs order, on the indemnity basis.
- (8) The Civil Procedure Rules 1998(a), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(b) and the County Court (Interest on Judgment Debts) Order 1991(c) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph 7(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply. The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

...

Rule 22
Withdrawal

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

...