FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/OLR/2020/0312, LON/00AG/OC9/2020/0034, LON/00AG/OLR/2020/0746, LON/00AG/OLR/2021/0108 & LON/00AG/OC9/2021/0023**
Property	**:**	**Flat 8, 135 Haverstock Hill, London NW3 4RU**
Applicant	**:**	**Ali Kashanipour and Mitra Maleki**
Representative	**:**	**Comptons Solicitors LLP**
Respondent	**:**	**David Gabriel Gross, Benjamin Gershon Gross and Samuel Oliver Gross**
Representative	**:**	**RIAA Barker Gillette (UK) LLP, solicitors**
Type of application	**:**	**(1) To decide costs relating to an application for a lease extension under the Leasehold Reform, Housing and Urban Development Act 1993, and (2) Under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal members	**:**	**Judge Professor Robert M Abbey**
Paper Based Hearing date	**:**	**28 May 2021**
Date of Costs Decision	**:**	**28 May 2021**

COSTS DECISION

Decision of the tribunal

(1) The Tribunal determines that the legal costs payable by the applicants are £2487 and £3504 being the respondent's statutory costs in respect of both notices of claim, pursuant to section 60 of the Leasehold Reform, Housing and Urban Development Act 1993

(2) The Tribunal also determines that there be no order for costs pursuant to Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 No. 1169 (L. 8)

Application for costs

1. The Applicants are the long leaseholder of **Flat 8, 135 Haverstock Hill, London NW3 4RU**.

2. The Respondent is the reversioner of the building and the competent landlord for the purposes of the Leasehold Reform, Housing and Urban Development Act 1992 (the "1993 Act").

3. Following the withdrawal of two notices of claim for a lease extension (dated 9 September 2019 and 17 January 2020, respectively) and the withdrawal of two substantive applications to the tribunal with two linked costs applications (received on 12 March and 16 June 2020, respectively), the respondent landlords apply for:

   (i) Their statutory costs in respect of both notices of claim, pursuant to section 60 of the Leasehold Reform, Housing and Urban Development Act 1993, and

   (ii) Costs against the applicants and/or their solicitors, pursuant to rule 13 of Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, for having issued the two substantive applications and their linked costs applications.

4. On 14 July 2020, the Property Chamber directed that it did not have jurisdiction to determine the validity of the First and Second Notices and having stayed the First and Second Applications further directed that the Tenants issue claims in the County Court no later than 14 October 2020 to determine the validity of the Notices. On 4 September 2020, Comptons on behalf of the Tenants wrote to the Property Chamber withdrawing the First and Second Notices in response to the directions given by the Property Chamber.

5. Rule 13(6) provides that 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. Accordingly, this application

is to be be determined by the Tribunal in accordance with the directions set out on 9 February 2021 by Judge Powell.

6. Although there are several case reference numbers for the two substantive applications and two linked statutory costs applications, the directions covered all the section 60 and rule 13 costs applications, made by letters dated 1 October and 16 November 2020. For administrative reasons, the second substantive application, LON/00AG/OLR/2020/0746, is proceeding under a new reference number, LON/00AG/OLR/2021/0108.

7. The details of the provisions of Rule 13 and section 60 are set out in the appendix to these Directions and rights of appeal made available to parties to this dispute are set out in an Annex.

8. The respondents say that had the Tenants completed a Lease Extension as agreed prior to service of the First Notice then the Landlords would have limited their costs to £250.00 plus VAT. In the event the respondents also say that the Tenants refused to complete the Lease Extension as agreed and as a result of the subsequent disagreement engendered by the Tenants their S.60 costs increased to the sum of **£2,487.00**. The Landlords therefore now seek to recover all of their S.60 costs on the basis that they are no longer bound by their agreement that they will only recover £250.00 plus VAT.

9. The Applicants then say that they were driven to respond to the Second Notice and incurred S.60 costs in connection with the deduction of title, the payment of a statutory deposit, the instruction of a valuer and the preparation and service of a Counter Notice. Those costs total **£3,504.00.**

10. With regard to the Rule 13 costs the respondents say that the First and Second Applications were thoroughly misconceived and should never have been issued and that the conduct of those Applications was negligent, improper, and unreasonable. The Applicants S.13 costs have been apportioned between the First and Second claims. In respect of the First claim, they are **£3,870.00** and the Second claim **£1,980.00**. Additionally, the respondents say that they should also have their costs of mounting and pursuing the S.13 Applications. The costs of mounting and pursuing these Applications has they say necessarily been complicated due to the at times confusing position adopted by the Tenants. The Landlord's costs of the S.13 Applications are **£6,636.00.**

11. The Tribunal must therefore consider two types of costs application. It will first consider the s.60 costs that are payable under statute with statutory guidance as to how they should be considered. Secondly the Tribunal will consider the rule 13 costs where guidance emanates from the Rules themselves as well as case precedents and particularly *Willow*

Court Management Company (1985) Limited v Mrs Ratna Alexander [2016] UKUT 0290 (LC) which will be considered in detail in this decision.

12. The main difference between the two costs applications is that with a Rule 13 costs application before a costs decision can be made, the Tribunal needs to consider a three stage approach. The first stage considers reasonableness of conduct. At a second stage it is essential for the Tribunal to consider whether, in the light of unreasonable conduct (if the Tribunal has found it 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.

13. The respondent filed with the Tribunal the respondent's written costs application and comments/observations thereon were requested of the applicant and these were indeed supplied in detail. It now falls to me to consider the costs application in the light of the written submissions before the Tribunal.

DECISION

(1) Section 60 costs

14. With regard to the s.60 costs, the provisions of section 60 are well known to the parties and the tribunal does not propose to set the legislation out in full. (For reference purposes an extract of the legislation and in particular section 60 is set out in an appendix to this decision along with details of appeal rights in an annex). However, costs under that section are limited to the recovery of reasonable costs of and incidental to any of the following matters, namely: -

    i. Any investigation reasonably undertaken of the tenant's right to a new lease;
    ii. Any valuation of the tenant's flat obtained for the purpose of fixing the premium or amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56
    iii. The grant of a new lease under that section.

15. Subsection 2 of section 60 provides that: -

> *"any costs incurred by a relevant person in respect of professional services rendered by any person shall only be regarded as reasonable 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".*

16. There are two notices that potentially attract costs awards. The first in the sum of £2487 and the second in the sum of £3504. Of the first notice there is a dispute about whether the parties agreed a fee of £250 and if so is that figure and agreement binding on the parties. The respondents say that had the Tenants completed a Lease Extension as agreed prior to service of the First Notice then the Landlords would have limited their costs to £250.00 plus VAT. In the event the respondents also say that the Tenants refused to complete the Lease Extension as agreed and as a result of the subsequent disagreement engendered by the Tenants their S.60 costs increased to the sum of £2,487.00. The Landlords therefore now seek to recover all of their S.60 costs on the basis that they are no longer bound by their agreement that they will only recover £250.00 plus VAT.

17. The applicants say that a term of the Notice was that the Applicants were required to pay £250 plus VAT with respect to legal costs. This was agreed between the parties. As a result, they say that the Tribunal does not have jurisdiction to determine costs in relation to the Notice. They go on to cite *Denison Close Ltd v The New Hampstead Garden Trust Ltd* Unreported 2002 in the LVT where it was held that a landlord's counter-notice accepting the price proposed in the tenants' initial notice amounted to an agreement depriving the LVT of jurisdiction to determine the price. Further or in the alternative, the parties agreed the sum of £250 plus VAT in respect of the Landlord's Solicitors costs for the Notice. This should be used as a context in relation to the Section 60 Costs.

18. The respondents in reply say that the authority of *Denison Close Ltd* relates exclusively to the premium proposed in a tenant's initial notice and an agreement to that premium in a Counternotice. The premium is one of the terms of acquisition under Section 48(7) LRHUDA 1993. The terms of acquisition do not include the amount of the Landlords costs payable under Section 60 (*Montrose v Woburn Estate Co Ltd*) unreported, 2002, (Central London County Court). See para. 28-32 of Hague on Leasehold Enfranchisement Seventh Edition. In the circumstances the Tribunal retains jurisdiction to determine the Respondent's Section 60 costs in respect of the Notice.

19. I consider that this Tribunal does have jurisdiction to consider the s60 costs for the reasons set out above. I also consider that the respondent is not bound to the limit of £250. The applicants for whatever reason abandoned the original application and as such also abandoned the terms covered by it including the limit of £250. Therefore, the respondent is entitled to seek a higher figure.

20. The applicants then seeks to challenge the hourly rate claimed by the respondent. They assert "The hourly rate of the Landlord's Solicitor of £450 plus VAT is also absurdly high compared to the Government's Solicitors' guideline hourly rates published in 19 April 2010. This

provides an hourly rate of £317 plus VAT for a solicitor with more than 8 years PQE based in London W1 (London Grade 2). It is submitted further than a Partner could have delegate more work to a Grade D Solicitor who it is noted conducted some work in relation to the filed Statements of Costs. The hourly rate in accordance with the Guidelines is £126 plus VAT."

21. It is unsurprising that this is disputed by the respondents. They say that their legal team "has been retained by the Landlords for some years in connection with all of the legal work relating to the block of flats at 135 Haverstock Hill. It is a Central London firm and as such its hourly rates are by reference to Central London/West End hourly rates. As the Tribunal will be aware, the 2010 guidelines for the summary assessment of costs in the Civil Courts is now some 11 years out of date and a subcommittee of the Civil Justice Council has been established with the aim of making recommendations on the Guideline Hourly Rates (GHR) for assessment so that the existing GHR can be updated. Consultations in respect of this review concluded on 31 March 2021 and it is clear that the 2010 recommended GHR will now increase considerably in the near future. However, the Courts have consistently made it clear that guideline rates are simply guideline rates. As Senior Costs Judge, Master Gordon-Saker said in *Fuseon Ltd, R (On the Application Of) v Shinners* [2020] EWHC B18 (Costs) "the guideline rates are of course just that. They are fairly blunt instruments designed to assist Judges in the summary assessment of costs. The passage of time since 2010 means that they tend now to be used as a starting position rather than as carved in stone". Furthermore, the solicitor involved has been acting for the family who own the freehold for some 40 years and it seems a significant portion of his workload is given over to cases in the field of leasehold enfranchisement.

22. Leasehold enfranchisement is a highly specialised and technical area of the law and is due early reform to make it less troublesome. Be that as it may lawyers have to deal with the law as it exists and it is apparent that the complexity of this type of work will inevitably drive-up costs as a consequence. I am satisfied that the hourly rate claimed is appropriate. The fee rate billed reflects the experience and specialisation within Landlord and Tenant matters that can be attributed to the solicitor concerned. The Tribunal was satisfied that this was an appropriate hourly rate.

23. Having looked at the activities involved in this costs claim I am satisfied that they are reasonable and within the statutory definition of work covered by s.60 and therefore I will allow the claim in full in the sum of £2487.

24. I now consider the costs claim covered by the the second notice. In that regard it does seem to me that the respondents were driven to respond to the Second Notice and incurred S.60 costs in connection with the deduction of title, the payment of a statutory deposit, the instruction of

a valuer and the preparation and service of a Counter Notice. Therefore, those costs totalling £3,504.00 are also agreed as the same hourly rate prevails and as such the comments above will also apply.

(2) Rule 13 costs

25. With regard to the Rule 13 costs The Tribunal's powers to order a party to pay costs may only be exercised where a party has acted "unreasonably". Taking into account the guidance in that regard given by HH Judge Huskinson in *Halliard Property Company Limited v Belmont Hall & Elm Court RTM, City and Country Properties Limited v Brickman* LRX/130/2007, LRA/85/2008, (where he followed the definition of unreasonableness in *Ridehalgh v Horsefield* [1994] Ch 205 CA), the Tribunal has to be satisfied that there had been unreasonable conduct so as to prompt a possible order for costs.

25. The Tribunal was also mindful of a recent decision in the case of Willow *Court Management Company (1985) Limited v Mrs Ratna Alexander* [2016] UKUT 0290 (LC) which is a detailed survey and review of the question of costs in a case of this type. At paragraph 24 of the decision the Upper Tribunal could see no reason to depart from the views expressed in *Ridehalgh*. Therefore, following the views expressed in this recent case at a first stage the Tribunal needs to be satisfied that there has been unreasonableness.

26. At a second stage it is essential for the Tribunal to consider whether, in the light of any 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.

27. In *Ridehalgh* it was said that ""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.

28. The *Willow Court* decision is of paramount importance in deciding what conduct might be unreasonable. I have mentioned the approach of the Upper Tribunal in this decision but I think it appropriate to quote the relevant section of the decision in full: -

"*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…..*"*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?"

29., in *Laskar v Prescot Management Company Ltd* [2020] UKUT 241 (LC) the Upper Tribunal clarified the decision in Willow Court as follows:

"in Willow Court the Tribunal suggested an approach to decision making in claims under rule 13(1)(b) which encouraged tribunals to work through a logical sequence of steps, it does not follow that a tribunal will be in error if it does not do so. ***The only "test" is laid down by the rule itself, namely that the FTT may make an order if is satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings.*** *The rule requires that there must first have been unreasonable conduct before the discretion to make an order for costs is engaged, and that the relevant tribunal must then exercise that discretion. Whether the discretion has been properly exercised, and adequately explained, is to be determined on an appeal by asking whether everything has been taken into account which ought to have been, and nothing which ought not, and whether the tribunal has explained its reasons and dealt with the main issues in such a way that its conclusion can be understood, rather than by considering whether the Willow Court framework has been adhered to. That framework is an aid, not a straightjacket." [emphasis added]*

30. It seems to this Tribunal that therefore the bar to unreasonableness is set quite high in that what amounts to unreasonableness must be quite significant and of serious consequence. This being so the Tribunal must now consider the conduct of the parties in this dispute given the nature of the judicial guidance outlined above.

31. The respondents view of the alleged unreasonable conduct of the applicants is expressed as follows from their statement of case: -

"In this case the Landlords attempted to voluntarily grant a Lease Extension at a significant discount with capped S.60 costs to the Tenants as a tangible expression of their gratitude to their neighbours for putting up with significant disturbance during the landlords building works in the Block. The Landlords remain convinced that the Tenants concerns about the inclusive of £150.00 ground rent for the entirety of the term would preclude registration of the proposed Lease were at all timed unfounded. Were this the case, the Leases of flats 2, 3, 4 and 7 which have been extended on the same terms as those

offered to the Tenants would not have been registered at the Land Registry.

Even if there was a subsequent dispute revolving around the legitimacy of incorporating a ground rent in a Lease Extension under the LRHUDA 1993, the Tenants accepted the Landlords offer and having pre-agreed all the terms of acquisition and the capped S.60 costs, served the First Notice and thereafter extraordinarily sought to avoid the consequences of their own conduct. At any stage rather than issue the First Applications, the Tenants could have withdrawn the First Notice and indeed were even invited before they issued the First Applications to clarify if they had done so with no response. Even if they did not wish to withdraw the First Notice, the proper and appropriate behaviour would have been to issue a claim in the County Court for declaratory relief as to the validity of the First Notice rather than misleadingly issue the First Applications, a step which proved to be entirely redundant.

Only after probing correspondence from the Landlords solicitors did the Tenants admit their true intention was to challenge the validity of the First Notice. The Tenants reasons for issuing an Application to determine the Landlords S.60 costs which had been capped at £250.00 remains inexplicable given that at no stage were these modest costs ever in issue or challenged by the Tenants. The decision to serve the Second Notice and then issue the Second Applications when the position regarding the First Notice and First Applications was unresolved in circumstances where the position could so easily have been resolved by simply issuing a claim in the County Court or withdrawing the First Notice only served to confuse the issue further rather than clarify it. The Tenants gained no advantage in serving the Second Notice or issuing the Second claims and did not need to do so when they did so. The serving of the Second Notice and the issuing of the First and Second claims were unreasonable and negligent acts which might also be said to be improper and caused both parties to incur unnecessary and avoidable costs.

32. The applicants unsurprisingly take a different view. They say of the level of unreasonableness required: -

"This is a high threshold and has not been met in this case. There is a reasonable explanation. The Applicants and their Solicitor acted throughout to achieve the Applicants entitlement to a peppercorn ground rent in accordance with 1993 Act and relied upon trite case law authority and Land Registry Practice Guidance when doing so….. discretion should not be used as the Applicants and their Solicitor's conduct were attempting to

achieve the right given to the Applicants by Parliament and is therefore not unreasonable conduct. "

33. Taking into account all that the parties have said about the case and the actions of the parties involved, the Tribunal cannot find evidence to match the high bar of unreasonable conduct set out above. The tribunal was therefore not satisfied that stage one of the process had been fulfilled in that it found there has been no unreasonableness for the purposes of a costs decision under Rule 13 on the part of the applicant. The conduct may have been mistaken but it was not vexatious or such that following the legal tests the tribunal might consider such conduct unreasonable. The Tribunal accepts that the applicants and their solicitors did indeed try to achieve the applicant's statutory rights under the 1993 Act that could include a peppercorn rent and this could not be construed as unreasonable conduct. In *Ridehalgh*, the Court of Appeal stated that a legal representative has not acted "improperly, unreasonably or negligently" merely because he acted for a party who had pursued a case that was doomed to fail. However, a legal representative should not lend his assistance to proceedings which are an abuse of process. While it might be thought that the applications were very problematic and that they both eventually were withdrawn, there was no question that they were an abuse of the process. This simply was not the case in this dispute. The fact that a claim has been abandoned does not mean that it has been pursued negligently.

34. In the circumstances the tribunal determines that there be no order for costs pursuant to Rule 13.

Name:	Judge Professor Robert Abbey	**Date:**	28 May 2021

Appendix

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8)

Orders for costs, reimbursement of fees and interest on costs

13.

(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(**a**), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(**b**) and the County Court (Interest on

Judgment Debts) Order 1991(**c**) 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.

Leasehold Reform, Housing and Urban Development Act 1993

60 Costs incurred in connection with new lease to be paid by tenant.

(1) Where a notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely—
(a)any investigation reasonably undertaken of the tenant's right to a new lease;
(b)any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56;
(c)the grant of a new lease under that section; but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.
(2) For the purposes of subsection (1) any costs incurred by a relevant person in respect of professional services rendered by any person shall only be regarded as reasonable 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) Where by virtue of any provision of this Chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then (subject to subsection (4)) the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.
(4)A tenant shall not be liable for any costs under this section if the tenant's notice ceases to have effect by virtue of section 47(1) or 55(2).
(5)A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before [F1the appropriate tribunal] incurs in connection with the proceedings.
(6) In this section "relevant person", in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter, any other landlord (as defined by section 40(4)) or any third party to the tenant's lease.

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.