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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2017/0275**
Property	:	**28 Well Walk, London NW3 1LD**
Applicant	:	**Farlane Investments Ltd**
Representative	:	**Steven Newman, D & S Property Management**
Respondent	:	**1. Margaret Rose Hazel** **2. Joy Berthoud** **3. Shelley King and Trilby Harrison** **4. Nasser Shakib** **5. James Edwards and Chloe Dennis**
Representative	:	**Mr A Tilsiter, Shakib Property Management Ltd**
Type of application	:	**Rule 13 costs**
Tribunal members	:	**Ruth Wayte (Tribunal Judge)**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**4 April 2018**

DECISION

Decision of the tribunal

(1) The tribunal determines that the sum of £16,050 is payable by the Applicant in respect of the respondents' costs pursuant to rule 13(1) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

Background and application

1. This was a service charge dispute in relation to roof works carried out from 2010-2014, which were subsequently redone in 2017. There was very little dispute in relation to the 2017 costs, the leaseholders' position was that they wished to set off the costs of previous roof works on the basis that they were not reasonably incurred as the works had not been to a reasonable standard. The freeholder was fully aware of the claim and had agreed to fund the 2017 works up front and seek to recover damages in respect of the major works carried out in 2014 from the previous managing agents. Only in the absence of an agreement with the leaseholders would proceedings be issued to determine what, if anything, remained outstanding.

2. The freeholder changed its position after the leaseholders refused to pay the on account demand for the 2017 works and issued an application for a determination of the reasonableness and payability of those costs with a view to forfeiture proceedings. There was no mention of the 2014 works in the application. The leaseholders replied setting out their claim in respect of the previous roof works. In a response to that statement of case the applicant stated "*...it is for the Respondents to provide substantive and specific evidence that the major works of 2014 were not to a reasonable method of repair and that they were not undertaken to a reasonable standard.*"

3. Following a hearing on 23 November 2017 the tribunal determined that £96,081.25 was payable in respect of the budget for 2016/17 but also determined that some £40,000 should be set off in connection with the previous faulty works and other disallowed items. The decision issued on 15 December 2017 was critical of the applicant's conduct, stating at paragraph 42 that its "*..conduct in issuing these proceedings and the approach of putting the Respondents to proof in respect of its own service charges appears to this tribunal to be a cynical ploy to put them to the cost of establishing liability in respect of those works, rather than accepting its own responsibility under the Lease.*"

4. On 21 December 2017 the tribunal received the respondents' rule 13 costs application. I issued directions on 22 January 2018 for the determination of the application on the basis of written representations.

Determination

5. As both parties acknowledge, the leading decision on Rule 13 costs is *Willow Court Management Company 1985 Ltd v Alexander* [2016]UKUT 0290. In paragraph 43 the Upper Tribunal made it clear that such applications should be determined summarily and the decision need not be lengthy, with the underlying dispute taken as read. There are three steps: I must first decide if the applicant acted unreasonably. If so, whether an award of costs should be made and, finally, what amount.

6. In deciding whether a party's behaviour is unreasonable the Upper Tribunal in *Willow Court* cites with approval the judgment of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 2005. It does so at paragraph 24 of its decision in these terms:

   ""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 in the position of the party 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?".

7. The respondents rely on the applicant's unreasonable behaviour prior to proceedings in terms of their failure to agree or provide any rebate in respect of the defective works and their unreasonable conduct during the proceedings in terms of seeking forfeiture in order to put excessive or unreasonable pressure on the respondents, refusing to enter into mediation and various other failures to co-operate. They also point to unreasonable conduct during the hearing, in particular the failure to call expert evidence or offer any serious defence or challenge to the case in respect of the previous works. Finally, they point to a "Calderbank" offer made by the respondents prior to proceedings in the sum of £36,500.

8. In response, the applicant maintains that their application advanced the case in the sense that liability has now been established and was a reasonable course of action in at least that respect. In relation to the alleged failure to pursue the previous managing agents before issuing proceedings, it relies on the case of *Primeview Developments Limited v Ahmed and others* [2017] UKUT 0057 to rule out pre-application conduct as relevant to a Rule 13 application, which relates only to unreasonable behaviour in bringing or conducting proceedings. In relation to the other matters complained of, the applicant maintains that its approach cannot be characterised as unreasonable or so unreasonable that a costs order is appropriate.

9. Whereas Rule 13 applies only to unreasonable conduct in bringing or conducting proceedings, *Willow Court* confirms that it may sometimes be relevant to consider a party's motive in bringing proceedings, not just their conduct after the commencement of those proceedings. I consider that this is such a case. The director of the applicant was well aware of the respondents' reasons for the withholding of part of the on account payment sought for 2017 and had proposed an alternate course of action which he then abandoned. I further consider that the emphasis on forfeiture was designed to bring pressure on the leaseholders. In the context of this case, the proceedings were brought unreasonably. I also consider that the stance taken of putting the respondents to proof of the defective works was unreasonable and put them to the additional expense of an expert and the provision of additional documentation to support the case, the majority of which was within the applicant's control and indeed generated by them. That is not to say that all of the conduct was unreasonable in the sense required by Rule 13, although it was generally obstructive, unhelpful and increased the costs for both sides.

10. For these reasons I further determine that it is right to reflect the applicant's unreasonable behaviour in an award of costs. In determining the amount of costs, I have considered what might have been incurred had the applicant acted reasonably. I think it is likely that a determination would have been required as the parties were so far apart in respect of the amount due in terms of a rebate for the faulty works. If the proceedings had been issued with candour from the applicant in respect of the history and including all of the items properly in dispute, there would have been no need for expert evidence and arguably no need for counsel for the respondents. In the circumstances I am minded to award the respondents their costs in respect of those items but not the fees of Mr Tilister. That is mainly on the basis that I think it would have been likely that he would have conducted the proceedings on behalf of the respondents and since this tribunal is not a costs shifting jurisdiction, in the absence of Rule 13 issues, those costs would have been payable by the respondents in any event. The applicant accepts that the expert's and counsel's fees are reasonable.

11. In the circumstances and for each of the above reasons I make an award of costs in the favour of the respondents for £9,700 plus VAT in respect of counsel's fees and £3,675 plus VAT in respect of the expert's fees, making a total award of £16,050.

Name: Ruth Wayte **Date:** 4 April 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).