FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AQ/LLD/2018/0002**
Property	**:**	**Flat 2 Stonegrove House, Stonegrove, Edgware HA8 7TG**
Applicant	**:**	**Contract Hire Company (UK) Limited**
Representative	**:**	**Miss Lucy Stone QC (Counsel)**
Respondent	**:**	**Stonegrove House Limited**
Representative	**:**	**Mr Graeme Kirk (Counsel)**
Type of application	**:**	**Application for costs order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal members	**:**	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Neil Martindale FRICS (Valuer Member)**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**06 February 2019**
Date of amended decision	**:**	**15 March 2019**

AMENDED DECISION

The Tribunal has corrected clerical mistakes/accidental slips in paragraphs 4, 36 and 54 its original decision dated 26 February 2019, pursuant to Rule 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The corrections are all underlined in this amended decision.

Decision of the Tribunal

The Tribunal makes the costs order set out at paragraph 36 of this decision.

The Costs Application

1. This application ('the Costs Application') arises from a decision of this Tribunal dated 16 May 2018 ('the 2018 Decision'), made in proceedings ('the 2018 Proceedings') under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002.

2. The Costs Application was made in June 2018 but was incorrectly dated 12 April 2018. There has been a substantial delay in hearing the application, as the respondent sought permission to appeal the 2018 Decision from this Tribunal and the Upper Tribunal ('UT'). Both applications were refused and the applicant then sought permission to apply for Judicial Review of the UT's refusal, which was rejected by the Administrative Court on 05 November 2018. The Tribunal granted various stays of the Costs Application at the request of the respondent, with the final stay ending on 30 November 2018.

3. The relevant legal provisions are set out in the appendix to this decision.

The background and procedural history

4. The applicant is the leaseholder of Flat 2, Stonegrove House, Stonegrove, Edgware HA8 7TG ('the Flat'). The respondent is the freeholder of Stonegrove House, which contains eight flats let on long leases.

5. The background is largely set out in the 2018 Decision. In brief, the applicant queried various service charges for the Flat during 2016-17 2017, before paying the full sum claimed (£4,832.20) in July 2017. The managing agents subsequently demanded the respondent's costs for recovering these charges, totalling £4,471.80 ('the Initial Costs'), as an administration charge. These were claimed under clause 3(1)(f) of the applicant's lease, which obliges the applicant:

   "To pay all expenses (including Solicitor's costs and surveyor's fees incurred by the Lessor incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court".

6. The applicant disputed the Initial Costs and submitted an application to the First-tier Tribunal ('F-tT') under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act'), which was decided on paper ('the 2017 Proceedings'). It was not legally represented in those proceedings. The respondent was represented by N R Russell & Co Solicitors ('NRRC'). The F-tT determined that the Initial Costs were contractually recoverable but reduced them to £3,042.80, in a decision dated 19 December 2017 ('the 2017 Decision'). At paragraph 22 it declined to make an order under section 20C of the 1985 Act, saying *"the tribunal does not consider that the lease contains an appropriate costs clause; the Fourth Schedule would not appear to apply. However, taking into account the determinations, the tribunal determines that it would not be just and equitable for an order to be made under section 20C of the 1985 Act in this case."*

7. The applicant paid the sum of £3,042.18 to the managing agents on or about 02 January 2018. On 04 January, the agents demanded the respondent's costs of the 2017 Application in the total sum of £23,705.13 ('the Further Costs'); again as an administration charge. The applicant wrote to NRRC on 25 January, threatening a paragraph 5A application unless the demand was withdrawn by 30 January. The demand was not withdrawn and the application was submitted on 31 January.

8. The 2018 Proceedings were heard on 20 April 2018 with both parties represented by experienced property counsel; Miss Myriam Stacey (1998 call) for the applicant and Mr Edward Denehan (1981 call) for the respondent. Miss Stacey was instructed by the applicant, via public access whereas Mr Denehan was instructed by NRRC. The Tribunal dealt with the contractual recoverability of the Further Costs, as a preliminary issue and determined they were not recoverable under clause 3(1)(f) of the lease. It gave its decision verbally at the hearing and subsequently issued the 2018 Decision, which included its detailed reasons.

The law

9. The applicant seeks a costs order under rule 13(1)(b)(ii) of the 2013 Rules. It alleges that the respondent acted improperly and unreasonably in the 2018 Application. It does not seek an order for wasted costs under rule 13(1)(a).

10. 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 ('the 2007 Act'), 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 2018 Proceedings.

11. Rule 3(1) of the 2013 Rules provides that "*The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly."* This extends to *"dealing with the case in ways that 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"* (rule 3(2)(a)).

12. Not surprisingly, both representatives referred to the UT's decision 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, 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. 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."*

17. The respondent also relied on two additional UT decisions, ***Primeview Developments Limited v Ahmed and others***

[2017] 57 (LC) and ***Matier v Christchurch Gardens (Epsom) Ltd [2017] UKUT 56 (LC)***. In ***Primeview*** the UT distinguished conduct in the substantive underlying dispute with conduct of the proceedings (paragraphs 60 and 61) and allowed the landlord's appeal against a rule 13 order. In ***Matier*** it upheld such an order, made against a tenant acting in person. The order arose from the tenant's unreasonable conduct of the proceedings (non-compliant hearing bundles and excessive written material).

18. In addition to these authorities, the Tribunal referred the parties to the Court of Appeal's decision in ***Dammerman v Lanyon Bowdler LLP [2017] EWCA Civ 269***. That appeal concerned a costs order made on a Small Claim in the County Court and the operation of Part 27.14(2)(g) of the Civil Procedure Rules ('CPR'), which has some similarities with rule 13(1)(b). In Small Claims the Court has very restricted costs powers but it can make a cost order against a "*party who has behaved unreasonably*". This is qualified by Part 27.14(3), which provides "*A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test.*"

The hearing

19. The hearing of the Costs Application took place on 06 February 2019. The applicant was represented by Miss Stone QC. She is the company secretary for the applicant and was accompanied by her husband, Mr Charles Coleman, who is the sole director. The respondent was represented by Mr Kirk, who was accompanied by its sole director, Mr Rajesh Nihalani.

20. The applicant delivered hearing bundles to the Tribunal on 04 February, which meant the members did not get an opportunity to read them until the morning of the hearing. The bundles included a detailed position document from Miss Stone, copies of the application and response, copies of the statements of case and skeleton arguments from the 2018 Proceedings and copies of the 2018 Decision and the various applications and orders made since that decision. The Tribunal was also supplied with a chronology from Miss Stone, a skeleton argument from Mr Kirk and a statement of costs from NRRC.

21. At the start of the hearing, Miss Stone updated the Tribunal on the proceedings in the Administrative Court. Mrs Justice Lang DBE refused permission to apply for Judicial Review on 05 November 2018 and provisionally ordered the respondent to pay the applicant's costs, as claimed in the sum of £7,650. The respondent objected but the costs order was confirmed by Mr Justice Murray on 21 December 2018. The respondent subsequently applied for permission to appeal both costs orders, a time extension and a stay, with the applications filed with the

Court of Appeal on 09 January 2019. Those applications are yet to be decided. However, the decision to refuse permission to apply for Judicial Review is final. This means the 2018 Decision is also final.

22. After a short adjournment to consider Miss Stone's position document and Mr Kirk's skeleton argument, the Tribunal then heard oral submissions from both counsel.

The applicant's case

23. Initially, Miss Stone highlighted the voluminous documentation served by the applicant in connection with the 2017 and 2018 Proceedings and the subsequent applications to the UT and Administrative Court. She then made submissions on the respondent's conduct, which she described as "*over aggressive, oppressive and intimidatory*". In doing so, she highlighted paragraph 46 of the 2018 Decision which recorded Mr Denehan's statement that "*It was the respondent's modus operandi to forfeit for unpaid sums, as evidenced by the 2017 Decision. This might be viewed as overly aggressive but forfeiture was an available remedy.*"

24. Miss Stone addressed the respondent's conduct throughout this case; including the periods before and after the 2018 Proceedings but her primary focus was the period January to April 2018. She submitted that the respondent had acted unreasonably and in a manner designed to intimidate the applicant. In particular:

    (a) It had 'lost' the 2017 Proceedings, as the Initial Costs were reduced by the F-tT;

    (b) It then demanded the Further Costs on 04 January 2019, when there was no breach of the lease and before the 2017 Decision became final;

    (c) It made no attempt to withdraw the Further Costs demand, following payment of the Initial Costs;

    (d) It must have known, or ought reasonably to have known, there was no justification for the Further Costs demand;

    (e) It intended to cause alarm and distress to the applicant's sole director, Mr Coleman by demanding the Further Costs;

    (f) The applicant is a small company that only owns one property, being the Flat;

(g) The amount of the Further Costs were wholly disproportionate to the disputed service charges and the Initial Costs and were "*colossal*" for an application determined on paper;

(h) During the course of the 2018 Proceedings the respondent repeatedly stated that it was immaterial that the Further Costs vastly outweighed the Initial Costs;

(i) It insisted on the 2018 Proceedings being determined at an oral hearing, rather than on paper; and

(j) It intimated that it was entitled to its costs of the 2018 Proceedings by attempting to extract a settlement that included these costs (see paragraph 26 below), instructing very experienced counsel (Mr Denehan) and filing a statement from Mr Nihalani that referred to additional costs paid to NRRC.

25. This approach was intended to (and did) intimidate the applicant, who faced the prospect of ever spiralling costs unless it paid the Further Costs. As a result, it sought to negotiate a settlement with the respondent and made the following without prejudice save as to costs ('WPSATC') offers in the build up to the hearing:

21 March	£5,000 (open for acceptance until 28 March)
28 March	£10,000 (open until close of business on 04 April)
03 April	£12,500 (open until 4pm on 03 April)
12 April	£14,000 (open until 9am on 13 April)

26. None of these offers were accepted but NRRC did make a WPSATC counter-offer of £20,723, in a letter dated 27 March. This represented 60% of the Further Costs (£14,223) plus the respondent's costs of the 2018 Proceedings (£6,500). The letter cited the opening paragraph of the UT's decision in ***Barrett v Robinson [2014] UKUT 0322***, "*In relative terms this appeal concerns a large legal bill in a dispute about a small service charge"* to justify the respondent's approach to the litigation.

27. Miss Stone pointed out that the respondent would have been better off accepting any of the applicant's offers; rather than proceed with the hearing. She submitted that the outcome of the hearing demonstrated a total lack of merit in the respondent's case. The 2018 Proceedings only arose due to the unwarranted demand for the Further Costs and the respondent acted unreasonably in issuing the demand, opposing

the proceedings in an overly aggressive manner and failing to accept the applicant's offers.

28. Miss Stone referred to the Solicitors Regulation Authority ('SRA') report "*Balancing duties in litigation*", published in November 2018, which discusses the differing duties owed in litigation. Solicitors are not 'hired guns', whose only duty is to their client. They must also consider their duties to the court, third parties and the public interest, when following a client's wish to pursue aggressive or speculative litigation. They are responsible for the strategy on their client's case and should ensure that litigation is proportionate to the facts.

29. Miss Stone also submitted that the respondent had litigated without regard to proportionality and contrary to the overriding objective. This sent a clear message that it could spend what it liked and recover its costs from the applicant, which amounted to unreasonable litigation conduct. The respondent was represented by NRRC throughout and could not use ignorance of the law, as justification for the Further Costs demand or its approach to the litigation. It had "*upped the ante*" by instructing very senior counsel. On questioning from the Tribunal, Miss Stone accepted the choice of counsel was a matter for the respondent. However, the appointment of Mr Denehan prompted her client to involve more senior counsel. It originally consulted Mr Simon Allison (2005 call), who advised in conference. After, learning of Mr Denehan's appointment it consulted Mr David Holland QC. He also advised in conference but explained that his fees for drafting and representation would be disproportionate. He recommended Miss Stacey who drafted the statement of case and appeared at the hearing. This was reasonable, given Mr Denehan's seniority.

30. Miss Stone invited the Tribunal to summarily assess the applicant's costs in the total sum of £19,354.20, including VAT, which is broken down as follows:

- Freemans solicitors £796.20
- Mr Allison (counsel) £558.00
- Mr Holland QC (counsel) £3,000.00
- Ms Stacey (counsel) £15,000.00.

Miss Stone submitted that that these fees were proportionate and reasonable, given the amount of the Further Costs and the risk of further legal bills from the respondent. The applicant sought initial advice from Freemans but concluded that the cost of instructing them and counsel would be prohibitive. It then sought advice from Mr

Allison and Mr Holland before instructing Miss Stacey; all under the public access scheme.

31. In addition to the costs of the 2018 Proceedings, Miss Stone also sought her brief fee of £12,000 plus VAT, explaining that she and the applicant had entered into a public access contract the previous day. She pointed out that amount of her fee was very similar to the respondent's costs of the Costs Application, as detailed in NRRC's statement of costs. The Judge explained out that any rule 13 application for payment of this fee should await the Tribunal's decision.

The respondent's case

32. Mr Kirk's starting point was that there is nothing inherently unreasonable in pursuing an unsuccessful defence. The 2018 Proceedings were initiated by the applicant and defended by the respondent. The failure of this defence does not mean the respondent acted unreasonably. The case was complicated and the outcome was far from certain.

33. Mr Kirk urged the Tribunal to limit its consideration to the period January to April 2018 and to disregard the various applications made since May 2018. When deciding whether there had been unreasonable conduct, the Tribunal should look at what happened in the 2018 Proceedings. In response to a question from the Tribunal, he submitted that the period to be considered should start "*a few days before the application was made*".

34. Mr Kirk stressed that any unreasonable conduct must pertain to the litigation and made the following specific points:

    (a) The 2017 Proceedings arose because the applicant disputed and withheld its service charges, before finally making payment;

    (b) The respondent was partially successful in the 2017 Proceedings, as the F-tT determined that the Initial Costs were contractually recoverable but reduced them by approximately one third;

    (c) The respondent could not bill the Further Costs to the service charge account due to the section 20C order but believed they should be contractually recoverable from the applicant, in the light of the 2017 Decision;

    (d) There was no evidence to suggest the respondent intended to harass or intimidate the applicant by demanding the Further Costs;

(e) This was not a case "*patently lacking in merit*", as evidenced by the lengthy submissions made at the April 2018 hearing and the detailed nature of the 2018 Decision;

(f) It was more than arguable that the Further Costs were recoverable from the applicant with the respondent taking a broad view of the words "*incidental to*" at clause 3(1)(f) of the lease;

(g) The respondent incurred substantial costs in defending the 2017 Proceedings but there was nothing innately unreasonable about the amount of those costs and a lack of proportionality does not amount to unreasonableness;

(h) It matters "*not a jot*" that the applicant paid the Initial Costs in early January 2018, as the respondent was seeking its costs of getting to that point;

(i) The respondent had not acted unreasonably in demanding the Further Costs and then resisting 2018 Proceedings;

(j) There was nothing innately over aggressive in the respondent exercising its legal right to defend the 2018 Proceedings or requesting an oral hearing;

(k) The respondent lost on a complicated point of law, which the UT and Administrative Court were invited to reconsider;

(l) The applicant has reported Mr Russell of NRRC to the SRA, who will deal with the allegations of improper conduct;

(m) The Costs Application was made almost a month after the 2018 Decision was sent to the parties and could and should have been made at the April hearing;

(n) Mr Denehan did not concede over aggression or express an opinion when saying (of the respondent) *"This might be viewed as overly aggressive but forfeiture was an available remedy"*;

(o) The respondent was no obliged to accept the applicant's offers and its failure to do so did not amount to unreasonable conduct; and

(p) The applicant's highest offer was 60% of the Further Costs. There was nothing inherently or obviously unreasonable in declining this offer, given the respondent is a limited company whose only income is the ground rent from Stonegrove House.

In his skeleton argument, Mr Kirk submitted that the applicant was making "*a collateral attempt to import CPR Part 36 considerations and the body of case law around Calderbank offers, when Rule 13 suggests no such thing and there are no authorities to suggest that it ought to do so.*" He also pointed out that settlement and mediation offers were made in ***Willow Court*** but these did not give rise to rule 13 orders. In his oral submissions, Mr Kirk referred to ***Dammerman***, where the unsuccessful claimant rejected an offer made before the Small Claims hearing. At paragraph 33, the Lord Justices said *"The rejection of the £1,000 settlement offer is the only remaining factor that might be supportive of a finding of unreasonableness, but that on its own, is incapable of satisfying the test in Part 27.14(2)(g)."*

35. In his skeleton argument, Mr Kirk referred to the F-tT's decision in ***6 Ladbroke Gardens Management Ltd v Stemp*** (LON/00AW/LDC/2016/0045 and LSC/2016/0193), where a similar rule 13 application was refused. He also raised the spectre of a rule 13 application by his client, if the Costs Application were refused. NRRC's statement of costs summarised the respondent's costs and disbursements, which totalled £12,870. This included a total of 7 hours for Mr Rusell's attendance, travel and waiting for the hearing on 06 February 2019. As it transpired, Mr Russell did not attend.

The Tribunal's decision

36. The respondent shall pay the applicant's costs of the 2018 Proceedings from 13 to 20 April 2018, pursuant to rule 13(1)(b)(ii) of the 2013 Rules. The Tribunal shall give directions for a summary assessment of these costs, to be determined on paper, unless quantum is agreed by 26 March 2019.

Reasons for the Tribunal's decision

37. 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.*"

38. The Tribunal first considered whether the respondent had acted unreasonably in defending or conducting the 2018 Proceedings. When doing so, it only considered the period from 26 January 2018 until the conclusion of the hearing on 20 April 2018. 26 January is the appropriate start date, being the day after the applicant's letter to threatening a paragraph 5A application. The respondent's conduct outside this window is not relevant, as the Tribunal is only concerned with the conduct of the proceedings rather than the underlying dispute. This means the decision to demand the Further Costs on 04 January

and the amount of the demand are not relevant when addressing the first stage of the ***Willow Court*** test. Having said that, it was not inherently unreasonable to issue the demand. Given the outcome of the 2017 Proceedings, with the F-tT deciding that costs relating to the disputed service charges were recoverable under clause 3(1)(f) of the lease, it was conceivable that the costs of defending those proceedings would be recoverable in the same way. The claim for the Further Costs was ambitious and somewhat speculative but was arguable.

39. Before commenting on the respondent's conduct of the 2018 Proceedings, it is appropriate to clear up two points. Firstly, Miss Stone submitted that respondent acted unreasonably by insisting on an oral hearing. However, this was directed by the Tribunal on 31 January 2018, the day the paragraph 5A application was submitted. It is highly unlikely that the respondent was responsible for this direction. In any event, an oral hearing was entirely appropriate given the sum in dispute and the number of issues raised in the application form. Secondly, Mr Kirk submitted that the Costs Application should have been made at the April 2018 hearing. However, this would have been contrary to the instruction given at the hearing that that any rule 13 application should await the written decision (see paragraph 66 of 2018 Decision).

40. The decision in **6 Ladbroke Gardens** is not binding on the Tribunal and was of no real assistance, as it did not include details of the original proceedings or decision that gave rise to the rule 13 application. However, the Tribunal did have regard to the decisions in ***Primeview***, ***Matier***, and ***Dammerman***, as well as ***Willow Court***.

41. When looking at the respondent's conduct, the Tribunal first looked at the decision to defend the 2018 Proceedings. It agrees with Mr Kirk that there is nothing inherently unreasonable in pursuing an unsuccessful defence. In this case, the defence was wholly unsuccessful but was not devoid of merit. The outcome of the 2018 Proceedings turned on the interpretation of clause 3(1)(f) of the lease, consideration of the relevant authorities and the particular facts of the case. This involved some complicated legal issues and the case was not clear cut, as evidenced by the length of the 2018 Decision. Further, the respondent was represented throughout and it must be assumed that the decision to defend the proceedings was based on advice from NRRC and Mr Denehan. In the circumstances, it cannot be said that this decision was unreasonable.

42. The applicant raised a number of grounds for disputing the Further Costs in its letter of 25 January 2018 and the paragraph 5A application dated 31 January. However, it did not specifically say the costs were outside clause 3(1)(f) of the lease or address the interpretation of this clause. Rather, these grounds were first raised in its statement of case dated 08 March 2018 (drafted by Miss Stacey). They proved decisive at the April 2018 hearing and led to the successful outcome. It is also

worth pointing out that the application included a misconceived abuse of process argument based on paragraph 22 of the 2017 Decision (see paragraph 6 above), which was abandoned at the hearing.

43. The applicant did not identify any procedural failings on the part of the respondent, such as a failure to comply with directions. Rather it relied on the respondent's approach to the litigation, which it repeatedly described as over aggressive. The Tribunal does not accept this description. As acknowledged by Miss Stone, the decision to instruct Mr Denehan was a matter for the respondent. Given the amount of the Further Costs and the legal issues involved, this was not unreasonable.

44. The respondent's modus operandi "*to forfeit for unpaid sums*" goes to the underlying dispute and does not amount to conduct of the 2018 Proceedings. When commenting on how this might be perceived, Mr Denehan was not conceding over aggression. Rather, he was saying how the approach "*might be viewed*", without expressing an opinion. Furthermore, forfeiture might well have been an option as the applicant did not pay the Initial Costs until the 2017 Proceedings were concluded. Mr Denehan's argument was that the Further Costs were incidental to forfeiture action. The Tribunal disagreed with him but this argument was not overly aggressive or unreasonable.

45. The Tribunal does not accept that the respondent's conduct of the 2018 Proceedings was overly aggressive, oppressive or intimidatory. Whilst it took a hard line, this was a reasonable litigation tactic. Given this finding and the arguable nature of its case, there was nothing improper about its conduct of the proceedings.

46. The applicant's grounds for disputing the Further Costs were made clear by 08 March 2018. Shortly after that time it began to make the WPSATC offers. The initial offer of £5,000 amounted to just over 20% of the Further Costs. It was not unreasonable for respondent to reject this offer or to make the £20,723 counter-offer, which included a contribution to its costs of the 2018 Proceedings. This proved a sensible negotiating tactic, prompting much improved offers from the applicant. However, what was unreasonable was the respondent's failure to accept any of the improved offers.

47. The applicant's improved offers of £10,000, £12,500 and £14,000 were extremely generous, given the ambitious nature and somewhat speculative nature of the Further Costs claim. Had the respondent accepted any of these offers then the 2018 Proceedings would have been concluded by the morning of 13 April at the latest and it would have recovered a substantial proportion of the Further Costs. It may also have avoided Mr Denehan's brief fee. However, it chose to press on with the case and recovered nothing. Its failure to accept any of the improved offers was clearly unreasonable conduct of the Proceedings. The Tribunal notes that the UT made a finding of unreasonable conduct

in ***Primeview***, arising from the unsuccessful appellant's continuation of its appeal where the respondent had offered "*favourable terms*" (paragraph 94).

48. Part 36 of the CPR does not apply to proceedings before the F-tT but there is nothing in rule 13 to suggest that WPSATC offers cannot be taken into account. It is not as restrictive as CPR Part 27.14(2)(g), as considered in ***Dammerman***, which is qualified by Part 27.14(3).

49. In this case, the applicant made three very generous WPSATC offers in the weeks preceding the hearing. The respondent's failure to accept any of these offers was unreasonable conduct of the 2018 proceedings and should be taken into account.

50. Having found unreasonable conduct, the Tribunal then considered whether to make an order for costs. When doing so, it had regard to all relevant circumstances including the respondent's conduct before and after the 2018 Proceedings.

51. There was nothing obviously unreasonable about the respondent's conduct after the 2018 Decision. When applying for permission to appeal and permission to apply for Judicial Review, the respondent was simply exercising its legal rights, albeit unsuccessfully. It is not appropriate for the Tribunal to comment on the applications for permission to appeal the costs orders made by the Administrative Court, which are yet to be decided.

52. The Tribunal agrees with Miss Stone that the Further Costs were "*colossal*". They were wholly disproportionate to the Initial Costs, being approximately five times the original sum claimed. It is bizarre that the respondent chose to incur costs approaching £24,000 on a dispute over £4,471.80. The sum actually allowed by the F-tT was only £3,042.18, so this was the respondent's 'gain' from contesting the 2017 Proceedings.

53. The amount of the Further Costs appears unreasonable, given the manner in which the 2017 Proceedings were decided. This was a paper determination without an oral hearing. It is difficult to conceive how the respondent and NRRC incurred almost £24,000 of costs in such a case, where there was no involvement from counsel. Having said that, their bills were not scrutinised in the 2018 Proceedings. The applicant succeeded on the preliminary issue, so it was unnecessary for the Tribunal to assess the Further Costs. This means the most that can be said of these costs is they look extremely high for a paper case.

54. Given that the respondent rejected three very generous WPSATC offers on an ambitious claim for costs that looks extremely high, it is appropriate to make a rule 13 order. The Tribunal has "*full power to*

determine by whom and to what extent the costs are to be paid", subject to the 2013 Rules, by virtue of section 29(2) of 2007 Act. Having regard to the overriding objective and the Tribunal's findings at paragraph 48 above, the appropriate order is that the respondent should pay the applicant's costs from 13 April 2018 until the conclusion of the hearing. Whilst there need not be a causal connection between the unreasonable conduct and the costs incurred, it is relevant to look at when that conduct occurred. The final WPSATC offer expired on the morning of 13 April. The respondent acted unreasonably in continuing to resist the case, rather than settling, from 13 April onwards. Accordingly it should pay the applicant's costs from that date.

55. Miss Stone invited the Tribunal to assess the applicant's costs on an indemnity basis. Rule 13 costs are normally assessed on the standard basis, which is appropriate in this case. However, the point may be academic as the only cost incurred after this date was Miss Stacey's brief fee of £9,000, including VAT (part of her total fees of £15,000).

56. Mr Kirk did not make any submissions on the amount of the applicant's costs. However, it is clear from paragraph 24 of his skeleton argument that quantum is disputed. It is not appropriate to summarily assess the costs without representations from the respondent. Hopefully the parties can agree the sum due within the next 28 days. If not, the Tribunal will give directions for the summary assessment of the applicant's costs. Given there is only one fee to assess, this will be a paper determination.

Next steps

57. At the start of the hearing, the Judge expressed concern about the huge costs that have been incurred by both parties. The original service charge dispute involved a sum of just £4,832.20. This has given rise to three F-tT applications, as well as applications to the UT, Administrative Court and Court of Appeal. The parties have spent tens of thousands of pounds arguing over their costs with very little gain. They should make strenuous efforts to settle the outstanding issues before incurring yet more costs.

Name: Tribunal Judge Donegan **Date:** 15 March 2019

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

Overriding objective and parties' obligations to co-operate with the Tribunal

Rule 3

3. - (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes –

(a) dealing with the 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;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it –

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must –

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Orders for costs, reimbursement of fees and interest on costs
Rule 13

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.

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