UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 89(LC)

LC-2022-295

**Royal Courts of Justice, Strand,
London WC2A**

11 April 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – COSTS – application to discharge manager on grounds of partiality – whether appellants acted unreasonably in bringing the application or applying for disclosure – rule 13(1)(b), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

BETWEEN:

**ANTHONY ORCHARD
JACQUELINE ORCHARD**

Appellants

-and-

**ALISON MOONEY (1)
HELEN ORKIN (2)**

Respondents

**Martin Rodger KC, Deputy Chamber President and
Mrs Diane Martin MRICS FAAV**

14-15 March 2023

Mr David Warner, instructed directly, for the appellants
Mrs Alison Mooney, the manager, represented herself
Mr Jonathan Ross, of Forsters LLP, for the second respondent

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The following cases are referred to in this decision:

Laskar v Prescott Management Ltd [2020] UKUT 241 (LC)

Willow Court Management Company v Alexander (2016) UKUT 0290

Introduction

1. On 3 April 2023 we handed down our decision in the appellants' appeal against the decision of the First-tier Tribunal, Property Chamber (the FTT) on 22 October 2021 dismissing their application to discharge the first respondent as tribunal appointed manager of the building in which they own a flat. This is our decision on the appellants' appeal against the FTT's second decision, of 4 April 2022, by which it ordered them to pay £7,000 in costs to the manager and £10,500 in costs to Ms Orkin (the second respondent) because it considered that they had behaved unreasonably in making the application to discharge the manager and in the way they had conducted it.

2. We will assume that readers are familiar with our decision in the first appeal, which has the neutral citation number [2023] UKUT 78 (LC). In it we set aside the FTT's first decision but, for the reasons explained in paragraphs [85] to [97], dismissed the application to discharge the management order.

The FTT's decision

3. The costs order was made under rule 13(1)(b) of the FTT's procedural rules (the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013) which, exceptionally, allows the FTT to make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings.

4. The FTT recorded early in its decision that it had received written submissions from the parties including a substantial amount of new material provided by Ms Orkin's solicitors in response to the submissions received from Mr and Mrs Orchard (on which they therefore had not had an opportunity to comment). The FTT explained that this material was not taken into account because it was supplied electronically in a form which the panel could not access. This feature is the subject of one of the appellants' grounds of appeal.

5. The FTT found that the appellants had acted unreasonably both in bringing the application to discharge the manager and in the way they subsequently conducted the application.

6. The FTT considered that the application to discharge the manager "was always likely to be hopeless" because the appellants had proposed no alternative other than that management should revert to a professional property company selected jointly by the leaseholders themselves. The appellants maintained that their proposal was based on a "genuinely held belief" but the FTT took a different view:

> "The applicants' proposal was so obviously preposterous that the tribunal is unable to see how the applicants could ever genuinely hold such a belief. The evidence, as set out in the tribunal's decisions, is far more consistent with the applicants using their proposal as a veneer to cover their true intentions of disrupting the work of the tribunal-appointed manager."

7. The FTT discerned the same objective in the appellants' approach to procedural issues, including disclosure. It was unable to see how the Orchards, who were both lawyers and

therefore taken to be familiar with litigation practice, could have failed to realise that their application for disclosure was "grossly disproportionate and ridiculously late". It therefore concluded that they had been:

> "… using their application for disclosure as a means of harassing the respondents rather than to advance the resolution of the case."

8. The FTT was also unimpressed by the Orchards' reliance on Mr Pendle's report of 30 July 2021. It noted their suggestion that the report "conclusively showed that the [manager] was wrong to assert that there was a defect to the applicants' terrace" and it acknowledged that "such a report would have turned the dispute on its head" and would have been "relevant in explaining or even justifying some of the applicants' conduct in these proceedings so as to undermine seriously the costs application". The decision contains no analysis of the report which does not appear to have been provided to the FTT until it was supplied by Ms Orkin's solicitor on 18 March, after the appellants had made their final submissions. The FTT was unable to open the cache of documents provided on that occasion, but it could read Mr Ross's covering letter and it seems to have based the following assessment of the report on what he said about it:

> "However, it is clear from the Second Respondent's letter of 18th March 2022 that the Applicants have again misrepresented the situation. While there is a report which supports their case, it is not conclusive. The Respondents reject that report for a number of reasons and have an arguable case for doing so. It is not for the Tribunal to determine whether the Respondents are right in this instance. However, the Tribunal is satisfied that the Applicants have not made out their allegation that the report is a game-changer or that the Respondents have knowingly or deliberately misled the Tribunal."

We infer that the FTT treated what it considered to be the Orchards' misrepresentation of the report as part of the unreasonable conduct which justified the making of the order.

9. The robust language used by the FTT in its criticism of the appellants conduct has been a particular focus of the appeal. As well as characterising the request for disclosure as "grossly disproportionate and ridiculously late" it accused the appellants of "gaslighting" the other parties (by suggesting Ms Orkin was acting as if she was their landlord) and described their application as "hopeless" and their alternative management proposal as "preposterous".

The grounds of appeal

10. In summary, the appellants' five grounds of appeal were that:

    1. The FTT was wrong in law in its approach to assessing whether or not the Orchards acted unreasonably in bringing and conducting the proceedings.

    2. There was no evidence and no objective basis for considering their conduct to have been unreasonable.

3. The FTT's failure to allow the appellants to respond to the final representations made on behalf of Mrs Orkin was unfair and constituted a substantial procedural defect.

4. The conduct of Mrs Mooney and Ms Orkin in withholding Mr Pendle's 30 July report from the Orchards and from the FTT was a relevant consideration in deciding whether or not to make an order and the manner in which the FTT dealt with it was unfair or unjust and constituted a substantial procedural defect.

5. There were other substantial procedural defects; and the FTT failed adequately to take into account other relevant considerations (or took into account irrelevant considerations) and the order made was therefore unfair or unjust.

Grounds 1 and 2: Was the FTT wrong in law in its approach to assessing whether the Orchards acted unreasonably, and was it entitled to find that they had acted unreasonably?

11. We were referred by Mr Warner to this Tribunal's decision in *Willow Court Management Company v Alexander* [2016] UKUT 290 which provided guidance on the exercise of the discretion to award costs under rule 13(1)(b). A three-stage approach was recommended. The first stage is to decide objectively if the party has acted unreasonably. The second stage is to consider whether, in the light of established unreasonable conduct and as a matter of discretion, an order for costs should be made or not. The third stage is to decide what the order should be.

12. The limited function of this Tribunal when considering an appeal against an award of costs by the FTT was explained in *Willow Court* at [44]:

> "… an appellate tribunal should exercise restraint when undertaking a review of a discretionary decision of a first-tier tribunal. If that tribunal properly directed itself on the applicable law, took into account all relevant matters and was not swayed by irrelevant matters, and did not reach a conclusion which is irrational, it is not for us to substitute our own assessment."

13. It was for that reason that Mr Warner argued in support of the first ground of appeal that the FTT had misapplied the Tribunal's guidance in *Willow Court* and had failed first to make an objective assessment of the appellants' conduct in order to determine whether it had been unreasonable, before proceeding to consider how its discretion should be exercised. In view of that submission, we repeat what was said by the Tribunal in *Laskar v Prescott Management Ltd* [2020] UKUT 241 (LC), at [34]:

> "Although at paragraph 28 of its decision in *Willow Court* the Tribunal suggested an approach to decision making in claims under rule 13(1)(b) which encouraged tribunals to work through a logical sequence of steps, it does not follow that a tribunal will be in error if it does not do so. The only "test" is laid down by the rule itself, namely that the FTT may make an order if is satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings. The rule requires that there must first have been unreasonable conduct before the discretion to make an order for costs is engaged, and that the relevant tribunal must then exercise that discretion. Whether the discretion has

> been properly exercised, and adequately explained, is to be determined on an appeal by asking whether everything has been taken into account which ought to have been, and nothing which ought not, and whether the tribunal has explained its reasons and dealt with the main issues in such a way that its conclusion can be understood, rather than by considering whether the *Willow Court* framework has been adhered to. That framework is an aid, not a straitjacket."

14. Mr Warner submitted that at the first stage the FTT did not apply the requisite standard in assessing the facts of the alleged unreasonable conduct. The language and tone of the FTT's decision suggested a loss of objectivity which undermined the whole decision. The issue between the parties was always about liability. If the Orchards had complied with the manager's notice requiring them to carry out remedial work they would have incurred expenditure for work that was not required and which would not have resolved the problem. Their behaviour in bringing the proceedings was therefore not unreasonable; it was entirely consistent with the position they took in the Court proceedings which was eventually vindicated by the judgment handed down on 6 October 2022.

15. Nor, Mr Warner suggested, had the Orchards been unreasonable in their conduct of proceedings. He acknowledged that part of the request for disclosure was disproportionate, as the FTT had complained, but he maintained that Mr Pendle's report of 30 July 2021 should have been disclosed without the need for an application and the request for it was a perfectly reasonable one which could not have been made any sooner.

16. Mr Warner submitted that if the fresh evidence was admitted for the purpose of the main appeal, it should also be taken into account on the costs appeal. On that basis it should have been apparent to the FTT that Mrs Mooney had misled them concerning the advice she had received, and that Ms Orkin had failed to explain what she and her solicitor knew and had made no attempt to correct the misleading account presented by Mrs Mooney.

17. In response, on behalf of Ms Orkin, Mr Ross accepted that the costs appeal would depend substantially on the outcome of the first appeal. However, he made the point that there had been a history of lack of engagement by the Orchards, in particular before, during and after the application to discharge Mrs Mooney. They had failed to appoint their own surveyor and had resisted access for Mr Kemp. Ms Orkin did not support Mrs Mooney's approach to the repairs, and she defended her appointment as manager because it was her only prospect of achieving the remedial works.

18. Mrs Mooney considered that both parties had behaved badly and asked us to take into account the time and expense she had incurred in standing between "a rock and a hard place".

19. We have sympathy with the difficult position Mrs Mooney found herself in, which would clearly be relevant to the exercise of a discretion to order payment of her costs of the proceedings, but costs can only be ordered where a party has acted unreasonably in bringing, defending or conducting the proceedings. As the Tribunal said in *Willow Court* at [28]:

> "A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. …"

20. The first question is therefore whether there is a reasonable explanation for the Orchards' decision to apply to have Mrs Mooney discharged. The FTT concluded that their motive was "to disrupt the work of the tribunal-appointed manager", but they were clearly entitled to resist the manager's notice requiring that they take full responsibility for intrusive remedial works to their property which are now shown not to have been justified. We agree that the underlying issue between the leaseholders was liability to pay for the works. By serving the notice (which included a threat to do the work and recover the cost from the Orchards) Mrs Mooney had abandoned her original neutrality and aligned herself with Ms Orkin's position. Her apparent determination to carry out the recommendations of Mr Pendle's first report caused the Orchards to conclude that she was not acting impartially between the leaseholders. While the more extreme aspects of that assertion were unjustified (there is no evidence of the manager taking instructions from Ms Orkin's advisers or even that they had a common view of what work was required) the basic complaint that the manager was not acting even-handedly was vindicated by her sharing of Mr Pendle's report of 30 July 2021 only with Ms Orkin and her advisers and not with the Orchards. The complaint that she was not being objective is strongly supported by her evidence to the FTT read in conjunction with her own surveyor's report which directly contradicted it.

21. A more conservative approach might have been for the Orchards to have asked the FTT to direct that the manager take no steps to act on the notice until the issue of liability had been determined by the Court, but we have some sympathy with the position they found themselves in, having to endure repeated inspections and intrusive works which meant they could not let their flat. Without the fresh evidence their application to discharge the manager might be thought to have been extreme, but with the benefit of the full picture now available the suspicions which fuelled it can be seen to a significant extent to have been justified. Had the FTT known what we now know the application might have succeeded.

22. As for the FTT's point that the application was hopeless without an alternative management plan, we do not agree. If the manager's conduct fell sufficiently below the standard the FTT and the parties were entitled to expect so as to justify her removal (which was the Orchards' case) we do not think the absence of an alternative to a return to the contractual position should necessarily have been regarded as fatal to the success of the application.

23. The FTT also found the appellants' conduct of the proceedings to have been unreasonable, but once again we consider that its assessment cannot stand in the face of the fresh evidence. It ought not to have been necessary for the Orchards to have applied for disclosure of Mr Pendle's report, because the manager should have provided it to them when she sent it to Mr Ross on 30 July. Their application for its disclosure was entirely reasonable and their suspicion that it would demonstrate that the basis on which the manager had held them responsible was unsound was justified. Other aspects of their application were unmeritorious because they sought material which was irrelevant or disproportionate, but in that respect it was not exceptional and the FTT ought to have been able to distinguish

between what was important and ought to be disclosed and what was not. The FTT's conclusion that the disclosure application was being used as a means of harassing the respondents might be supportable so far as it relates to the request for Ms Orkin to disclose documents which she held going back many years, but even that material was relevant to the Orchards' complaint that the manager was expecting them to undertake work which, in the past, had been treated as a joint expense.

24. The final example of unreasonable conduct relied on by the FTT was the suggestion that the appellants had misrepresented the report of Mr Pendle. We do not understand how the FTT felt able to reach that conclusion without having read the report itself. Had it done so it would have appreciated that the account given by the manager concerning the professional advice she had received was wrong, and that the most recent advice of her surveyor contradicted the basis on which she claimed to be acting. The fact that Ms Orkin's advisers disagreed with Mr Pendle's advice was nothing to the point as far as the manager's objectivity was concerned; the one matter on which Mr Pendle and Mr Kemp did agree was that the water was not entering through the surface of the terrace, which was the basis on which the manager claimed to be proceeding. Nor was it relevant that the report was not "conclusive" as to the cause of the water ingress; it did show conclusively that the manager had not given a truthful account of the professional advice she had received. As the FTT anticipated, such a report should indeed have seriously undermined the costs applications.

25. We therefore conclude that there is a reasonable explanation for the conduct complained of, and that the Orchards did not behave unreasonably in bringing and conducting the proceedings for discharge of Mrs Mooney. The costs decision must therefore be set aside.

26. In view of this conclusion it is unnecessary to consider the appellants' other grounds of appeal in any detail. The only point we would make is in relation to the fourth ground which suggests that the manager's conduct in withholding Mr Pendle's report from the appellants and from the FTT ought to have been treated by the FTT as relevant to the exercise of its discretion to make an order for the payment of her costs. We agree with that proposition.

Consequential matters

27. For the reasons given above we allow the appeal and set aside the FTT's costs decision.

28. If any party wishes to make any further application in relation to the costs of either of the appeals, either under section 20C, Landlord and Tenant Act 1985, or under the Tribunal's rules, they may do so in writing copied to all other parties within 14 days of the date on which this decision is sent to them by the Tribunal.

Mrs Diane Martin MRICS FAAV

Martin Rodger KC

Deputy Chamber President

11 April 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.