13023

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2018/0122**
Property	:	**Various Flats at Strickland House, Chambord Street, London E2 7LP**
Applicants	:	**See Appendix**
Respondent	:	**London Borough of Tower Hamlets**
Type of Application	:	**Supplemental cost applications following application for determination of liability to pay service charge**
Tribunal Members	:	**Judge P Korn** **Mr S Mason BSc FRICS**
Date of receipt of all written submissions	:	**3rd October 2018**
Date of Supplemental Decision	:	**17th October 2018**

SUPPLEMENTAL DECISION ON COSTS

Decision of the Tribunal

The Tribunal makes no orders under either paragraph 13(1)(b) or paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**").

The background

1. This application is supplemental to an application (the "**Main Application**") made by the Applicants pursuant to section 27A of the Landlord and Tenant Act 1985 (the "**1985 Act**") for a determination as to the payability of certain service charges in relation to the Property.

2. The hearing in respect of the Main Application was listed for two days (28th and 29th August 2018). However, on the first day of the hearing – after initial oral submissions, exchanges between the Judge and the parties' representatives and then discussions and negotiations between the parties' representatives direct – the Tribunal approved a Consent Order under which the application was withdrawn on the basis detailed in that Consent Order. As part of the terms of the Consent Order it was expressly acknowledged that cost applications could be made under paragraph 13(1)(b) and paragraph 13(2) of the Tribunal Rules, and the Consent Order included directions for making written representations in respect of such cost applications.

3. The Applicants have now made (a) a cost application pursuant to paragraph 13(1)(b) of the Tribunal Rules and (b) an application pursuant to paragraph 13(2) of the Tribunal Rules for the reimbursement by the Respondent of the application and hearing fees. The Respondent has also made a cost application pursuant to paragraph 13(1)(b) of the Tribunal Rules.

Applicants' written submissions

4. The Applicants submit that the Respondent acted unreasonably in connection with the proceedings relating to the Main Application. The Respondent failed to engage with the Applicants until the case management hearing in April 2018, it then rejected out of hand a suggestion of mediation at the case management hearing, and it then wrote to the lead Applicant (Hannah Wilson) on 13th June 2018 threatening to commence legal proceedings unless her service charge debt of £28,199.11 (in respect of the invoice dated 1st April 2017) was settled either in full or by way of agreed payment plan. It also threatened to seek forfeiture of her lease.

5. Instead of focusing on serving a statement of case the Respondent then on 19th June 2018 applied to the Tribunal for an order striking out the Applicants' case for alleged failure to comply with directions, an

was dismissed. It then failed to seek an extension of e of the witness statement of its principal witness despite appreciating that he was ill. In addition, it accepted the Applicants' witness statements without revealing that its own witness statements had not been finalised, thereby gaining an unfair advantage by seeing the Applicants' statements before finalising its own. Furthermore, on 8th August 2018 the Respondent declined to provide the Applicants with hard copies of its witness statements and expert reports, thereby requiring the Applicants to print out many hundreds of pages.

6. At the hearing on 28th August 2018 the Respondent submitted for the first time that no service charges in respect of the major works were payable until the works were complete and the cost finalised and that, therefore, the proceedings in respect of the Main Application were unnecessary.

Respondent's written submissions

7. The Respondent observes that on the first day of the hearing the Applicants abandoned the totality of their claim after the Respondent had confirmed that it would defer payment of the service charges in question until actual expenditure had been calculated.

8. In the Respondent's submission the litigation pursued by the Applicants has been entirely futile. It quotes from the decision of the Upper Tribunal in *Jam Factory Freehold Ltd v Bond (2014) UKUT 443*, citing this as authority for the proposition that a challenge to 'on account' payments under section 19(2) of the 1985 Act is something of a sterile affair because what matters, in terms of ultimate liability, is the actual service charge due at the end of each financial year. It therefore asserts that the Applicants have been unreasonable because the benefit attainable through their application was of such limited value that *"the game was not worth the candle"*, with the costs of the litigation being out of all proportion to the benefit to be achieved.

9. In the Respondent's submission, the only explanation for the Applicants' flawed strategy was the Applicants' misconceived view that they had the right to determine the scope of the major works in question. This led them to ignore the fact that the Respondent had confirmed in an email sent by Shajahan Ali to David Raedeker on 19th April 2018 (shortly after the commencement of the application) that no interim costs would be demanded until the major works were complete. That email was then circulated by Mr Raedeker to the other leaseholders. Although Mr Raedeker asserted that the leaseholders felt that they could not *"rely on Shajahan Ali's official confirmation"*, Hannah Wilson confirmed in her witness statement that the leaseholders had repeatedly been told that they would not need to pay the interim demand. The Respondent submits that this appears to be corroborated by notes of a meeting on 28th September 2017 in which

Richard Harris stated: *"There is no need to pay until the Add and Omit meeting – it can be recalibrated. The policy is not to demand"*. In her letter dated 20th June 2018 Hannah Wilson then stated *"... We seek, therefore, a determination on the necessity of those works even if the Respondent confirms that payment for them will be deferred until it has produced a final bill"*.

10. At the hearing, after some initial discussion, the Tribunal invited the Respondent to consider whether it should give an undertaking not to pursue the interim service charges. The Respondent was more than happy to do so on the basis of the application not proceeding, as this had been the Respondent's consistent policy since before the issuing of the application.

11. In the Respondent's submission, the Applicants' conduct has been unreasonable because their application and reasoning were both deeply flawed despite their having access to legal advice.

12. In response to the Applicants' submissions on the point, the Respondent does not accept that any failure to engage on its part could be considered "unreasonable conduct" for the purposes of Rule 13(1)(b). As regards the suggestion of mediation, both parties' representatives considered it to be unsuitable. As regards the Respondent allegedly having ignored the Applicants' *"many attempts since 2017 to engage constructively"*, in fact several meetings took place and the Respondent's level of engagement went far beyond the statutory requirements.

13. As regards the letter before action sent to Hannah Wilson, the Respondent does not accept that such letter constitutes unreasonable conduct or that the reference to possible forfeiture is anything other than standard practice. As regards the failure to seek an extension of time for filing a witness statement, little (if any) prejudice was caused to the Applicants and the late service was not deliberate. As regards the early receipt of the Applicants' factual witness statements, the Respondent considered these to be almost entirely superfluous and anyway it was the Applicants' decision unilaterally to serve their statements rather than wait for mutual exchange.

Applicants' further written submissions

14. In response to the Respondent's written submissions, the Applicants submit that the email to Mr Raedeker is a very thin foundation for asserting that the proceedings were misconceived. In addition, in view of the size of the interim demands the Applicants did not accept that the cost of proceedings outweighed the amount in dispute. Furthermore, the excessive costs incurred by the Respondent were a matter of its own misjudgement and they could have been minimised

by engaging constructively with the Applicants or by making it clear much earlier that payment of the interim demands was not required.

15. No attempt was made by the Respondent officially to notify all of the Applicants that the advance service charge was not to be regarded as payable. Furthermore, the Respondent had a history of making demands for payment and resiling from promises or assurances previously given, and the Applicants' written submissions include a list of broken promises by reference to documents in the hearing bundle. The Applicants also point to an email from Ann Otesanya (from the Council) to Hannah Wilson stating that *"... by initiating the Tribunal proceedings you have formally refused our deferred payment offer for the Works. The invoices are technically due and payable (in arrears) and the Council is entitled to recovery ..."*.

The Tribunal's analysis

Paragraph 13(1)(b) of the Tribunal Rules

16. Paragraph 13(1)(b) of the Tribunal Rules states as follows: *"The Tribunal may make an order in respect of costs ... if a person has acted unreasonably in bringing, defending or conducting proceedings in ... a leasehold case"*.

17. In the Upper Tribunal decision in *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)* the Upper Tribunal considered, inter alia, what is meant by acting "unreasonably" and the issue of causation.

18. In *Willow Court* the Upper Tribunal said that whilst what constitutes acting unreasonably is fact-sensitive, the approach to be followed when determining whether conduct has been unreasonable is as set out in the case of *Ridehalgh v Horsfield (1994) 3 All ER 848.*

19. In *Ridehalgh v Horsfield* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. This formulation was adopted by the Upper Tribunal in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007* and (as noted above) in *Willow Court.* One principle which emerges from these cases is that costs are not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings.

20. Sir Thomas Bingham also said that unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case, but that conduct could not be

deeply flawed, we do not accept that the Applicants' conduct amounts to unreasonable conduct for the purposes of Rule 13(1)(b). The Respondent's central point in this regard refers back to the question of whether the Applicants knew or should have known at an early stage that the Respondent would not be pursuing leaseholders at any stage for payment of the interim demand, and we have already dealt with this point. The Respondent has also raised the related points that an application pursuant to section 19(2) could be seen as a "sterile affair" and that Hannah Wilson expressed the wish in correspondence to pursue the claim even if the demand for payment was being deferred, but we have dealt with these points too.

28. In conclusion, therefore, we do not accept that either party has acted unreasonably within the meaning of, and for the purposes of, paragraph 13(1)(b) of the Tribunal Rules. As the Upper Tribunal stated in *Willow Court*, unreasonable conduct is an essential pre-condition of the power to order costs under Rule 13(1)(b), and so having made this finding it follows that we do not need to make a determination on any connected issues, including the nature, extent and consequences of the parties' conduct and the reasonableness or otherwise of the amount of costs sought. Accordingly, we decline to make an order under paragraph 13(1)(b) of the Tribunal Rules.

Paragraph 13(2) of the Tribunal Rules

29. Paragraph 13(2) of the Tribunal Rules states as follows: *"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".*

30. The Applicants seek the reimbursement by the Respondent of the application and hearing fees. Whilst we have not found that the Applicants' conduct amounts to acting unreasonably for the purposes of Rule 13(1)(b), arguably the application should not have been made at all, and certainly it should not have reached a hearing. For the reasons already given, in our view both parties share the blame for the fact that the application was made and was then pursued up to and including the day of the hearing, but the Applicants' share of that blame – particularly once they had the benefit of legal advice – means that it would not be appropriate to order the Respondent to reimburse these fees.

31. In conclusion, therefore, we decline to make an order under paragraph 13(2) of the Tribunal Rules.

Name: Judge P. Korn **Date:** 17th October 2018

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

List of Applicants

Hannah Wilson	Flat 18
Jane Miller	Flats 2 and 3
Anne Crompton	Flat 7
Adam Drummond	Flat 10
Anurag Jain	Flat 11
David Raedeker and Ameneh Mahlhoudiji	Flat 14
Gladys Christofi	Flat 19
Francis Akpata	Flat 21
William Allen	Flat 23
Nadine Sandford	Flat 16
Alejandro Bonatto	Flat 22