12674

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2014/0382**
Property	:	**54 John Kennedy House, Old Rotherhithe Road, London Se16 2QF**
Applicant for Costs Orders	:	**London Borough of Southwark**
Representative	:	**Mr Peter Cremin**
Respondents on Costs Applications	:	**Mr Jerry Hewitt (1)** **Ms Runa Akhtar (2)**
Representative	:	**Mr Jerry Hewitt**
Type of Applications	:	**Costs – Rules 13(1) (a) and (b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**
Tribunal Member	:	**Judge John Hewitt**
Date of Decision	:	**22 March 2018**

DECISIONS ON COSTS APPLICATIONS

The issues before the tribunal and its decisions

1. The issues before the tribunal were:

An application pursuant to rule 13 (1)(a) for a costs order against Mr Jerry Hewitt in the sum of £3,532.00; and

An application pursuant to rule 13 (1)(b) for a costs order against Ms Runa Akhtar in the sum of £3,783.00

2. The decision of the tribunal is that both applications are refused for the reasons set out below.

Reasons

Preliminary and background

1. In this decision the parties are referred to as follows:

London Borough of Southwark	'the council'
Mr Jerry Hewitt	'Mr Jerry Hewitt'
Ms Runa Akhtar	'Ms Akhtar'

2. In the substantive proceedings Ms Akhtar was the applicant (for part of the time represented by Mr Jerry Hewitt) and the council was the respondent. In those proceedings Ms Akhtar sought a determination of several different services charges claimed by the council. Some of those service charges were determined but a major works service charge remained outstanding for determination. The protracted delay was due to the lateness in the council providing a final account of the costs of those works.

3. Ms Akhtar made an application to withdraw her application and by a notice dated 21 November 2017 the tribunal consented to that withdrawal.

4. Under cover of a letter dated 19 December 2017 the council sent to the tribunal a document dated 18 December 2017 in which the council made applications for costs orders as follows:

Against Mr Jerry Hewitt pursuant to rule 13(1)(a)	£3,532.50
Against Ms Akhtar pursuant to rule 13(1)(b)	£3,783.00

The document making those applications sets out in some detail how those sums claimed have been arrived and the basis on which the applications are made.

5. The costs applications were deemed to have been made within the time limits prescribed by rule 13(5).

8. Rule 13(6) provides that the tribunal may not make an order for costs against a person (the paying party) without first giving the paying party an opportunity to make representations.

9. Accordingly, directions were given on 19 January 2018. In those directions it was stated that the tribunal considered the costs applications may be determined by summary assessment pursuant to rule 13(7)(a) and that the costs applications were suitable for determination on the papers to be filed and served in accordance with the directions and without an oral hearing. The tribunal indicated that would endeavour to make such a determination during week commencing 19 March 2018. The tribunal also reminded the parties that any of them was entitled to ask for an oral hearing. Any such request was to be made in writing by no later than 5pm Friday 9 February 2018. The tribunal has not received any request for an oral hearing.

10. Pursuant to the directions the parties have exchanged statements of case. I have been provided with a file, which runs to a total of 633 pages, divided into two sections, A & B. Later reference in this decision to a letter and a number in square brackets, ([ ]) is a reference to the section and page number of that that file. The file contains:

Applications for costs	[A1-30]
Joint representations of Mr Jerry Hewitt and Ms Akhtar (settled by Mr Sam Madge-Wyld of counsel)	[A31-42]
Additional representations of Mr Jerry Hewitt	[A43- 87]
The council's statement of case in reply (with annexures)	[A88- 110]
Directions 19 January 2018	[A111- 114]
The parties' supporting documents	[B1-519]

The statutory provisions, rules and related materials

11. In the Appendix to this decision I have set out the relevant provisions of:

Section 29 Tribunals, Courts and Enforcement Act 2007;

Rules 3, 13 and 14 of this tribunal's rules; and

Extracts from: Civil Procedure Rules 1998 Practice Direction 46.8: Personal liability of legal representative for costs – wasted costs orders: rule 46.8

12. In my directions dated 19 January 2018 I drew attention to several authorities and recommended that the parties should bear them in mind when formulating their respective statements of case:

Ridehalgh v Horsefield [1994] Ch 205;

Willowcourt Management Company (1985) Limited v Mrs Ratna Alexander [and other parties] [2016] UKUT 0290 (LC); and

Patrick Brian Matier v Christchurch Gardens (Epsom) Limited [2017] UKUT 56 (LC);

In his submissions Mr Madge-Wyld, and in its reply the council, has made references to the first two authorities. The council has also made reference to two authorities which go to hourly charge-out rates the quantum of costs.

13. In preparing this decision I have reminded myself of the guidance given in the authorities, particularly in *Ridehalgh v Horsefield* . The focus in early jurisprudence was the duty owed by a solicitor to the court. In a sense, a statutory extension of that jurisdiction to barristers was introduced by what is now s51(6) and (7) Senior Courts Act 1981:

"(6) In any proceedings mentioned in subsection (1), the court may disallow, or (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 rules of court.

(7) In subsection (6), *"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 court considers it is unreasonable to expect that party to pay."

14. In practice, in the County Court and above, most representation is undertaken by solicitors and barristers. A non-lawyer may not represent a party without the express permission of the court. Most of the authorities thus focus on the duty which the lawyer owes to the court and the consequences which flow from a breach of that duty and as regards improper, unreasonable or negligent conduct or omissions.

15. As regards costs generally and wasted costs, material paragraphs from *Willow Court* are:

12. The source and structure of the FTT's power to award costs is therefore apparent. The general principle is laid down by section 29(1): costs of all proceedings are in the discretion of the FTT, which has full power to determine by whom and to what extent the costs are to be paid, subject to the restrictions imposed by the 2013 Rules. Those restrictions prohibit the making of an order for costs except in the circumstances described in rule 13(1).

13. Rule 13(1) identifies three circumstances in which an order for costs may be made. In all cases rule 13(1)(a) allows the FTT to may make an order for the

payment of "wasted costs" as that expression is defined in section 29(5) of the 2007 Act; we will consider that power later. In the three categories of case referred to in rule 13(1)(b), (agricultural land and drainage, residential property, and leasehold cases) the FTT has power to award costs only if a person has acted unreasonably in bringing, defending or conducting proceedings. Finally, rule 13(1)(c) has the effect that, in a land registration case, the power to award costs is unrestricted, other than by the overriding objective.

14. A "leasehold case", to which the power in rule 13(1)(b) applies, is any case in respect of which the FTT has jurisdiction under any of the enactments specified in section 176A(2) of the Commonhold and Leasehold Reform Act 2002 (rule 1(3)); those enactments include the Landlord and Tenant Act 1985, section 27A of which confers jurisdiction on the FTT to make determinations in relation to service charges.

15. In addition to these powers in relation to costs the FTT may also, in any case, make an order under rule 13(2) for the reimbursement of fees. That power is unrestricted, other than by the overriding objective.

Wasted costs

16. None of the decisions under consideration in these appeals included a wasted but it is relevant for us to begin by considering the power conferred by section 29(4) and rule 13(1)(a) because all of the submissions we received on the power to make an order for costs under rule 13(1)(b) where a party has behaved unreasonably referred to the leading case on wasted costs.

17. The power to make an order for wasted costs under rule 13(1)(a) and section 29(4) of the 2007 Act is concerned with the conduct of a "legal or other representative" of a party, and not the conduct of the party themselves. It is a distinct power which should not be confused with the power under rule 13(1)(b).

18. The key characteristic of "wasted costs", as they are defined by section 29(5) is that they are costs incurred by a party "as a result of any improper, unreasonable or negligent act or omission" on the part of a representative. Section 29(5) replicates section 51(7) of the Senior Courts Act 1981 which confers jurisdiction in relation to wasted costs in the civil courts.

19. A legal or other representative, as is explained in section 29(6), is any person exercising a right of audience or a right to conduct proceedings on behalf of a party. Rule 14(1) of the 2013 Rules provides that a party to proceedings in the FTT may appoint a representative "whether legally qualified or not" to represent them in the proceedings. It follows that a wasted costs order may be made either against a legal representative or a lay representative, but never against the party themselves. Section 29(4) of the 2007 Act confers a general discretion where wasted costs have been incurred which is not further restricted by rule 13(1)(a). It goes without saying that the discretion must be exercised judicially and that, when exercising it, the FTT must have regard to the overriding objective.

20. The leading authority on wasted costs is Ridehalgh v Horsefield [1994] Ch 205 in which the Court of Appeal examined the origin and exercise of the jurisdiction conferred on civil courts by section 51(7) of the 1981 Act. At page 232 C – 233 F Sir Thomas Bingham MR, giving the judgment of the whole court, considered the expressions "improper, unreasonable or negligent" the meanings of which, he considered, were not open to serious doubt:

"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 it is not unreasonable.

The term "negligent" was the most controversial of the three ... We are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.
...

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."

21. The whole of the discussion of wasted costs in Ridehalgh v Horsefield is couched in terms of the conduct of professional lawyers. It was also concerned with the construction of the tripartite expression "improper, unreasonable or negligent".

16. Thus, as regards professionally qualified representatives the bar was set high before the court would exercise its discretion to impose a wasted costs order on the representative.

17. That context must be borne in mind when considering the different subject matter and language of rule 13(1)(b) which is concerned only with the conduct a party, and only with conduct which is "unreasonable". In these circumstances the guidance in *Willow Court* was:

Unreasonable behaviour
22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in Ridehalgh. We therefore restrict ourselves to mentioning Cancino v Secretary of State for the Home Department [2015] UKFTT 0005 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). Cancino provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.

23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in Ridehalgh on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent"

conduct and it was submitted that unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to 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, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. 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 given in Ridehalgh 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 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?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. 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.

The element of discretion in rule 13(1)(b)

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only ... if a person has acted unreasonably...." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28. At the first stage the question is whether a person has acted unreasonably. 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. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes 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." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.

The position of unrepresented parties

31. One circumstance which may often be relevant is whether the party whose conduct is criticised has had access to legal advice. It was submitted on behalf of the respondents in each appeal that no distinction should be drawn between represented and unrepresented parties in the context of rule 13(1)(b). In support of those submissions reference was made to the decision of the Court of Appeal in Tinkler v Elliott [2012] EWCA Civ 1289 which concerned an application under CPR 39.3(3) to set aside a judgment entered after a party had failed to attend a hearing. Such a judgment may only be set aside if, amongst other things, the applicant has acted promptly. At paragraph 32 Morris Kay LJ considered the relevance of the fact that the applicant was unrepresented:

"I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that the litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence."

We entirely accept that there is only one set of rules which applies both to represented and to unrepresented parties but we do not consider that Tinkler v Elliott has any relevance to these appeals. Whether a person has acted promptly involves a much more limited enquiry than whether a person has acted unreasonably.

32. In the context of rule 13(1)(b) we consider that the fact that a party acts without legal advice is relevant at the first stage of the inquiry. When considering objectively

whether a party has acted reasonably or not, the question is whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way in which that party acted. In making that assessment it would be wrong, we consider, to assume a greater degree of legal knowledge or familiarity with the procedures of the tribunal and the conduct of proceedings before it, than is in fact possessed by the party whose conduct is under consideration. The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings.

33. We also consider that the fact a party who has behaved unreasonably does not have the benefit of legal advice may be relevant, though to a lesser extent, at the second and third stages, when considering whether an order for costs should be made and what form that order should take. When exercising the discretion conferred by rule 13(1)(b) the tribunal should have regard to all of the relevant facts known to it, including any mitigating circumstances, but without either "excessive indulgence" or allowing the absence of representation to become an excuse for unreasonable conduct.

34. At paragraph 26 of Cancino the tribunal considered the balance which is required to be struck when considering application for costs against unrepresented parties:
"First, the conduct of litigants in person cannot normally be evaluated by reference to the standards of qualified lawyers. Thus the same standard of reasonableness cannot generally be applied. On the other hand the status of unrepresented litigants cannot be permitted to operate as a carte blanche to misuse the process of the tribunal. The appropriate balance must be struck in every case. In conducting this exercise, tribunals will be alert to the distinction between pursuing a doomed appeal in the teeth of legal advice and doing likewise without the benefit thereof... Stated succinctly, every unrepresented litigate must, on the one hand be permitted appropriate latitude. On the other hand, no unrepresented litigate can be permitted to misuse the process of the tribunal. The overarching principle of facts sensitivity looms large once again."

We agree with these observations. We also find support in Cancino for our view that rule 13(1)(a) and (b) should both be reserved for the clearest cases and that in every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable.

The withdrawal of claims
35. In one of the appeals with which we are now concerned (Stone), costs were awarded under rule 13(1)(b) on the grounds that the applicant had delayed in withdrawing proceedings until after a time when it should have been clear to him that he had achieved as much by concession from the management company as he could realistically expect to obtain from the FTT by proceeding to a hearing. It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and to abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs.

36. In this regard our attention was drawn to the decision of the Court of Appeal in McPherson v BNP Paribas [2004] EWCA Civ 569, which concerned rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (permitting the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably). Having noted that in civil litigation under the CPR the discontinuance of claims was treated as a concession of defeat or likely defeat, Mummery LJ went on, at paragraph 28:

"In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for Employment

Tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss MacAtherty appearing for the Applicant, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the Tribunal should not adopt a practice on costs which would deter applicants from making sensible litigation decisions."

37. The views of the tribunal in Cancino were to similar effect, at paragraph 25(i):

"Concessions are an important part of contemporary litigation, particularly in the overburdened realm of immigration and asylum appeals.... Occasionally a concession may extend to abandoning an appeal (by the appellant) or withdrawing the impugned decision (by the respondent). We consider that applications for costs against the representative or party should not be routine in these circumstances. Rule 9 cannot be invoked without good reason. To do otherwise would be to abuse this new provision."

18. Before summarising the parties' respective cases I wish to make a couple of general observations. The proceedings were commenced in 2014 and have had a fairly tortuous history. I need not go into all the reasons save to say some were the fault of the parties and their respective parties and some of the early directions from the tribunal could have been clearer. In a sense the original claim was framed in an overly complex way and sought to include various remedies outside of the scope of the jurisdiction of the tribunal. Throughout there has been a tendency for both parties to decline to follow directions when it suits them. Both parties have failed to engage with one another and to attempt to cooperate with one another. Each tries to score points. Both parties have a problem with proportionality and documentation and both have a tendency to overcomplicate.

19. The current file before me is a micro - example of all that:

19.1 The directions provided for each of Mr Jerry Hewitt and Ms Akhtar to serve their respective statements of case in answer. A joint statement of case (12 pages) was served but in addition Mr Jerry Hewitt served a separate statement of case of his own (45 pages) delving into minute factual matters of detail not all of which concern the application for a costs order against him.

19.2 The council chooses to serve a statement of case in reply save as regards a number of matters raised by Mr Jerry Hewitt on which they say he has no locus.

19.3 That is then followed by section B - 519 pages dealing with contentious issues of fact on the costs applications where the maximum amount at stake is just over £7,000. As far back as July 2015 a direction was issued that the trial bundle for the whole hearing should not exceed 350 pages, later increased to 550 pages, but even then the parties could not agree what to

include/exclude and each ended up providing their own lever arch files.

The gist of the case for the council
Mr Jerry Hewitt Rule 13(1)(a)

20. The claim is for £3,532.50 made up as to:

£2,722.50	Conduct complained of – Delivery on 17 February 2015 of five boxes of papers unindexed and uncollated for use at the hearing that was set for 19 February 2015;
£270.00	Conduct complained of – Request made on 1 September 2017 for disclosure of certain documents which the council says he already had.
£540.00	Conduct complained of – Over the course of the proceedings raising issues that had no merit - number of examples are cited but the main cause for complaint was resurrecting in November 2017 an issue to do with Florrie's Law which he had previously said was no longer an issue.

21. As to the claim to £2,722.50, Mr Jerry Hewitt says that in February 2015 he was merely assisting Ms Akhtar on an informal basis as friend and that at the hearing on 19 February 2015 Ms Akhtar was represented by two trainee solicitors on a pro bono basis. Mr Hewitt says that it was not until 28 May 2015 that Ms Akhtar appointed him as her representative in the tribunal proceedings and sent an email to the tribunal confirming that appointment [B120].

The council appear to accept that position but argue in a submission filed much later during the course of the proceedings (when Mr Jerry Hewitt was acting as Ms Akhtar's representative) Mr Hewitt said [A95]: *"From 6 February 2015 to 16 February 2015 the Applicant and her representative worked tirelessly to assemble her own bundle while trying not to duplicate the three large volumes provided by the Respondent."*

22. I am not persuaded that in February 2015 Mr Jerry Hewitt was Ms Akhtar's representative within the meaning of rule 14. That rule permits a party to appoint a representative but by rule 14(2) the party must send to the tribunal (and the opposite) party written notice of the name and address of the representative. Unless and until that is done the person concerned is not an appointed representative.

23. I am reinforced in this conclusion because even though tribunal proceedings are often conducted in a less formal manner than some court proceedings, it is very important for the tribunal to know who the parties are, who their representatives (if any) are what the correct addresses for service of documents are.

24. I am satisfied that in the quotation above what Mr Jerry Hewitt was really saying was " ... *the Applicant and I worked tirelessly...*". At that time Mr Hewitt was a friend assisting Ms Akhtar, nothing more.

25. I therefore reject the claim on that ground. I should moreover make the point that there is a complex background issue of fact as regards disclosure and the circumstances leading up to the hearing that was scheduled for 19 February 2015 but which did not go ahead as a substantive hearing. I am far from satisfied that a rule 13(1)(a) costs application is the appropriate forum for a resolution of such factual disputes. The explanation put forward by Mr Jerry Hewitt is not so unreasonable as to be rejected out of hand.

26. As to the claim for £270.00, in the scheme of things this is so small as to verge on an abuse of process. Again, it is the subject of a factual dispute. Pages and pages of submissions and documents are devoted to it. Mr Jerry Hewitt's submissions on it run to 11 pages alone. The council has chosen not to comment on any of those submissions. Simply to assert that Mr Jerry Hewitt 'made an application for disclosure of documentation that he already had'.

27. The major works in dispute in these proceedings were carried out under a major and complex partnering agreement that the council entered into evidently in the belief that it might assist deliver works and services in a cost effective manner. The partnering agreement in itself led in turn to a series of further complex agreements, schedules and specifications.

28. Mr Jerry Hewitt vehemently denies that he made a request for duplicate disclosure and he sets out his reasons which the council has chosen not to respond to. I am satisfied that Mr Jerry Hewitt had a reasonable explanation for making the request that he did. Even if the council is right in its argument (about which I am far from convinced) I find that such conduct it far from *'improper, unreasonable or negligent'* within the meaning of s29 Tribunals, Courts and Enforcement Act 2007. It must be remembered that Mr Jerry Hewitt is a lay representative. The standard of conduct expected on him is less than that expected of a professional lawyer. There may have been many reasons for the request including perhaps oversight and the morass of papers and documents that had been provided to in the course of the proceedings.

29. For these reasons I reject the claim.

30. As to the claim to £540 the general complaint is that over the course of the proceedings Mr Jerry Hewitt made a number of issues irrespective of merit or chances of success. The council lists 16 examples of alleged conduct. That is an incorrect allegation in any event. Many of the issues had been raised by Ms Akhtar prior to Mr Jerry Hewitt's appointment as her representative. It is also incorrect that all of them were without merit. Ms Akhtar succeeded on some of them. Further, included in the

list were several s20B issues. At first instance the tribunal found that one of the s20B notices in issue was both invalid and had not been correctly served. On appeal the Upper Tribunal took a different view but that does not in any way indicate it was such a bad or poor point to take that it triggers a wasted costs order.

In the event in terms of detail, the council relied upon one issue, that of Florrie's Law. In terms of fact it is correct that at a CMC on 19 June 2017 Mr Jerry Hewitt confirmed it was no longer an issue and that at a CMC on 6 November 2017 Mr Jerry Hewitt said that it was an issue. The question turned on whether the council had received some form HM Government Grant towards the major works, the subject of the dispute. Mr Jerry Hewitt claimed that in the interim internal documents held by the council suggested to him that it did or might have done so. This was denied by the council but the relationship between Mr Jerry Hewitt and the council had sunk so low that Mr Hewitt had lost confidence with the accuracy of information emanating from the council. Mr Madge-Wyld submitted that it was not unreasonable of Mr Hewitt to put the council to proof. I had suggested that the point could be resolved by a letter signed by the Borough Treasurer but the council chose to deal with it by way of (effectively) a one page witness statement [A14] from an officer and claims costs of £540 for the preparation of it. Evidently that document took a qualified solicitor equivalent to Grade A one hour to attend on the witness and two hours to draft.

31. I prefer the submissions made on behalf of Mr Jerry Hewitt. I find it was not so unreasonable of Mr Jerry Hewitt to put the council to proof. His explanation is within the range of what is reasonable for a lay representative. It was not a complex point and it was one which the council was able to deal with quite easily. I therefore reject the claim.

32. In its final submissions the council says that whilst it is used to dealing with tribunal applications by leaseholders, and whilst it rarely makes applications for costs orders under rule 13, it does so in the current case as a *"deterrent to unreasonable behaviour which leads to costly and protracted cases as such as this."*

33. I have been concerned with these proceedings for a number of years. It is clear to me that the council became very frustrated with the manner in which Mr Jerry Hewitt conducted the case and the level of detail that he drilled into. There are occasions when he over did it I find that was partly due to lack of confidence and that he was out of his comfort zone and trying to cover too many eventualities. At times he could not see the wood for the trees, but taken overall I find it cannot be fairly said that his conduct came anywhere as near as the threshold that would trigger a wasted costs order.

34. I find that it would be contrary to the ethos of the tribunal system that lay representatives be deterred from assisting those within their

community who may need some form of help, provided, of course, that the lay representative does not over step the mark.

Ms Akhtar Rule 13(1)(b)

35. The is for £3,783.00 made up as to:

£1,623.00	Conduct complained of – taking the point that she did not receive s20B notices, a draft account and the final account;
£2,160.00	Conduct complained of - challenging the cost, quality and extent of certain major works only to withdraw her claim at a late stage

36. As to the claim to £1,623, at first instance the tribunal found that whilst the evidence of Ms Akhtar was not wholly satisfactory, it did find, on the balance of probabilities that the council had not served the s20B notice (there was no compelling evidence from the council as the manner in which it was allegedly served) and that Ms Akhtar had not received it. The fact that a different tenant, Stell LLC, did receive one or some of the s20B notices is irrelevant because they were served under a different process and by a different mechanism. On appeal, the Upper Tribunal took a different view of the facts which was some might consider surprising because that tribunal did not have the benefit of hearing the oral evidence. The Upper Tribunal did not conclude that Ms Akhtar deliberately lied or misled the FTT. The conflicting conclusions of the Upper Tribunal does not in any way support the assertion that it was unreasonable for Ms Akhtar to have taken the point. It was a point taken from a very early stage and was not a make weight brought up at the last moment.

37. The council appears to want to re-litigate issues of fact in this costs application and it is wholly inappropriate and disproportionate to do so.

38. I therefore reject the claim.

39. As to the claim to £2,160, in *Willow Court,* the Upper Tribunal gave clear guidance that the fact of withdrawal or discontinuance is not to be taken as an indication a claim was unreasonably made or pursued and that claimants ought be deterred from dropping claims by the prospect of an adverse costs order.

40. It was not in dispute that Ms Akhtar was entitled to bring the application in the first instance and during the course of the proceedings succeeded on some points and obtained some concessions from the council.

41. In paragraphs 8 -10 of Mr Madge-Wyld's submissions he sets out the reasons for Ms Akhtar's late withdrawal. The council in reply submitted that Ms Akhtar had been in receipt of legal advice for over 3 and a half

years and had not filed any witness statements to support her case and that it was only at the end that she gave up when it was made clear she would be required to make out her case. He council submits Ms Akhtar was perverse and unreasonable.

42. I am not sure it is right that Ms Akhtar had the benefit of legal advice over a long period. In the early days Ms Akhtar had some pro bono advice from trainee solicitors but that came to an end in early 2015 and after that Mr Jerry Hewitt, who is not a lawyer was on his own. Moreover, the council has not challenged the reasons for withdrawal put forward by Mr Madge-Wyld and I infer that the council accepts them, or at least does not challenge them.

43. Having given careful consideration to the guidance before me I am not persuaded that Ms Akhtar acted in such an unreasonable manner as to merit an adverse costs order being made against her. I therefore reject the claim.

Judge John Hewitt
22 March 2018

The Appendix

Tribunals, Courts and Enforcement Act 2007

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 rules

3.— Overriding objective and parties' obligation to co-operate with the Tribunal

(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.

13.— Orders for costs, reimbursement of fees and interest on costs

(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 an application or on its own initiative.

(4) A person making an application for an order for costs—
(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

14.— Representatives
(1) A party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party must send or deliver to the Tribunal and to each other party written notice of the representative's name and address.

(3) Anything permitted or required to be done by or provided to a party under these Rules, a practice direction or a direction may be done by or provided to the representative of that party except—
(a) signing a witness statement; or
(b) sending or delivering a notice under paragraph (2), if the representative is not a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act.

(4) A person who receives due notice of the appointment of a representative—
(a) must thereafter provide to the representative any document which is required to be sent to the represented party, and need not provide that document to the represented party; and
(b) may assume that the representative is and remains authorised until receiving written notification to the contrary and an alternative address for communications from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).

Civil Procedure Rules 1998 Practice Direction 46.8

Personal liability of legal representative for costs – wasted costs orders: rule 46.8

5.1 A wasted costs order is an order –

(a) that the legal representative pay a sum (either specified or to be assessed) in respect of costs to a party; or

(b) for costs relating to a specified sum or items of work to be disallowed.

5.2 Rule 46.8 deals with wasted costs orders against legal representatives. Such orders can be made at any stage in the proceedings up to and including the detailed assessment proceedings. In general, applications for wasted costs are best left until after the end of the trial.

5.3 The court may make a wasted costs order against a legal representative on its own initiative.

5.4 A party may apply for a wasted costs order –

(a) by filing an application notice in accordance with Part 23; or

(b) by making an application orally in the course of any hearing.

5.5 It is appropriate for the court to make a wasted costs order against a legal representative, only if –

(a) the legal representative has acted improperly, unreasonably or negligently;

(b) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted;

(c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs.

5.6 The court will give directions about the procedure to be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.

5.7 As a general rule the court will consider whether to make a wasted costs order in two stages –

(a) at the first stage the court must be satisfied –

(i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and

(ii) the wasted costs proceedings are justified notwithstanding the likely costs involved;

(b) at the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above.

5.8 The court may proceed to the second stage described in paragraph 5.7 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to make representations.

5.9 On an application for a wasted costs order under Part 23 the application notice and any evidence in support must identify –

(a) what the legal representative is alleged to have done or failed to do; and

(b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative.

ANNEX - 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.