



**FIRST - TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

<b>Case Reference</b>	:	BIR/00AW/LAM/2015/0001
<b>Property</b>	:	1 Palace Gate, Kensington, London, W8 5LS
<b>Applicant</b>	:	(1) Wayland Investments Inc.c/o Kleinwort Benson (Channel Islands) Limited (2) Henry Sehayek and Dalia Noonoo as Trustees of the Palace Gate Discretionary Trust
<b>Representative</b>	:	Collyer Bristow LLP Solicitors Daniel Dovar, Counsel, Tanfield Chambers
<b>Respondent</b>	:	Winchester Park Limited (incorporated in the British Virgin (Islands)
<b>Type of Application</b>	:	An application for costs made under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and section 20C Landlord and Tenant Act 1985 following a Final Decision of the Tribunal dated 26 July 2018.
<b>Tribunal Members</b>	:	I.D. Humphries B.Sc.(Est.Man.) FRICS P.J. Hawksworth (Lawyer) N.J. Wint B.Sc. FRICS ACIArb
<b>Date and Venue of Hearing</b>	:	25 and 26 January 2017 at the First-tier Tribunal (Property Chamber), 10 Alfred Place, London, WC1E 7LT.
<b>Date of Decision</b>	:	14 May 2019

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**DECISION**

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## Introduction

- 1 The Applicant made an application for costs under:
    - 2 1 Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the Rule 13 application') and
    - 2 Section 20C of the Landlord and Tenant Act 1985 ('the section 20C application')
- by email and letter dated 3 August 2018, following a Final Decision of the Tribunal in respect of the subject property dated 26 July 2018.
- For various reasons the application was stayed pending the outcome of other matters.
- 3 The Respondent has been barred from taking any further part in proceedings relating to applications for orders under section 20C of the Landlord and Tenant Act 1985 or Rule 13 of the Tribunal Procedure Rules by order of Regional Judge D Jackson dated 1st March 2019.
  - 4 The Tribunal met and considered the Applicant's submissions on 15th March 2019. Further information was requested which was received from the Applicant's Solicitors on 3rd April 2019 which has been considered by the Tribunal which finds as follows.

## Law

- 5 Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides:
  - ' (1) *The Tribunal may make an order in respect of costs only*
    - (a) ...
    - (b) *if a person has acted unreasonably in bringing, defending or conducting proceedings in*
      - (i) ...
      - (ii) *a residential property case, or*
      - (iii) ... '
- 6 Section 20C of the Landlord & Tenant Act 1987 provides:

*' 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 First-tier 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. '*
- 7 The Tribunal are mindful of the Court of Appeal guidance on what constitutes 'unreasonable' conduct in *Ridehalgh v Horsefield* [1994] EWCA Civ 40 and the sequential test applied to Tribunal proceedings relating to interpretation of Rule 13 in *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 0290 ('*Willow Court*').

## Submission

- 8 The Applicants refer to the test of unreasonable conduct in *Willow Court*.

- 9 They further put forward the following examples to highlight lack of proper management of the property but state that the matters below are not put forward in their own right as an example of unreasonable conduct “but so that the Tribunal can resolve any doubt as to what the intentions of the Respondent were in relation to management”.
- (i) Mr Mahpud had been severely criticised by a previous Tribunal;
  - (ii) the Applicants had been forced to commence injunction proceedings to restore the lift service to their flats (which had been deliberately stopped by Mr Mahpud);
  - (iii) Despite the Applicants having won the s 27A Application, the Respondent had forced them to enter County Court proceedings to determine their service charge accounts; further proceedings in which they were again vindicated as their accounts were found to be substantially in credit.
- 10 The Applicants state that the main reason for the request for costs is their concern over the identity of the party managing the property, i.e. a lack of transparency.
- 11 They further submit:
- (i) that the Respondent's offer of assurances, the day before the Hearing, demonstrated that the Respondent never intended to adhere to them;
  - (ii) that the Respondent had advanced an argument with so little merit that it was unreasonable to have defended the claim;
  - (iii) that the Respondent had attempted to avoid the appointment of a Manager by employing their own Manager after the section 22 notice had been served (Mr Maloney) and introducing another party to act as their representative after the preliminary Tribunal Hearing (Mr Fisher).
- 12 The Applicants submit that this was an attempt by the Respondent to mislead the Tribunal and consequently the Respondent should be liable for the Applicants' costs.
- 13 The Applicants note that a section 20C order had been made in the Management Order but request confirmation, relying on the findings of the substantive determination.

## **Determination**

### Application under Rule 13

- 14 Rule 13 gives the Tribunal a power to make an order for costs only if a person has acted unreasonably in bringing, defending or conducting proceedings. Since the proceedings in question had clearly not been “brought” by the Respondent, the matter for the Tribunal to consider is whether there had been unreasonable conduct by the Respondent in defending or conducting these proceedings.
- 15 On the question of whether behaviour is unreasonable, *Willow Court*, at paragraph 24 made it clear in the Tribunal’s view that the guidance as to unreasonable conduct given in *Ridehalgh* is still applicable. In *Ridehalgh* it was stated:

“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 judgement but it is not unreasonable"

16 At paragraph 24 of *Willow Court*, the Upper Tribunal stated:

"We see no reason to depart from the guidance given in *Ridehalgh v Horsefield* at 232E despite the slightly different context". It then went on to repeat the requirements for unreasonability set out in *Ridehalgh* including specific reference to Sir Thomas Bingham's "acid test" that is to say, is there a reasonable explanation for the conduct complained of?

17 The Upper Tribunal also stated 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".

18 As Rule 13 (1) makes clear, there is an element of discretion in an award of costs by virtue of the use of the word "may" in the Rule rather than "must". Again we turn to *Willow Court* which at paragraph 27 states:

"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 of discretion for the tribunal."

19 What approach should a tribunal take in considering whether or not to exercise such discretion? This tribunal's view is that it should follow the approach set out by the Upper Tribunal in the remainder of paragraph 27 and in paragraph 28 of *Willow Court* as under:

"27.....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 be engaged. A discretionary power is then engaged and the decision maker moves to a second stage of 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".

20 As to costs in Tribunal cases generally, the Upper Tribunal in paragraph 43 of *Willow Court* made it clear that "such applications should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had an opportunity to make submissions". As to the form of decision the Upper Tribunal went on to state:

"A decision to award costs need not be lengthy and the underlying dispute can be taken as read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding the form of the order and the sum to be paid." Later in *Willow Court* at paragraph 62 the point is made that "The residential property division of the First-tier Tribunal is a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs".

- 21 Thus it is the test of unreasonable conduct set out in *Ridehalgh* and the guidance set out in *Willow Court* that this Tribunal has sought to apply in respect of the Applicants' submissions in this Application.
- 22 Working through those Submissions sequentially the Tribunal finds as under:
- 23 In respect of the matters referred to at paragraph 9 above and the reference to the three matters referred to in paragraph 7 of the Applicants' submissions, the Tribunal, of course, made a management order in this case. In considering, however, for the purposes of this Rule 13 costs application, whether the Respondent's actions have been unreasonable in defending or conducting these proceedings, the Tribunal finds that the pre-proceedings conduct or behaviour of the Respondent in different proceedings is not a matter to which the Tribunal should attach significant weight in considering unreasonable conduct in these present proceedings. So far as the previous s 27A application proceedings were concerned, a Rule 13 application could have been made following those proceedings. Similarly a costs application could and may have followed the injunction proceedings and account proceedings in the County Court which the Applicants refer to in paragraph 7 of their submissions. The Tribunal finds that it is the actions of the Respondent in the present management proceedings that the Tribunal has to consider in any costs application relating to these proceedings.
- 24 The allegations of unreasonability made by the Applicants amount to the following:
- (a) Lack of transparency – who was in control of management;
  - (b) Assurances – a number of assurances were made by the Respondent at the opening of the hearing which the Applicants say were never followed up;
  - (c) Unreasonably defending the application – the Applicants states that the factual allegations behind most of the breaches were admitted, however the Respondent disputed the relevance of the same and
  - (d) Appointment of own manager – the Applicants make the point that it was only after the section 22 notice had been served and the application commenced that the Respondent attempted to avoid the appointment of a manager by appointing their own.
- 25 Applying *Willow Court*, the Tribunal has to subject each allegation to the question “did the Respondent act unreasonably” that is to say whether the Respondent's conduct permits of a reasonable explanation.
- 26 **Lack of Transparency:**  
The Tribunal had serious concerns over who was in control and in the end it was not sufficiently convinced that proper management control was being exercised. But the decision of the Respondent to put forward Mr Mahpud at the hearing was not in itself an unreasonable decision in the sense that the Respondent could have reasonably formed a belief that Mr Mahpud (even though somewhat discredited in the previous s27A application) would be able to tell the Tribunal about the landlord, the property and management issues about which he had direct knowledge of. In other words, at the hearing, the decision to call Mr Mahpud was conduct permitting of a reasonable explanation. As the Tribunal noted in its final decision, it was not impressed by the subsequent, post-hearing decision of the Respondent to involve Mr Fisher. Given the previous criticisms and concerns expressed about Mr Mahpud by the Tribunal in these proceedings and the tribunal in the previous section 27A proceedings however, it might have seemed reasonable to the Respondent to have Mr Fisher act as an intermediary between the Respondent and Mr Maloney. In other words, whilst the Tribunal was not subsequently impressed by it, the mere involvement of Mr Fisher is not conduct which does **not** permit of a reasonable explanation. In the Tribunal's view, that appointment

or involvement is an insufficient ground to pass the test of unreasonableness and thus warrant a finding of unreasonable conduct for the purposes of Rule 13. The Respondent may well have thought they were making matters more transparent by appointing Mr Fisher even though the Tribunal found that as a matter of fact, this made matters worse.

27 **Assurances:**

In the Tribunal's view the making of the assurances was conduct permitting of a reasonable explanation: the Respondent wished to avoid a management order being made and the assurances were put forward by their Counsel with that in mind. There is no evidence to enable the Tribunal to find that the assurances were put forward to frustrate or harass or in bad faith and on the facts, the Tribunal declines to find, as the Applicant suggests, that the Respondent never had any intention to give or action those assurances. They were a prequel to possible negotiations which in fact never materialised, because for their own understandable reasons the Applicant was intent on pursuing a management order.

28 **Unreasonably defending the Application:**

This application culminated years of difficulty and bad blood between the parties. In the Tribunal's view it was not surprising that it was resisted but it cannot be unreasonable for a party defending a case to put forward arguable points even though the Tribunal later rejects them and finds little merit in them. *Ridehalgh* makes clear that unreasonability has to go beyond a test of whether arguments are meritorious or not – to have been unreasonably advanced, such arguments have to be vexatious or designed to harass which was not the case here. Whilst the Tribunal preferred the arguments and evidence of the Applicants, the Respondent did, at the very least, have an arguable case. The making of the arguments was thus conduct permitting of a reasonable explanation.

29 **Appointment of own Manager:**

The Applicants found this head of its Rule 13 Application on the grounds that Mr Maloney's appointment was not genuine in the sense that he was not given proper control to manage the property. Again, in the Tribunal's view the appointment of Mr Maloney was conduct permitting of a reasonable explanation. The management of this property had been in issue for a number of years, thus it was reasonable to bring in an experienced professional manager to take it over. Indeed, in paragraph 49 of the Tribunal's preliminary decision the Tribunal expressed the wish that "the Tribunal would like to see him (Mr Maloney) continue in his present role for another six months". Thus, for the purposes of unreasonable conduct, the Tribunal finds that it was not, of itself, unreasonable for Mr Maloney to be appointed in the first place nor was it unreasonable for that appointment to be continued post hearing. As the Tribunal's final decision makes clear, the Tribunal did not consider that Mr Maloney had the proper degree of control, hence a management order was made but the decision to appoint him and continue that appointment after the hearing was not conduct which did not permit of a reasonable explanation.

30 The Tribunal must also consider how the Respondent has acted in the conduct of the proceedings. At the hearing, the Respondent was represented by highly experienced and capable Counsel against whom no allegation of misconduct in the conduct of his client's case can be made. Counsel had ensured that the Tribunal were given full access to parts of the property requiring inspection; the hearing was conducted in a courteous manner and all information requested by the Tribunal had been given. The pre-hearing preliminaries were protracted and somewhat acrimonious but given the breakdown in trust between the parties that was not surprising. But in the Tribunal's view it was not unreasonable that the application should have been resisted nor was the Respondent's case conducted unreasonably in a way which was vexatious or designed to harass.

- 31 In conclusion, the Tribunal considers it worth repeating and emphasising that the residential division of the First-tier Tribunal is a costs shifting jurisdiction by exception only. In this case, notwithstanding the management order made and the concerns expressed in our two previous decisions, the Tribunal does not find, applying *Willow Court* and guided as to conduct by *Ridehalgh*, that unreasonable conduct has occurred by the Respondent such that an order for costs is justified.

### **Decision under Rule 13**

- 32 The application for an order for costs under Rule 13 is refused.

#### Application under section 20C Landlord & Tenant Act 1985

- 33 The Tribunal has considered the Application and grants the Order requested by the Applicants under Section 20.

### **Decision under Section 20C Landlord & Tenant Act 1985**

- 34 The Tribunal orders that all or any of the costs incurred, or to be incurred, by the Respondent in connection with proceedings before the Tribunal, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

I.D. Humphries B.Sc.(Est.Man.) FRICS  
Chairman

Date: 14 May 2019

### **Appeal**

In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the applicants / respondent may make further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal.

The Upper Tribunal (Lands Chamber) may be contacted at: 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (tel: 020 7612 9710); or by email: [lands@hmcts.gsi.gov.uk](mailto:lands@hmcts.gsi.gov.uk)