UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT procedure – appeal against award of costs for unreasonable conduct – s.29, Tribunals Courts and Enforcement Act 2007 – rule 13(1)(b), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – disregard of directions – personal attacks in correspondence – over lengthy and repetitive submissions – unrepresented party – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

PATRICK BRIAN MATIER

Appellant

and

CHRISTCHURCH GARDENS (EPSOM) LTD

Respondent

Re: 1 Christchurch Gardens,
Christchurch Mount,
Epsom, Surrey

Determination on written representations

The following case is referred to in this decision:

Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC)

Introduction

1. On 25 February 2015 the First-tier Tribunal (Property Chamber) ("FTT") determined an application by the respondent landlord concerning the liability of the appellant leaseholder to pay service charges under the terms of his lease of Flat 1, Christchurch Gardens, Epsom. The respondent was wholly successful in obtaining the determinations it had sought.

2. On 28 July 2015 the FTT granted an application for costs made by the respondent under rule 13(1)(b) of the Property Chamber Rules 2013 on the grounds that the appellant had acted unreasonably in the conduct of the proceedings. The FTT ordered the appellant to pay £1,250 plus VAT as a contribution towards the costs incurred by the respondent. The contribution was a relatively modest proportion of the total cost of the proceedings to the respondent which (including costs incurred in associated county court proceedings) exceeded £19,000.

3. The appellant was granted permission to appeal by this Tribunal. When granting permission the Tribunal described the decision of the FTT as careful and conscientious but nevertheless considered that it was arguable that the FTT had been in error in treating two aspects of the appellant's behaviour as constituting unreasonable behaviour. The first was his vigorous objection to the manner in which material which he wished to put before the FTT had been re-arranged and edited in the hearing bundle by the respondent's solicitors. The second was the prolixity of the appellant's written submissions (in circumstances where he acted without legal representation and where no guidance had been given by the FTT nor any limit placed on the written material which the parties were invited to submit).

4. Consideration of the appeal was postponed while the Tribunal considered the conjoined appeals in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (LC) which gave guidance on applications for costs under rule 13(1)(b). Following the publication of that decision the parties agreed that the appeal could be determined on the basis of their written representations without the need for an oral hearing.

Relevant facts

5. The respondent is the freeholder of a block of 34 flats at Christchurch Gardens. The appellant is the long leaseholder of Flat 1. The respondent is owned by the leaseholders of the flats in the building, including the appellant, and its directors are themselves leaseholders who act on a voluntary basis. The respondent engages a management company to manage the building on its behalf.

6. Little turns on the detail of the original dispute between the parties. It concerned arrears of service charges claimed by the company from the appellant. By May 2012 the sum in dispute totalled £2,443.00, of which £1100 related to the cost of external re-decoration undertaken in 2009. The appellant was dissatisfied with the quality of the external work and with the consultation which had been undertaken in advance of the contract being awarded.

7. Having made no progress in resolving the disagreement through the efforts of its managing agents, the respondent engaged solicitors to act on its behalf. In the course of their

earliest communications with the appellant those solicitors acknowledged that the statutory consultation which had preceded the award of the 2009 external re-decoration contract had been flawed. For that reason the solicitors informed the appellant that the respondent would limit its claim in respect of that element of the service charge arrears to £250.

8. Despite this concession no agreement was reached between the parties and on 7 June 2012 the respondent's solicitors wrote to the appellant demanding payment of £1,637 and warning that they anticipated receiving instructions to commence proceedings which, they pointed out, might ultimately lead to the forfeiture of the lease if the disputed sum was not paid. The appellant responded by inquiring of the solicitors whether they had been instructed by the managing agent, whose engagement he considered to be invalid "and probably illegal" because of a lack of prior consultation. The appellant took the view that the agents had no authority to act on behalf of the respondent or to instruct solicitors. The appellant also questioned the authority of the directors of the respondent (whom he referred to as "self-styled directors"). His hostility to the directors is apparent from the correspondence. He claimed not to be concerned about the sums involved in the dispute but only wished to see "a return to an honest administration" in place of "the abuse of power which has blighted our community for these last few years."

9. The protracted and repetitive correspondence between the appellant and the respondent's solicitors was unproductive. By September 2013 county court proceedings were commenced by the respondent in which the previous concession limiting the appellant's contribution towards the external re-decoration works was withdrawn and dispensation from the statutory consultation formalities was sought instead.

10. The proceedings were transferred to the FTT. In its decision given on 25 February 2015 the FTT concluded that the full amount of the service charges were reasonable; that the managing agents were not engaged under a qualifying long term agreement and hence no consultation had been required when they were appointed; that the respondent's admitted failure fully to comply with the statutory consultation requirements relating to the external painting contract could be dispensed with; and that the contract itself had been carried out to a reasonable standard.

The respondent's application for costs

11. The respondent applied to the FTT for the payment of its costs under rule 13(1)(b). The rule gives the FTT the power to make an order in respect of costs in a residential property case, if,a person has acted unreasonably in bringing, defending or conducting the proceedings.

12. In its application, which was settled by counsel, the respondent asserted that the appellant had acted unreasonably in raising the various issues on which he had relied as grounds of defence to the service charge claim. Alternatively he had acted unreasonably in the manner in which he had conducted the proceedings and had "corresponded frequently and unnecessarily" with their solicitors and with the tribunal thereby causing the costs incurred by the respondents to escalate. The respondent gave only one specific example of the unreasonable conduct it relied on, namely exchanges of correspondence with the FTT concerning the preparation of evidence for the substantive hearing. The only other example of unreasonable conduct was

expressed in general terms and complained of the appellant's presentation of his case both in writing and at the hearing itself; it was alleged that the appellant had caused the hearing to overrun the two days allotted to it and had made it necessary for closing submissions to be prepared in writing at additional expense.

13. On 27 April 2015 the FTT gave directions requiring the appellant to respond to the application by 13 May. The directions were sent to the appellant on 28 April under cover of a single letter which also enclosed a separate decision refusing permission to appeal and a certificate correcting a minor error in the original decision. It is clear from the appellant's subsequent submissions that he received all three of these documents (or parts of them) but in his appeal he maintains that the directions themselves comprised only a single page and that the second page of the document, including the timetable for him to respond to the application for costs, was not included in the material he received. The appellant acknowledged receipt of the FTT's letter by email on 29 April and asked whether the application for costs would be stayed pending the outcome of his intended appeal to this Tribunal.

14. It was clear from the FTT's covering letter of 28 April that it enclosed not only a decision refusing permission to appeal but also further directions. Despite it being apparent from the directions that they concerned the respondent's pending application for costs, the appellant appears not to have noticed that the first page of the document (which he says is all he received) contained no directions at all. It is surprising that the appellant did not raise this apparent omission with the FTT. It is also puzzling that the appellant did not rely on the omission to provide him with a complete copy of the FTT's directions when he applied to this Tribunal for permission to appeal the FTT's costs decision. He did complain in that application that the FTT had made its costs decision despite knowing that he had applied for judicial review of this Tribunal's refusal of his application for permission to appeal the FTT's substantive decision on the service charge dispute. In paragraph 80 of his application for permission to appeal the costs decision the appellant stated quite clearly that while his application for judicial review was pending he had taken the view that it would be premature for him to produce a detailed response to the application for costs. It is not easy to reconcile that statement with the appellant's suggestion that he had been unaware of the FTT's direction that he should produce a response to the submissions on costs by 13 May.

15. Despite these uncertainties I am prepared to proceed on the assumption that the appellant did not receive a full copy of the FTT's directions requiring him to respond to the application for costs. I think it extremely unlikely that he would have allowed the FTT to make a decision on such an important issue without hearing his side of the story. A far larger sum was at stake than in the substantive proceedings and the appellant clearly has both the time and the energy to argue his own case at considerable length. That he did not do so is more likely, in my view, to be attributable to a breakdown in communication than to a deliberate decision on his part not to respond while his judicial review application was awaiting determination.

The FTT's decision

16. In its decision the FTT rejected the suggestion that the appellant had acted unreasonably in contesting the proceedings at all. Although the appellant had failed in all of his arguments, with one exception the points he had taken had not been misconceived. There was a

substantial legal issue about the management agreement and the respondent had needed to obtain dispensation from the consultation requirements in relation to the external painting.

17. The FTT suggested that it would only be in very rare cases that a leaseholder would be found to have acted unreasonably in seeking to resist a dispensation application. I agree with that suggestion, and would go further. I would suggest that it will be equally rare for reliance by an unrepresented individual acting in good faith on points of defence, even if they are misconceived, to amount to unreasonable conduct. The FTT has ample powers to control the taking of manifestly bad points by striking them out or determining them summarily. It is preferable that the incurring of unnecessary costs be controlled by the exercise of those powers, rather than by penalising unrepresented parties who cannot tell a good point from a bad one. In this case the FTT found that the points taken by the applicant were not insubstantial, which ought to have been apparent to the respondent's advisers, but even if they had been weaker they would have provided no proper basis for an application for costs.

18. When it came to a consideration of the appellant's conduct of the proceedings the FTT found more substance in the respondent's complaints, and concluded that he had behaved unreasonably. Its core reasoning appears at paragraphs 14 to 16 of its decision, in which it said the following:

> "14. First, there was a long running and significant issue about the bundles. Following a lengthy CMC the Tribunal gave directions dated 8 July 2014 about the preparation of submissions, evidence and hearing bundles. The directions were intended in part to limit excessive and repetitive written submissions and documentations. The purpose is plain. In the words of the overriding objective, a limitation on documentation and written submissions enables the Tribunal "to deal with the case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties and of the Tribunal." The [appellant] resisted this process, and in the most trenchant terms. Between 15 September 2014 and the hearing date there were no fewer than [8 letters to the FTT] variously complaining about the contents of the hearing bundle and seeking an adjournment of the hearing. He was well aware that each of these letters would probably require some kind of response from the [respondent] and the tribunal. In the event, the documents [the appellant] complained about were all considered by the tribunal at the hearing. Many of these documents were simply elaborations on the statement of case (which were limited by the directions referred to above) or they proved irrelevant.
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> 15. In addition, the written material which the [appellant] relied upon was undoubtedly repetitive and prolix. The [appellant's] Case Summary document dated 17 August 2014 ran to 23 pages of closely typed script. The [appellant's] two bundles of documents included over 50 pages of detailed further argument cross-referenced with hundreds of exhibited documents. In a similar vein, the [appellant's] closing written submissions ran to a further 58 pages – not to mention a lengthy application for permission to appeal.
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> 16. In the tribunal's view, there is no doubt that the sheer volume of written material submitted by the [appellant] amounts to unreasonable conduct. The parties had agreed at the CMC that there were only 6 discrete issues and the amounts in dispute were not substantial. It was plainly not proportionate to the complexity of the issues or the costs and resources of the parties and the tribunal. The parties are required by rule 3(4) to help

the tribunal to further the overriding objective. The [appellant] conspicuously failed to enable the tribunal to deal with the application fairly and justly by wasting its time and the time of the [respondent] on unfocussed and prolix written submissions."

19. The FTT then considered the sum which should be awarded to the respondent in costs. It approached the assessment by seeking to identify costs which could be said to have been caused by the appellant's default, an approach which it described as "necessarily an inexact calculation". Nevertheless it regarded the best proxy for unnecessary additional costs as being the costs of the written closing submissions prepared by counsel at a cost of £1,250 plus VAT. It considered that these had only been necessary because of the appellant's unreasonable conduct during the hearing.

The appeal

20. When it gave its reasons for refusing the appellant's application for permission to appeal on the issue of costs the FTT dealt at some considerable length with his grounds of appeal. It had commented in its decision on the fact that it had received no submissions from the appellant in response to the application, and in the face of the appellant's complaint that he had not received a complete copy of the FTT's directions it asked itself specifically whether it should review its decision. One of the grounds on which a decision may be reviewed is if a document has not been received by a party. Given the uncertainty over the question of whether the appellant had received a full copy of the directions it was appropriate for the FTT to deal in detail with the grounds of appeal and to consider whether, had the same points been raised in good time, they might have made a difference to the outcome. It is clear that, having considered all of the points which the appellant made in his application for permission to appeal, the FTT remained firmly of the view that the modest award of costs which it had made was appropriate. It concluded that there was no realistic prospect of a successful appeal, declined to review its decision and refused to grant permission to appeal.

21. The appellant's application to this Tribunal for permission to appeal covers 20 pages organised in 101 paragraphs. The Tribunal gave permission to appeal on the 2 issues which I have already identified, namely whether the FTT was in error in finding that the threshold of unreasonable conduct had been crossed by him in his correspondence objecting to the manner in which documents were presented in the hearing bundle, and in the prolixity of his written and oral submissions. Despite those being the only two points on which permission to appeal was given the appellant submitted further wide-ranging submissions after it was agreed that the appeal would be determined on written representations. It is not my intention to deal in detail with the additional complaints made in those submissions. They included a repeat of complaints about the FTT's substantive decision, and critical observations on the appellant's alleged willingness to refer the dispute to mediation. I am satisfied that the FTT was fully aware of the background to the application for costs (including the correspondence on the subject of mediation) as a result of having considered the documents prepared for the substantive hearing. Permission to appeal was not granted in relation to those issues and I say no more about them.

22. The first ground of appeal for which permission was granted concerns the appellant's vigorous complaints about the preparation by the respondent's solicitors of the bundles for use

at the original hearing. This issue was dealt with at paragraph 14 of the decision on costs and it was a significant matter in the FTT's assessment of the appellant's behaviour. It is necessary to put the issue in context by referring to the facts as they emerge from the correspondence.

23. The procedural directions given by the FTT on 8 July 2014, shortly after the case had been transferred to it from the county court, referred to six specific issues which had to be determined. These had been identified at a case management hearing attended by the appellant and by counsel for the respondent. The directions required the respondent to provide certain documents, for the appellant then to provide signed witness statements of the evidence on which he intended to rely, and finally for the respondent to serve its own witness statements. The hearing bundle was to be prepared by the respondent and the FTT gave specific directions about the content of the bundle. It directed that the bundle be divided into three parts. Exhibits to witness statements (i.e. documents attached to a narrative statement) were to be excluded from that part of the bundle containing witness statements (section B) but were to be included in a separate section (section C) comprising exhibits and all of the documents disclosed by the respondent. The FTT required that these be arranged in strict chronological order. The FTT indicated that the hearing would last for 1 and a half days, including time for it to deliberate on its decision, and that it would commence at 11.00am following an inspection of the property at 10.00am on the first hearing day.

24. It is apparent from its detailed refusal of permission to appeal that the FTT took the view that it was the appellant who was in breach of its directions given on 8 July 2014 rather than the respondent's solicitors. The appellant hotly disputes that suggestion.

25. The appellant provided the respondent's solicitors with a witness statement, described as a "case summary", running to 23 pages. This document explained why he considered the directors of the respondent had abused their position, and had discriminated against him and subjected him to harassment when he sought to ensure that they obey the law, comply with the leases and comply with the wishes of the shareholders. The case summary was accompanied by what the appellant described as "a fuller explanation in file A" (the 50 pages referred to by the FTT) together with relevant documentary evidence in file B (the hundreds of pages of exhibits) and an album of photographs. The appellant explained that the evidence was presented in that way for the convenience of the FTT and to enable reference to be made to supporting documents easily and with a minimum of searching.

26. The respondent's solicitors were under directions from the Tribunal to omit exhibits to witness statements and to include these separately in chronological order. The appellant took no account of that direction when he prepared his evidence. The respondent's solicitors sought to comply with the direction by including the appellant's case summary with other witness statements in section B of the hearing bundle, and by re-arranging the contents of the appellant's files A and B in such a way as to omit duplicates and to organise the material in chronological order together with the documents relied upon by the respondent. In undertaking this task it appears that some or all of the appellant's commentary on documents, the "fuller explanation" which had been included in his file A, was omitted from the hearing bundles.

27. When the appellant's case summary and supporting material was first served on the respondent's solicitors they objected to eight specific paragraphs containing allegations against the directors of conflicts of interest and discrimination, refusal to mediate, complaints to the police, the threatened prosecution of one leaseholder, threats of physical violence, a refusal to produce documents and what were described as "other breaches of the law". The appellant responded by explaining that he wished the FTT not simply to consider the "unlawful conduct" (by which he meant failures of consultation) which was directly in issue but also to consider "the climate in which the unlawful conduct happened" during the entire period 2009 to 2012. The examination of this conduct would, he suggested, "indicate clearly a lack of truthfulness and integrity of many of the directors."

28. On 22 September 2014 the respondent's solicitors wrote to the FTT explaining that they had arranged the appellant's documents in chronological order as directed and acknowledging that they had omitted duplicate copies of documents and what they referred to as "the notes in file A" on the grounds that these were not part of the appellant's witness statement. They explained that in addition to the hearing bundles they had provided the FTT with a complete copy of the appellant's material for its reference and had informed the appellant that they had done so. The appellant wrote again to the Tribunal on 2 October and 15 October 2014 complaining of this conduct, eliciting further replies from the respondent's solicitors.

29. Having now seen the correspondence referred to in paragraph 14 of the FTT's decision I now have a very much better appreciation of the scope of this dispute than when granting permission to appeal. The appellant had prepared his evidence in a manner which he regarded as convenient but which entirely overlooked the directions given by the FTT. He had not included all of the evidence he wished to give in a single witness statement but had distributed it over a number of different documents to which he attached a great number of exhibits, none of them in chronological order and a great many of them having nothing to do with the six issues identified by the FTT in its directions. It was he who was at fault in failing to consider the FTT's directions with sufficient care and abide by them.

30. Given that the appellant was unrepresented and, as he pointed out, at risk of losing his home through forfeiture, it was not unreasonable that he should want to present his case in the best light and to organise it in a way which he thought would make it more readily understandable. Had his only default been to organise his presentation in an unorthodox manner there would have been no grounds for a costs sanction. However, when it was pointed out to him that the manner in which he had arranged the documents was not consistent with the FTT's directions, he ought to have appreciated that there was substance in that criticism. He did not do so. Instead he embarked on an intensive correspondence with the FTT itself complaining about the censorship of his case and the dishonesty of the directors and their agents. Despite the reassurance given by the respondent's solicitors on 22 September that all of his material had been provided to the FTT in its original form, as well as in the hearing bundles, and their offer to include any further documents which might inadvertently have been omitted, the appellant sent a further 5 letters to the Tribunal up to 26 October complaining about the contents of the bundle and seeking an adjournment of the hearing.

31. Having now a fuller appreciation of these exchanges I am satisfied that the FTT was entitled to conclude that the appellant was aware that each of his letters would require

consideration and a response from the respondent's solicitors as well as consideration by the FTT. There can have been no doubt in the appellant's mind that allegations about the truthfulness and integrity of many of the directors of the respondent company, who were his neighbours and volunteers, would be likely to provoke a response from the respondent's solicitors. It would also have been apparent to him, had he paused to consider, that these allegations had nothing whatsoever to do with the six issues identified by the FTT in its directions.

32. As it explained in *Willow Court* at paragraph 44, this Tribunal will be very slow indeed to substitute its own assessment of the conduct of a party in proceedings before the FTT for the assessment made by that tribunal itself. If the FTT properly directed itself on the applicable law, took into account all relevant matters, was not swayed by irrelevant matters, and did not reach a conclusion which was irrational, its assessment must be respected. It is not then for this Tribunal to substitute a different judgment on the significance and reasonableness of conduct which the FTT has directly experienced.

33. In my judgment the FTT was entitled to regard the appellant's behaviour in relation to the content of the bundles as unreasonable. Making every appropriate allowance for the fact that the material he wished to rely on had been edited and organised in a way inconsistent with his wishes, he nevertheless responded in an intemperate and unjustifiably aggressive manner. He continued in the same manner despite the reassurances given to him that all of the material he relied on had been provided to the FTT and that anything that had been omitted from the chronological bundles which he wished to rely on could be inserted if he would identify it.

34. There was therefore conduct which passed the threshold required to give the FTT jurisdiction to make an order for costs under rule 13(1)(b).

35. The second aspect of the appellant's conduct relied on by the FTT was that the written material he presented was "undoubtedly repetitive and prolix". His 23 page witness statement was supported by 50 pages of detailed further argument and 58 pages of closing submissions. These were described as "unfocussed", which is a fair comment on the documents I have seen.

36. The FTT reminded itself in paragraph 10 of its decision that the appellant acted without legal representation (although it also explained, correctly, that that was not a reason why rules, orders and tribunal directions should not apply equally to him). The FTT read all of the material provided by the appellant and, having seen much of it, I am satisfied that it was entitled to come to the conclusion that it exceeded by a considerable distance what was reasonable and proportionate to deal with the six discrete issues raised in the proceedings. The FTT had estimated that the hearing would be capable of being completed, allowing time for its own deliberations, in a day and a half. It clearly regarded the excessive written material presented by the appellant as contributing very significantly to the inability to stick to that timetable which, having regard to the limited issues, seems to me to have been a wholly realistic one. Even if, as the appellant points out, the inspection commenced later than had been intended, the first day of the hearing got underway by 11.30am and ought to have been capable of being completed within the time allowed. As it was, it was necessary to adjourn the hearing without closing submissions having been made and for the parties to be put to the

additional expense and inconvenience of preparing them in writing. Although the appellant blames the respondent's counsel for the duration of the hearing, the FTT took a different view and it is impossible for this Tribunal to find on the material before it that the FTT's view was not one reasonably open to it.

37. Whether a similar inability to be concise and tendency to repetition would amount to unreasonable conduct in any other case is not a question which arises. The appellant's behaviour occurred in the context of these proceedings, after he had made repeated allegations of misconduct and illegality against the directors of the respondent and its agents, and after the exchanges over the contents of the bundles. The FTT was entitled to make a judgment on the appellant's conduct in that context and to be satisfied that there was no good reason for him to behave as he did and that a reasonable person in his position would not have done so.

38. I am therefore satisfied that the FTT was entitled to regard the appellant's behaviour as having been unreasonable. There is no appeal against the modest assessment of costs which the FTT made and I therefore dismiss the appeal.

Further applications

39. There remains only to consider further applications made by both parties relating to the costs of the proceedings and of the appeal. The respondent has asked for an order under rule 10 of the Lands Chamber Rules 2010 for its cost of responding to the appeal on the grounds that the appeal was brought unreasonably and included numerous unparticularised and unsupported allegations in the application for permission. I do not regard the appellant's conduct in making the application for permission to appeal (which was successful) or in presenting the appeal as having been unreasonable. I take into account the fact that he is unrepresented and relatively unfamiliar with legal proceedings, that he feels a genuine though misplaced sense of grievance about the manner in which the FTT's directions in relation to the hearing bundles were complied with by the respondent's solicitors and am satisfied that his presentation of his case did not cross the line between reasonable and unreasonable behaviour.

40. The appellant has also included in his written material a request that costs he incurred in the proceedings before the FTT should be the subject of an order under rule 13 of the Property Chamber rules in his favour. No such application was made to the FTT and it is not open to the appellant to make an application for the first time in this Tribunal. Finally the appellant makes an application under rule 10 of the Lands Chamber Rules 2010 for an order in his favour for the costs of the appeal. I am satisfied that neither the respondent nor its solicitors have behaved unreasonably in the conduct of the appeal and there is no basis on which such an order could be made in the appellant's favour.

Martin Rodger QC
Deputy Chamber President

15 February 2017