FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
Formerly the Leasehold Valuation Tribunal

Case Reference	:	**LON/00AU/LSC/2015/0518**
Property	:	**2nd/3rd Floor Flat, 322 Upper Street, London N1 2XQ**
Applicant	:	**Mr D. Aranda**
Representative	:	
Respondents	:	**Ms R. Currell, Mr C. Currell, Dolphin Land Limited**
Representative	:	**Mr P. Harrison of Counsel**
Type of Application	:	**Section 20C Landlord and Tenant Act 1985, and Rule 13 FtT (Property Chamber) (RP) Rules 2013- Restriction of Landlord's costs and Unreasonableness**
Tribunal Members	:	**Judge Lancelot Robson** **Mrs S. F. Redmond Bsc (Econ) MRICS**
Original Decision Date	:	**17th November 2016**
Supplemental Determination and Decision Date	:	**2nd February 2017**

SUPPLEMENTAL DECISION

DECISION SUMMARY

A. **Rule 13** - The Tribunal refused the Applicant's application

B. **Section 20C** – The Tribunal granted the Applicant's application and decided that none of the Respondents' costs of this application are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

BACKGROUND

1. in the original application, the Applicant sought a determination under section 27A of the LANDLORD AND TENANT ACT 1985 (as amended) of reasonableness and/or liability under a lease dated 7th November 2005 (the Lease) to pay service charges for the service charge years commencing on 1st April 2005 (excluding period from 1st April – 6th November 2005), 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015. The substantive decision in the case was dated 17th November 2016.

2. Pursuant to Directions given in that case, the Section 20c and Rule 13 applications were to be the subject of written submissions as directed in the substantive decision.

3. The parties duly made written submissions which were considered by the Tribunal

A. Rule 13

4. This part of the application was presented on the standard form for a Section 20c application also containing the Section 20c application, but the Tribunal noted that the Applicant was acting in person. The Respondents were aware of this issue from the Directions and they did not take any point on the form of it, so nothing turns on that matter.

Applicant's Case

5. The Applicant submitted that he had made many attempts to resolve the various issues with the Respondents before making the original application. He had requested various documents to try and understand the Respondent's demands and statements. The Respondents had ignored his letters so he had no other option but to make the application. The Respondents were continuing to ignore his requests for information.

6. In the discovery process leading up to the hearing the Respondents had initially denied that they held any evidence of the accounts prior to 6 years before the application. They had even attempted to have the years 2005 – 2010 struck out. He submitted that they were legally obliged to keep their records for 12 years. Thus information was supplied late and he noted that some had been "manipulated by handwriting". The

Respondents should bear all the costs of the proceedings. He had spent £25,000 on legal costs, which he submitted could have been avoided.

Respondent's case

7. The Respondents referred to the guidance on Rule 13 applications given by the Upper Tribunal in Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC) , and the interpretation of unreasonableness set out in Ridehalgh v Horsefield [1994] Ch. 205. Nowhere in the original decision did the Tribunal describe the Respondents as having acted vexatiously or unreasonably in the sense of Ridehalgh. On those issues on which the Respondents had lost, e.g. the self-containment works, the Section 20 notices, the stance taken by them was not unreasonable. The Applicant had only succeeded on 3 of the other 44 issues.

Decision

8. The essence of the Willow Court decision can be summarised as follows:

Following Ridehalgh v Horsefield, the interpretation of unreasonableness is well established. 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. Conduct cannot be described as unreasonable simply because it leads to an unsuccessful result or because 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 is not unreasonable.

9. The Upper Tribunal in Willow Court also considered that Rule 13 applications should not be regarded as routine or allowed to become major disputes in their own right. There should be a sequential three stage test. The first stage is to decide whether the person has acted unreasonably. The second stage should be to consider whether to make an order or not, and the third stage should be to decide what the terms of the order should be. The Tribunal should have regard to all the relevant circumstances at the second and third stages. At the first stage the behaviour of an unrepresented party with no legal knowledge may be relevant, and also, although to a lesser degree, at the second and third stages, however it should not become an excuse for unreasonable conduct. At the third stage a causal connection with the costs sought is to be taken into account.

10. The Tribunal considered the evidence and submissions. It recalled the evidence given at the hearing. It noted that at some stages the Respondents' agent had not been forthcoming with documents, and its accounting was often less than clear, in that it required close reference to other documents to understand the demands and summaries presented to the Applicant. It took the Tribunal some time to

understand the accounts itself at the hearing, even with the assistance of the Respondents' agent. There were also some errors in its handling of the sinking fund. The Tribunal did not consider the fact that the Respondents applied to limit the years in dispute as unreasonable. It did not accept the Applicant's submission that their agent had a legal obligation to preserve documents for 12 years, although many agents might have considered it prudent to do so in the light of events. The Tribunal considered that all the circumstances of the case should be considered. In its view, the original disputes in this case related to a serious disagreement over the meaning of the contract for sale and the extent of the self-containment works to be charged to the landlord, complicated by the Applicant's over-enthusiasm to start his own works (this latter item was the subject of other proceedings). The dispute and confusion over the self-containment works almost inexorably led to disputes as to whether Section 20 notices were required for certain works, and concerns about proving items being added to the service charge. Shortly stated, the parties were in a downward spiral of mutual distrust. While the Tribunal did not agree with the Respondent's calculation of service charge items "won" and "lost"(the Respondents' calculation was inconsistent and there seemed to be a number of "score draws which were not taken into account"), it is clear that the Respondents succeeded on rather more of those items than they lost.

11. The Tribunal thus decided that the Respondent's conduct taken as a whole was not perfect, but it was not unreasonable for the purposes of Rule 13. That being the case, it did not have to go on to consider the second and third stages of the test laid down in Willow Court. The Tribunal notes in passing that even if the Applicant had succeeded on the first and second stages, he would have failed at the third stage because he had no evidence as to the details of his figure of £25,000. Thus it would have been impossible to show a causal connection between any unreasonable behaviour and any specific element of the Applicant's costs.

B. Section 20C

Applicant's Case

12. The Applicant effectively repeated his submissions at paragraphs 5 and 6 above, adding that the Respondent Landlords should not be allowed to reimburse themselves for their costs through the service charge.

Respondents' case

13. The Respondents founded their case on the number of issues decided in their favour, producing a table of what can be termed "wins", "losses" and "mixed" results. They also referred to the Lands Tribunal (now the Upper Tribunal) case of Tenants of Langford Court v Doren Ltd LRX/37/2000, which found the Tribunal's discretion under Section 20C to be "wide and unfettered" and included the making of making orders

for only some of the landlord's costs. Also Schilling v Canary Riverside LRX/26/2005 where HH Judge Rich stated:

"... weight should be given rather to the degree of success, that is the proportionality between the complaints and the determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of service charges on the one hand and the costs of the dispute on the other hand"

Further, in Schilling the Lands Tribunal found that the tenant's complaints (which were upheld) had resulted in only a 6.4% reduction in the recoverable service charges. It therefore declined to make a Section 20C order in respect of those costs. The Respondents noted that in relation to general service charge items (Issue F in the original decision) the Applicant had put in issue 44 separate items and only succeeded on 9 of them. Many points were unmeritorious at the outset and should not have been taken, and significantly increased the costs of the hearing. The insurance and cleaning costs were given as an example. The Respondents submitted that the case was similar to Schilling, and that the Tribunal should decline to make an order as the tenant failed on the majority of the points, or only disallow a small part of the costs. They conceded that their suggested approach was somewhat crude, but did illustrate their contention.

Decision

14. The Tribunal considered the evidence and submissions. The Applicant's submission was simple. He thought the Respondents' conduct had led to the application and the costs. The Respondents effectively urged us to take a mathematical approach.

15. The Tribunal's powers in this area are wide and unfettered, although they should, of course, not be exercised capriciously. The Tribunal did not consider this case to be on all fours with Schilling. There was both a quantitive and a qualitative difference in the sums reduced. It decided that it should look at the facts and circumstances of the case as a whole, and what is just and equitable, following the comments of H. H. Judge Gerald in St John's Wood Leases Ltd v O'Neil [2012] UKUT 374 (LC), who cautioned against too strict an application of the arithmetical approach. Whatever the "wins" and "losses", it was clear that there were several issues of principle which needed to be decided, particularly the interpretation of the Agreement for Lease relating to the self-containment works. From that item the solution to other issues followed, as noted above in the Rule 13 discussion. Very considerable sums were reduced as the result of the Tribunal's decision on that issue. To use an analogy, effectively the Respondents were inviting the Tribunal to count many (but not all it should be noted) of the individual trees in the wood, but not consider the wood as a whole However to pursue the analogy, not all trees in a wood are of equal size. One large well grown oak tree can equate to scores of smaller trees, whatever measure is used. The issue of the self-containment works was crucial to the resolution of other issues.

Further, this dispute has rumbled on for more than 10 years, becoming more convoluted and acrimonious as time went on. It is appropriate to consider what other reasonable alternative the Applicant had to resolve the dispute. The Respondent's agents were unresponsive, their accounting was Delphic, and they were resorting to the County Court to recover service charge arrears they considered were owed. The Tribunal noted its previous comments that the accounting information generally was difficult to follow even at the hearing. The sinking fund account in particular was still insufficient on the morning of the resumed hearing. The Tribunal decided that the costs incurred by both parties should lie where they fell, i.e. on the party who incurred them. The Tribunal thus granted the Applicant's Section 20C application relating to all the Respondents' costs of this application.

Tribunal Judge: Lancelot Robson **2nd February 2017**

Appendix

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
- (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances

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

Regulations 13(1) - (3)

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 land and 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.

(3) The Tribunal may make an order under this rule on application or on its own initiative.
