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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BC/2018/166**
Property	:	**Flat 305, Elizabeth Court, Navestock Crescent, Woodford Green, Essex IG8 7BG**
Applicant	:	**London Borough of Redbridge**
Representative	:	**Mr Gethin, Batchelors Solicitors**
Respondent	:	**Mr G Kadri**
Representative	:	**Mr R Bowker of counsel**
Type of Application	:	**For costs**
Tribunal Members	:	**Tribunal Judge Prof R Percival** **Mr D I Jagger MRICS**
Date of Decision	:	**4 December 2018**

DECISION

The application

1. The Applicant seeks an order for costs under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"), rule 13(1)(b).

Background

2. On 3 September 2018, the Tribunal issued our decision on the applicant landlord's application for a determination under section 27A of the Landlord and Tenant Act 1985 and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in respect of both service charges and administration charges claimed by the applicant.

3. On 5 October 2018, the application for an order under rule 13(1)(b) was received in the Tribunal office. It was dated 3 October. On 17 October 2018, we issued directions that the respondent tenant be invited to submit representations on the application, to be received by 1 November 2018. On October 30, representations drafted by Mr Bowker for the respondent were received in the Tribunal office.

4. As the procedural background to the substantive section 27A/schedule 11 claim is relevant to the determination of the application before us, we reproduce paragraphs 3 to 8 of our decision:

> 3. Proceedings were originally issued in the County Court Business Centre under claim number D3QZ43PN. The claim was for £2,438.69 in respect of service charges, and separately £427.72 in respect of metered heating and hot water costs. In addition, the applicant claimed contractual legal costs of £1,264.80.
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> 4. The claim was transferred to this Tribunal by order of District Judge Rand at the County Court at Clerkenwell and Shoreditch on 16 April 2018.
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> 5. Following the transfer of the case to the Tribunal, directions were issued on 2 May 2018, providing in the usual way for disclosure, statements of case and preparations for the hearing.
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> 6. On 27 June 2018, the Tribunal wrote to the parties, setting out further orders made by a procedural judge. From the letter, it is apparent that the respondent had written to the applicant, but not the Tribunal, in relation to an application to vary the directions, in a letter dated 21 June 2018. The issue appears to have

been that the respondent asked for a delay in the hearing date because of travel plans. A subsequent letter, dated 25 June, referred to the first letter and attached what, from the description in the letter, appears to have been a rudimentary statement of case.

7. The letter records the orders of the procedural judge that:

(i) the respondent supply a copy of the letter of 21 June, together with evidence of pre-booked travel arrangements;

(ii) the applicant make accounts and invoices available for inspection in the week commencing 2 July 2018; and

(iii) that by 9 July 2018, the respondent serve a complete schedule identifying the service charge items challenged, with reasons.

8. On 16 July 2018, Judge Andrew issued a decision and further directions. The decision was that the respondent be barred for taking any further part in these proceedings pursuant to rules 9(3)(a),(b) and (d) and rules 9(7) and (8), the respondent having failed to comply with the directions of 2 May and those in the letter of 27 June, and in particular had failed to adequately state his case and/or identify the costs to which he objected, with reasons. The directions related to preparations for the hearing in the light of this decision.

The section 27A/schedule 11 application

5. The applicant asked us to decide two issues. In respect of the service charges, the respondent had paid the claim in full in July. The applicant submitted that in the circumstances, the respondent had agreed or admitted that the service charges were payable and reasonable. We decided that he had.

6. The second issue before the Tribunal related to the payability and reasonableness of claimed contractual legal costs. In respect of this issue, we decided, against the applicant, that the costs were not payable under the section 146 notice clause in the lease (paragraph 16 of the seventh schedule).

The extension of time application

7. The application was two days out of time. The applicant did not formally apply for an extension of time, but did state that the decision in the 27A application had been received on 5 September and that "the Applicant's solicitor has been unexpectedly absent from the office from 20 September to today's date [3 October]." By Rule 13(5), an application must be made within 28 days after the date on which the Tribunal sends the decision notice.

8. In the directions, we stated that we were prepared to consider the application as an extension of time application under rule 6(3)(a) of the Rules.

9. The respondent did not oppose the application for an extension of time.

10. We are prepared to extend, on the basis that it is for a very short time, in the light of the overriding objective (Rule 3). We record, however, that the bare statement that the solicitor with conduct of the case was unexpectedly absent is not an adequate explanation.

The costs application

The parties' submissions

11. The application sets out the history of the litigation, in particular drawing attention to the inadequacy of the respondent's defence when the matter was before the County Court, his failure to comply with directions or to avail himself of the respondent's offer for him to inspect invoices at their offices, his failure to substantively engage with the Scott schedule, and with the further letter from the Tribunal, and his failure to attend the hearing.

12. The application concludes that if the respondent had engaged with the process, the issues in dispute could have been considerably narrowed. It goes on

> "The respondent's failure to engage with the proceedings, either in failing to comply with directions or even to attend the hearing so as to be satisfied that the applicant had properly incurred costs, is a *prima facie* example of unreasonable conduct in defencing the proceedings."
>
> "The respondent has frequently failed to engage with the applicant's solicitors in responding to simple requests for clarification as to the issues in dispute."

13. In his response, Mr Bowker for the respondent submits that our consideration of the applicant falls to be determined according to the well-known principles set out in *Willow Court Management Company*

(1985) Limited v Alexander and conjoined appeals [2016] UKUT 290 (LC); [2016] L. & T.R. 34. Those principles require us to consider, in turn, whether the conduct of the party against whom the application is made is, on an objective test, unreasonable; the exercise of the discretion conferred on the Tribunal by rule 13(1)(b); and finally the terms of an order, including quantum of costs, if an order is to be made (*Willow Court* at [28]).

14. Mr Bowker takes the applicant to task for failing to mention *Willow Court*, particularly in a case in which the respondent had not been represented previously. The applicant's failure to structure the application according to the *Willow Court* principles is, the respondent argues, sufficient to justify dismissing the application.

15. Mr Bowker also refers the Tribunal to the observations on the appropriate level of representation before the Tribunal at *Avon Ground Rents v Child* [2018] UKUT 204 (LC), at [65] and [66].

16. In relation to the first *Willow Court* stage, Mr Bowker argues that the respondent's conduct may have been mistaken, self-defeating, unhelpful and uncooperative, but was not unreasonable in the narrow sense identified in *Willow Court.*

17. As to the second stage, even if we were to find the respondent's conduct unreasonable, we should exercise our discretion against making an order. Mr Bowker relies on the proportionality principle in rule 3(2). In particular, he points to the resources of the parties, and the disparity thereof, and the call on the resources of the Tribunal.

18. Finally, if we were to find against the respondent, Mr Bowker submits that any order should be considerably less than that contended for by the applicant, both having regard to the details of the work for which the claim is made, and to the observations of the Upper Tribunal in *Avon v Child* as to whether legal professional representation is appropriate in such cases.

Discussion and conclusions

19. We must, as Mr Bowker rightly submits, consider the application by applying the sequential approach set out in *Willow Court.* While it would no doubt have assisted the Tribunal if the application had been couched in terms of this approach, we do not accept Mr Bowker's argument that the failure to do so alone is sufficient reason for us to dismiss the claim.

20. We therefore consider first unreasonableness. It is important that the Upper Tribunal reaffirmed the importance of the approach to unreasonableness taken, in a distinct context, by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205, in which Bingham LJ said that

the term connoted "conduct which is vexatious, designed to harass the other side rather than advance the case."

21. The Upper Tribunal rejected at [23] to [24] a submission that it should, in general

> "treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, [or] fails to state their case clearly ..."

22. In this case, the complaint against the respondent is largely limited to his failure to "engage", including failing to adhere to directions. As a result of that behaviour, he was barred from taking further part in the proceedings. That was an appropriate response to these failings, but nonetheless they were failings which fall within the description set out above.

23. The Upper Tribunal also took account of the position of unrepresented parties. That a party is a litigant in person is relevant to the assessment of the reasonableness of their conduct ([25], [31] to [34]). Broadly, the conduct complained of is that the respondent did not do that which was required of him, and indeed, which it would have been in his interests to have done. Such negligence or blind-eye turning, in a lawyer, could well reach the high threshold for *Willow Court/Ridehalgh* unreasonableness, but we do not consider it did so in the case of the respondent, while unrepresented.

24. We should add that we consider the applicant's complaint that the respondent did not attend the hearing is misconceived, given the order barring him from taking part in proceedings. He could, of course, have attended, but without further order from us, he could not have taken any part in the hearing.

25. We conclude that the respondent's conduct, while reasonably characterised as unhelpful, even irresponsible, was not, in the required sense, unreasonable, and therefore the pre-condition for the making of an order under rule 13 is not made out.

26. One aspect of the circumstances of the application has, however, given us pause. In his order barring the respondent from taking further part in the proceedings, Judge Andrew relied on rule 9(3)(a), (b) and (d). Each condition is sufficient on its own to justify the making of the order.

27. Rule 9(3)(d) states that the Tribunal may strike out a case if

> "the Tribunal considers ... the manner in which [the proceedings] are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal"

The order itself was adapted in accordance with rules 9(7) and (8) to the barring of a respondent rather than striking out of an application.

28. The applicant did not rely on the use of this provision, and no argument has been addressed to us by either party as to its relevance to our decision. Nonetheless, we have given the point some consideration.

29. We conclude, first, that the Judge may have been relying on the respondent's conduct as being "otherwise an abuse of the process of the Tribunal" rather than being "vexatious" (it is unlikely he would have had in mind that it was "frivolous").

30. Secondly, even if the Judge had meant that the respondent's conduct was vexatious, we doubt that that would be a finding binding upon us in respect of this rule 13(1)(b) application.

31. In one of the cases heard with *Willow Court, Sinclair v Sussex Gardens Right to Manage Ltd*, a rule 13(1)(b) costs application was made at the case management conference ("CMC") and refused. The Tribunal subsequently made an order under the rule, on the basis that the procedural judge at the CMC "did not intend [the CMC ruling] to be definitive" and exclude a later application. The Upper Tribunal was critical of this stance:

> "There is no statement to that effect in the decision given on 10 February 2015 and the renewal of the rule 13(1)(b) application was not listed by the procedural judge as one of the matters in issue."

See *Willow Court* at [87].

32. We note that the Upper Tribunal relied on further procedural flaws in the final order in reversing it, rather than the Tribunal's re-consideration of the earlier order.

33. But in any event, we consider that it is one thing for a ruling made at a CMC to be binding as to conduct up to that time, should a subsequent application for *the same order* be made at a later point in the proceedings. It is quite another to find that an assessment of the quality of the conduct made at one time for the purposes of one procedural order should subsequently be binding as to that assessment for the purposes of a quite different order.

34. In the *Sussex Gardens* case, the Upper Tribunal implied that, had there been an indication that the first ruling was not to be considered determinative, that would have been effective. In this case, we overwhelmingly doubt that Judge Andrew would have considered that he was in effect pre-determining an application under rule 13 by referring to rule 9(3)(d) in making the barring order as he did. Had one of the parties suggested that he should state that it was not

determinative of a costs application, we consider it likely that he would have found the suggestion surprising and unnecessary.

35. In addition, unlike the *Sussex Gardens* case, the finding (here, that the conduct was vexatious) was not necessary to the making of the barring order.

36. Nonetheless, we consider that in the circumstances it would be appropriate for us to set out, briefly, how we would have chosen to exercise our discretion at the second *Willow Close* stage.

37. At a very general level, the question in *Willow Close* was when the First-tier Tribunal's general rule that costs are not shifted should be displaced, and costs should follow the event. In all of the appeals considered by the Upper Tribunal, a costs order against a losing party was reversed.

38. In this case, while we found for the applicant on the question of whether the respondent had agreed or admitted the (paid) service charge, we found for the respondent on the administration charge. The latter was clearly the more significant issue before the Tribunal.

39. That the respondent was preponderantly successful at the hearing is, we consider, a matter to which we should have regard in considering how our discretion should be exercised, if we are wrong to conclude that the conduct of the respondent was not unreasonable. Neither could it be said that his conduct immediately before the hearing in settling the service charge was unreasonable, even if his conduct before that point was (ex hypothesi) unreasonable.

40. In addition, we take into account that the respondent was acting in person, and give that due weight at stage two, without excessive indulgence.

41. Accordingly, if we are wrong to conclude that the respondent's conduct was not unreasonable to the required degree, we would have exercised our discretion not to make an order under rule 13(1)(b).

42. It is not necessary to consider the third stage in the *Willow Court* sequence.

43. We refuse the application.

Name: Tribunal Judge Professor Richard Percival **Date:** 4 December 2018