FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AH/LCP/2019/0006**
Property	**:**	**18 Langdale Road, Thornton Heath, Surry CR7 7PP**
Applicant	**:**	**Assethold Limited**
Representative	**:**	**Scott Cohen Solicitors**
Respondent	**:**	**18 Landale Road RTM Company Limited**
Representative	**:**	**Lorna Morgan of Harmens Management Willesden Junction**
Type of application	**:**	**Application to determine the costs to be paid by an RTM company under s.88(4) of the Commonhold and Leasehold Reform Act 2002 and rule 13 costs application**
Tribunal members	**:**	**Judge N Hawkes** **Mrs A Rawlence FRICS**
Venue of paper determination	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**18 June 2019**

DECISION

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Decisions of the Tribunal

(1) The Tribunal determines that it will not make an order for costs against the Respondent pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 rules").

(2) The Tribunal determines the Respondent shall pay the Applicant costs in the sum of £2,512.20 pursuant to section 88(4) of the Commonhold and Leasehold Reform Act 2002.

The application

1. The Applicant seeks a determination pursuant to section 88(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") in respect of the costs payable by the respondent RTM Company.

2. Directions were given in respect of this application on 28 February 2019. By paragraph 5 of these Directions, the Respondent was required to send a statement of case, any legal submissions, and certain other documents to the Applicant by 29 March 2019.

3. Section 88 of the 2002 Act provides:

88 Costs: general

(1) A RTM company is liable for reasonable costs incurred by a person who is—

(a) landlord under a lease of the whole or any part of any premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by the appropriate tribunal.

4. By an email dated 15 April 2019, the Applicant also applied for an order for costs against the respondent pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 rules").

5. In this email, the applicant states:

"We would ask the Tribunal to note that the directions and the Applicant's schedule of costs and supporting documents all clearly provide the basis of the application. Whilst this may involve multiple claim notices, it is a fairly routine matter without any complexities. Our client is delayed in recovery of costs pending determination in this matter and the Applicant considers the Respondent is merely striving to further delay the same.

The directions are dated 28th February, which is almost two months to date. Aside from a mere email on 3 April (which was only after the Applicant chased for the Respondent's statement) the Respondent does not appear to have raised the issue of non-receipt of the copy application prior to this date, nor do they appear to have actively sought to chase either ourselves or the Tribunal for the same. The Applicant considers the same constitutes 'unreasonable' conduct which is vexatious rather than advancing the resolution of the case. There is no reasonable basis for this behaviour other than to delay a determination of this matter.

Multiple correspondences were also exchanged on the issue of these costs prior to the application being made, so, the Respondent was fully aware of the same even prior to the application being issued."

6. By letter dated 2 May 2019, Directions were given in respect of the rule 13 costs application.

7. The Tribunal will consider the rule 13 costs application first because any costs awarded pursuant to rule 13 of the 2013 Rules would not fall to be considered under section 88(4) of the 2002 Act.

The costs application pursuant to rule 13 of the 2013 rules

8. The Tribunal's power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which includes provision that:

29. Costs or expenses

(1) The costs of and incidental to—

(a) all proceedings in the First-tier 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 …

9. Rule 13(1)(b) of the Tribunal Procedure Rules provides so far as is material:

13.—(1) The Tribunal may make an order in respect of costs only—

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

…

(ii) a residential property case.

10. In determining the application pursuant to rule 13 of the 2013 Rules, the Tribunal has had regard to *Willow Court Management Ltd v Alexander [2016] UKUT 290 (LC); [2016] L. & T.R. 34* in which the Upper Tribunal gave guidance on the approach that a Tribunal should take when considering rule 13 cost applications.

11. The Tribunal has considered the entirety of *Willow Court* and notes that at paragraph [43], the Upper Tribunal stated:

"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 that it is appropriate to make

an order, and record the factors taken into account in deciding the form of the order and the sum to be paid."

12. In summary, the Tribunal is to apply a three-stage approach. Firstly, applying an objective standard, the Tribunal must consider whether or not the Applicant has acted unreasonably. An unsuccessful outcome is not sufficient on its own to warrant an order under rule 13 and the Tribunal must be careful not to use this power too readily.

13. At [24] of *Willow Court*, the Upper Tribunal stated:

"… 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 v Horsefield 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?"

14. Further, at [32] of *Willow Court*, the Upper Tribunal stated:

"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."

15. If the Applicant is found to have acted unreasonably, the Tribunal must consider whether or not an order for costs should be made. This involves a consideration of the nature and seriousness of the Applicant's conduct and the Tribunal retains a discretion at this stage.

16. If the Tribunal determines that it will make an order for costs, the terms of the order fall to be considered. There is no need for a causal connection to be established between the conduct and the costs incurred. The Tribunal can make an order for payment of the whole or part of a party's costs. The nature, seriousness and effect of the unreasonable conduct are important factors.

17. The Applicant seeks an order for costs in the sum of £2,872 (inclusive of VAT) and has set out the basis for the rule 13 costs application in written submissions dated 12 May 2019.

18. In these written submissions, the Applicant states that it was obliged to issue proceedings for a determination under section 88(4) of the 2002 Act in the absence of agreement by the Respondent.

19. The Applicant states that a failure to respond alone does not constitute unreasonable conduct in the context of a rule 13 application. However, the Applicant submits that, in this instance, the Respondent's conduct goes further than lack of agreement and failure to respond and that there has been:

"deliberate delay and responses which in the Applicant's submission is indicative of a vexatious disregard for the cost implications of the proceedings and conduct which serves solely to delay the Respondent's obligation to pay whilst increasing costs"

20. The Applicant then sets out a detailed chronology and stresses that, as at the date of the Applicant's submissions, the Respondent had still not served a response to the Applicant's application.

21. An email in reply from the Respondent dated 17 May 2019 includes the statement that:

"It has taken a disproportionate amount of time to read, consider, distil and apply the relevant documents and principles. I apologise to the tribunal and Ms Scott for the slightly late submissions. The Respondent submits the Applicant has not been adversely affected by the delay."

22. The Tribunal notes that the Respondent's representative is not a solicitor. The Tribunal accepts the Respondent's explanation that the delay was caused by the time which it took the non-legally qualified representative to carefully consider both the documents and the applicable law in relation to this application, which concerns several different claim notices. The Tribunal notes that the Respondent's response bundle runs to 119 pages and that it refers to a number of legal authorities.

23. The Tribunal is not satisfied on the balance of probabilities that the delay on the part of the Respondent amounts to conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case.

24. It would have been preferable for the Respondent to have complied with the Tribunal's Directions or to have made an application for an extension of time within time. However, applying an objective test and having considered the entirety of the Upper Tribunal's decision in *Willow Court*, the Tribunal is not satisfied on the facts of this particular case that the Respondent's conduct reached the threshold of "unreasonable" within the meaning of rule 13.

25. Further proceedings have now been issued concerning a 2019 claim notice and the Respondent's representative may be expected to have a better understanding of Tribunal procedures (and of the need to comply with directions unless an extension of time has been granted) in those fresh proceedings.

The costs application pursuant to section 88 of the 2002 Act

26. This application concerns a number of claim notices and the Applicant has set out the chronology as follows.

The first claim notice

27. On 10 May 2018, a claim notice dated 8 May 2018 was served on the Applicant by the Respondent. On 10 May 2018, the Applicant's solicitors wrote to the Respondent requesting further information. On 15 May 2018, the Respondent provided certain documents. The Applicant then served a counter notice on 6 June 2018 and the Respondent made no application to the Tribunal for a determination that on the relevant date the Respondent RTM Company was entitled to acquire the right to manage.

The second claim notice

28. On 12 September 2018, a claim notice dated 7 September 2018 was served on the Applicant by the Respondent. On 12 September 2018, the Applicant's solicitors wrote to the Respondent requesting further information. No response was received. By letter dated 20 September 2018, the Respondent withdrew this claim notice.

The third claim notice

29. By the letter dated 20 September 2018 withdrawing the claim notice dated 7 September 2018, the Respondent served a claim notice dated 14

September 2018. On 20 September 2018, the Respondent's solicitors requested further information. No response was received and so the Applicant's solicitors sent a chasing letter to the Respondent on 28 September 2018. Again no response was received.

30. On 16 October 2018, the Applicant's solicitors served counter notices in respect of the second and third claim notices. By letter dated 19 November 2018, the Respondent withdrew the claim notice dated 14 September 2018.

The costs assessment

31. The Tribunal can only deal with the application which is currently before it i.e. the Applicant's application dated 26 February 2019 concerning the specific claim notices which are set out in this application. The issue currently before the Tribunal is the determination of what amounts to reasonable costs in consequence of these claim notices.

32. None of the claim notices which form the basis of the Applicant's application have been relied upon. If the recent 2019 right to manage claim notice were the sole notice to have been served, no costs would have been incurred in connection any of the claim notices which form the subject matter of this costs application. The Tribunal finds that it is likely on the balance of probabilities that the 2018 claim notices are not relied upon because they are not valid.

33. Having carefully considered the parties' submissions and the evidence to which it was referred, the Tribunal assesses the costs as follows.

34. The Tribunal accepts the Applicant's submissions concerning the first claim notice and allows the costs claimed in consequence of this notice in the sum of £1,305.60 (including Eagerstates' fees) in their entirety.

35. As regards the second and third claim notices, the Tribunal considers that the duplication of work has not adequately been reflected in the fees claimed. The second and third claim notices were served in the same year as the first claim notices and the identity of the tenants did not change.

36. Taking these factors into account, the Tribunal determines that the solicitors' fees fall to be reduced by 25% to £891, including VAT, plus disbursements in the sum of £15.60 and that the fees of Eagerstates are limited to the sum of £300, including VAT.

37. Accordingly, the Tribunal determines that the total sum payable pursuant to section 88(4) of the 2002 Act in respect of reasonable costs

incurred in consequence of the claim notices which form the subject matter of this application is £2,512.20.

Name: Judge N Hawkes **Date:** 18 June 2019

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).