



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

Case Reference	:	CHI/18UK/LSC/2020/0102
Property	:	Lenwood Country Club Lenwood Road EX39 3PN
Applicants	:	Christopher Graham Ley Gerald 12 Graham Ley and Marion Jean Ley Patricia Jane Langdon 27 Peter Charles Metherell 48 Brian Steele and Jennifer Steele 41 Lawrence May 32B David John Baldwin 19A Rebecca Edmonds 34 Juliet Chandler 39 Patrick Butler and Julie Renshaw 58 Kevin Bedford 53
Representative	:	Mrs Lisa Ley
Respondent	:	Ground Rent Trading Limited
Type of Application	:	Application for Costs Rule 13 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules)
Tribunal Members	:	Judge C A Rai (Chairman) Mr M Woodrow MRICS (Chartered Surveyor)
Date type and venue of Hearing	:	10 July 2021 Determination on the papers without an oral hearing
Date of Decision	:	29 July 2021

DECISION

Background

1. The Tribunal determined an application (the Service Charge Proceedings) relating to the Applicants' liability to pay and reasonableness of service charges for the service charge years ending 29 September 2020 and the on account service charges demanded for the service charge year ending 29 September 2021. That decision was dated 21 June 2021. It included an order by the Tribunal that the Respondent reimburse all the fees which the Applicant had paid to the Tribunal. References to paragraph numbers in that decision are in square brackets prefaced with "D".
2. The Applicants' submissions in respect of the Service Charge Proceedings included an application for costs which was not included in the original application. The Respondent's statement of case and witness statement are both dated 25 January 2021. The Applicant's response to those statements is dated 8 February 2021. In that response the Applicant applied for costs on the grounds of Respondent's unreasonable behaviour. It was suggested that the Respondent's unreasonable behaviour had occurred throughout the five years during which it has owned Lenwood Park.
3. Subsequently, after the submission of the hearing bundle to the Tribunal, the Respondent was barred from participating in the proceedings.
4. In its decision disposing of the Service Charge Proceedings (the Decision), the Tribunal:-
 - a. referred to Rule 13(6) which states that the Tribunal cannot make an order for costs without affording the "paying party" an opportunity to make representations to it.
 - b. offered the Respondent a final opportunity to respond to the "costs application" on or before 9 July 2021.
 - c. asked the Applicants to provide a schedule of the costs claimed in sufficient detail, with an explanation of the calculation of the amount claimed, to enable the Tribunal to make a summary assessment of the costs.
5. The Applicants have asked for costs of £3,002.02. They provided a schedule recorded the number of hours spent preparing their case. They also claimed a disbursement of £50.56, the cost of software which enabled the preparation of the electronic bundle and provided a copy of the invoice.

6. The Applicants stated that since they had not been represented by a “legal professional” the number of hours of preparation are “understandably more than would be expected of a legal professional”. They calculated the sum claimed based on the the hourly rate earned by their representative in the course of her employment as a bookkeeper/administration manager (£25.89 per hour). The Applicants have claimed for 114 hours of which 23 hours has been attributed to the preparation of the initial application, 48 hours to the preparation of their case and 43 hours to the preparation of their response (to the Respondent’s statements) and the preparation of the hearing bundle.
7. The Applicants referred the Tribunal to samples of correspondence sent to the Respondent over the past year which they claimed “has been largely ignored” [Page 207]. They also stated that they had made numerous attempts to resolve outstanding issues with the Respondent since it acquired the Park without success. They referred the Tribunal to a bundle submitted prior to the determination of an earlier application, CHI/18UC/LSC/2019/0113 determined following a two day hearing on 4/5 March 2020, by a tribunal comprised of three members, two of which also determined the Service Charge Application.
8. The Tribunal has not received any representations from the Respondent in relation to this costs’ application.

The Law

9. Rule 13 (1)(b) provides the Tribunal with jurisdiction to consider a costs application on the grounds of unreasonable behaviour of a person. It may make an order in respect of costs if a party has acted unreasonably in bringing, defending or conducting proceedings in three categories of cases including a leasehold case, defined in the rules as being a case in respect of which the Tribunal has jurisdiction under any of the enactments specified in section 176A(2) of the Commonhold and Leasehold Reform Act 2002 (CLARA). The Landlord and Tenant Act 1985 is listed in that subsection.
10. The Applicants sample correspondence, included in the bundle and the other correspondence supplied to the Tribunal in relation to a previous application, is the only tangible evidence of the Respondent’s unreasonable behaviour referred to by the Applicants.
11. The Upper Tribunal provided guidance in the case of **Willow Court Management Company (1985) Ltd v Alexander [2016 UKUT 290 (LC)]** on the Tribunal’s power to award costs.
12. In that decision, the Upper Tribunal said that whenever the Tribunal exercises any power conferred by the rules, or interprets those, it is required by rule 3(3) to give effect to the overriding objective.

13. The overriding objective is set out below.

Rule 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.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally

14. In paragraph 28 of **Willow Court**, the Upper Tribunal suggested an approach to decision making in claims for costs under Rule 13(1)(b), often referred to as a “three stage” test. Later in the case of **Laskar v Prescott Management Company Ltd 2020 UKUT 241 (LC)** the Upper Tribunal clarified that the suggested approach was intended to encourage tribunals to work through a logical sequence of steps. The Upper Tribunal confirmed that the only “test” is that laid down by rule 13 itself, being that the Tribunal may make an order if it satisfied that a person has acted unreasonably. In this case the Tribunal would have to find that that the Respondent acted unreasonably in (bringing,) defending or conducting the proceedings.

Decision and Reasons

15. The Service Charge Proceedings related to the determination of the service charges incurred for the year ending 29 September 2020, on account payments demanded for the year ending 29 September 2021, the buildings insurance charge for the insurance spanning 2020/2021 and applications under section 20C of the Landlord and Tenant Act 1985 and paragraph 5 of schedule 11 of CLARA.
16. The Respondent failed to comply with the Tribunal’s directions and omitted to provide a statement of service charge expenditure for the year ending 29 September 2020.

17. The Respondent claimed that it was too soon for the Applicants to have made the application because no accounts for the earlier year had been prepared and until those accounts were available, the Tribunal could not determine whether or not the service charges were reasonable. It also made promises about when the accounts would be produced but has never supplied copies of the accounts to the Tribunal (or the Applicants).
18. It also suggested it was impossible to make a reasonable assessment of the accuracy of the budget on which the demands for the subsequent year (ending 29 September 2021) had been based until the accounts (for 2019/2020) became available.
19. The full details of the application, the Tribunal Directions and the Respondent's response are set out in the Decision. In the Decision the Tribunal said that despite it having afforded the Respondent several opportunities to supply information requested, it did not. This resulted in the Respondent being barred, on 16 April 2021, from taking any further part in those proceedings. No further representations were received from the Respondent. The Tribunal therefore determined the Service Charge Proceedings, doing the best it could, with the limited information which it had received before the Respondent was barred.
20. The Decision recorded that in relation to some specific service charges demanded, earlier tribunal decisions relating to Lenwood Park had already determined that these were not recoverable. For example, the bank charges included in the Respondent's demands for 2019/2020 had previously been disallowed.
21. The Respondent conceded some of the Applicants' claims but it did not respond fully to all of the questions raised, particularly those raised in relation to changes in the budget headings. It also took no account of the fact that the Tribunal had already made a determination about the amount of insurance contributions **Harris and Ready-Wearne v Ground Rent Trading Limited CHI/18UK/LSC/2020/0131.**
22. Although the Respondent was given notice more than once that the Tribunal was considering debarring it from participating in the Service Charge Proceedings, it omitted to provide the information that the Tribunal had directed it to provide. After a single request for an extension of time, which was granted, it stopped corresponding with the the Tribunal or the Respondent and provided no further information.
23. The Applicants' application for costs was made on 8 February 2021, before the Respondent was barred from participation in the proceedings. The Applicants suggested that the Respondent's repeated refusal to deal with its correspondence is unreasonable behaviour. Whilst this Tribunal accepts that this was undesirable behaviour, it must decide on the facts before it if the Respondent has behaved unreasonably. Only if it makes that finding is there any need for it to assess whether or not it will exercise its discretion to award costs against the Respondent. Thereafter it would determine the amount of

those costs. These are the logical steps that the Upper Tribunal has encouraged this Tribunal to consider.

24. The Upper Tribunal considered what might constitute “unreasonable behaviour” in some detail when deciding **Willow Court**. Whilst acknowledging that there are a large number of authorities in which powers to award costs equivalent those contained in rule 13(1)(b) have been considered, the Upper Tribunal stated that the language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in **Ridehalgh v Horsefield [1994] Ch 205**, supported by the repeated emphasis of the “fact-sensitive nature of the inquiry in every case”, referred to and relied upon by Judge McCloskey and Judge Clements in **Cancino v SSHD [2015] UKFTT (IAC)**. It is acknowledged that **Ridehalgh** provides an authoritative construction of statutory terminology. “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 to an unsuccessful result or because a more cautious legal representative 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 reflecting on a practitioners judgement but it not unreasonable.....” (It is also important to remember that the decision in **Ridehalgh** dealt with wasted costs).
25. In this application the Applicants stated that the conduct of the Respondent in the five years since it became the owner of Lenwood Park has resulted in several applications to the Tribunal. They referred specifically to one decision but the Tribunal is aware of other decisions. It knows that another application to the County Court (transferred to the Tribunal under the Deployment Project) made by the Respondent to recover service charges from a leaseholder did not fully succeed due to the failure of the Respondent to provide the Court with sufficient information and documentation to support its own application. The Applicants’ statement is factually accurate.
26. The wording of rule 13(1)(b) refers to the Respondent’s actions in relation to (in this case) defending the proceedings. Initially the Respondent failed to comply with directions, failed to provide documentation requested prior to the hearing date, promised to produce the accounts for the year ending 29 September 2020 but failed to provide them and failed to respond to the Tribunal debaring it from participating in the proceedings. Despite those actions or omissions not being specifically referred to by the Applicants as evidence of the Respondent’s unreasonable behaviour, the Tribunal has still considered and assessed whether or not they are relevant in the context of the application before it.

27. The Applicants' claim for costs relied upon the Respondent's conduct over the past year and during the preceding five years which it stated was unreasonable. That does not fall within the wording of rule 13(1)(b). It was not conduct in the course of the proceedings.
28. In considering whether, in the context of the service charge proceedings, the Respondent's behaviour has been unreasonable the Tribunal needs to consider the facts.
29. Initially Mr Simon (the Respondent's representative) dismissed the Application as being premature. [D para 38]. He appeared to have confused the application for determination of the actual service charges for the year ending 29 September 2020 with the application for a determination of the reasonableness of the demand [D para 39] for the on account service charge payment for the year ending 29 September 2021. Mr Simon claimed that he was unable to produce invoices relating to expenditure before the accounts had been prepared. His explanation was not accepted by the Tribunal. He also stated that the application should not have been made or determined until the accounts had been produced. The accounts are still not available and his statement that the accounts would be published on or before 31 March 2021 proved to be inaccurate.
30. The absence of accounts for 2019/2020 hampered the Applicants' assessment of the accuracy of the budgeted expenditure for the subsequent year because there is no record of actual expenditure for the preceding year and therefore no evidence or facts underlying the calculation of the budget for 2020/2021 [D para 55].
31. The Respondent has consistently ignored correspondence. The Applicant has suggested that the Respondent has failed to apply previous Tribunal decisions fully. According to the Applicants it credited all leaseholders with an adjustment of service charges ignoring that some of those credits related to years during which not all of the current leaseholders owned their chalets or bungalows.
32. The Respondent has not co-operated with the Tribunal and sought to delay the proceedings on the day before the expiry of a time limit before finally abandoning any engagement with the Tribunal.
33. Despite taking all of this into account, the Tribunal has not identified any of these facts as evidence of the Respondent's unreasonable behaviour. It believes that there is a lack of coordination between the Respondent, its managing agents and Mr Simon (its in-house legal representative) which has resulted in the wholly unsatisfactory management of Lenwood Park, the services provided and the service charges demanded. It considers that this is a reasonable explanation of the Respondent's conduct. The correspondence which the Applicants claimed was unreasonable was from the Respondent, its managing agents and Mr Simon.

34. Whilst acknowledging the substantial amount of time which the Applicants must have spent on the preparation of their case, they proceeded with the application in the knowledge that the Tribunal is essentially a “cost free” environment.
35. Since the Tribunal is satisfied that the Respondent has not behaved unreasonably in conducting or defending the proceedings, the Tribunal dismisses the application for costs.

Judge C A Rai (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Chamber must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to **rpsouthern@justice.gov.uk** as this will enable the First-tier Tribunal to deal with it more efficiently.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.