FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BJ/LRM/2021/0019P**
Property	**:**	**46 Falcon Road, London SW11 2LR**
Applicant	**:**	**46 Falcon Road RTM Company Limited**
Representative	**:**	**Mr E Crossfield of the RTM Company**
Respondent	**:**	**Boccel Management Limited**
Type of Application	**:**	**Supplemental cost application following an application for a determination of entitlement to right to manage**
Tribunal Member	**:**	**Judge P Korn**
Date of Decision	**:**	**23rd November 2021**

SUPPLEMENTAL DECISION ON COSTS

Description of type of determination

This has been a determination on the papers (without an oral hearing) which has not been objected to by the parties.

Decisions of the tribunal

(1) The tribunal makes an order under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**") that the Respondent is required to pay to the Applicant its costs of £1,550.00.

(2) The tribunal also makes an order under section 20C of the Landlord and Tenant Act 1985 for the benefit of all of the members of the Applicant company in their capacity as leaseholders that none of the costs incurred by the Respondent in connection with these proceedings (including the proceedings relating to the Main Application) can be added to the service charge.

(3) The tribunal also makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for the benefit of all of the members of the Applicant company in their capacity as leaseholders that none of the costs incurred by the Respondent in connection with these proceedings (including the proceedings relating to the Main Application) can be charged direct to any tenant as an administration charge under their lease

The background

1. This application is supplemental to an application (the "**Main Application**") made by the Applicant for a determination of entitlement to the right to manage the Property. In a decision on the Main Application dated 26th October 2021 Ms H Bowers of the First-tier Tribunal ("**FTT**") determined that the Applicant had acquired the right to manage the Property on the relevant date.

2. The Applicant has now made a cost application pursuant to paragraph 13(1)(b) of the Tribunal Rules and cost applications pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

Applicant's written submissions

3. Mr Jesus Rodriguez, leaseholder of Flat 12 and a director of the Applicant company, has made a witness statement in support of the cost application, part of which gives background information to the Main Application.

4. Mr Rodriguez states that from late 2018 to the time of the making of the Main Application Mr Richard Davidoff was the sole director of the Respondent company and that he appointed ABC Block Management Limited ("**ABC**") as the managing agent of (inter alia) the Property. Mr Davidoff is also sole director and sole shareholder of ABC.

5. In Mr Rodriguez's submission, by the terms of its Articles of Association the developer/freeholder intended that the leaseholders take joint control of the Respondent company, and he states that it is clear that they can in principle do so simply by applying to become members. A number of leaseholders have attempted to become members of the Respondent company over the years but any

applications for membership have been "obfuscated" or seemingly not received or actioned. In the meantime, there has been what he describes as a worrying rise in service charges *"for no apparent reason other than for the financial gain of Richard Davidoff and ABC Block Management Limited"*.

6. Mr Rodriguez states that the right to manage claim was a direct result of the issues described above. Mr Davidoff resisted the claim and continued to do so despite the fact that the other two superior landlords accepted it on 18th June 2021.

7. Instead of accepting the position unconditionally, on 22nd June 2021 Mr Davidoff telephoned Mr Rodriguez and offered to accept that the Applicant had a right to manage but only in return for leaseholders dropping a service charge application which they had made to the FTT. Mr Davidoff also alleged that the right to manage claim was critically flawed and that the Applicant would lose that claim if it proceeded with it through the FTT.

8. The FTT determined the Main Application in the Applicant's favour on 30th September 2021 but then on 1st October 2021 the Respondent objected that its request for an oral hearing had not been acknowledged. As a consequence, the decision of 30th September 2021 was set aside and an oral hearing was set for 8th November 2021. On 20th October 2021 the Respondent then withdrew its challenge to the Main Application.

9. The Applicant submits that the Respondent's behaviour shows an intent to delay and obfuscate the Main Application, and that the Main Application was only made necessary in the first place because Mr Davidoff had appropriated the Respondent company.

10. Mr Rodriguez also notes that the Association of Residential Managing Agents expelled ABC as a member on 4th November 2021 following what he describes as a damning FTT report on Mr Davidoff's performance as an FTT appointed manager in relation to a different property.

11. The Applicant seeks a cost award in the sum of £1,550.00 against the Respondent and against Mr Davidoff personally, that sum representing the costs incurred by the Applicant in these collective proceedings. They also seek an order under section 20C of the Landlord and Tenant Act 1985 and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

Respondent's position

12. The Respondent has not made any submissions in response to the Applicant's cost applications despite having been given an opportunity to do so.

The tribunal's analysis

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

13. Although not explicit in the Applicant's cost application, it is clear from paragraph 12 of Ms Bowers' decision on the Main Application that the Applicant's cost claim is intended to be made under paragraph 13(1)(b) of the Tribunal Rules, the relevant part of which 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 residential property case, or … a leasehold case"*.

14. In its decision in *Willow Court Management Ltd v Alexander [2016] UKUT 290 (LC)* the Upper Tribunal gave some guidance on the application of paragraph 13(1)(b) of the Tribunal Rules and established a three-stage test. The first part of the test, which is a gateway to the second part, is whether the party against whom the cost application is made has "acted unreasonably".

15. As to what is meant by acting "unreasonably", the Upper Tribunal in *Willow Court* followed the approach set out in *Ridehalgh v Horsfield [1994] EWCA Civ 40, [1994] Ch 205* and stated that *"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"*.

16. In *Ridehalgh*, 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. One principle which emerges from both *Ridehalgh* and *Willow Court* is that costs are not to be routinely awarded pursuant to a provision such as paragraph 13(1)(b) of the Tribunal Rules merely because there is some evidence of imperfect conduct at some stage of the proceedings. Sir Thomas Bingham also said that conduct could not be described as unreasonable simply because it led to an unsuccessful result. The Upper Tribunal in *Willow Court* added that tribunals should also not be over-zealous in detecting unreasonable conduct after the event.

17. In the present case, I am satisfied that the conduct of the Respondent and of its sole director, Mr Davidoff, has been unreasonable. Leaseholders had legitimate concerns about the relationship between

the Respondent and ABC and about the impediments to their becoming members of the Respondent company. It is also clear that the Respondent, through its sole director Mr Davidoff, used inappropriate tactics to try to prevent the leaseholders acquiring the right to manage and to pressurise them to drop their service charge application. The Respondent/Mr Davidoff then opposed the right to manage claim, despite seemingly not having any real grounds for doing so, and then objected to the FTT's initial determination on the right to manage claim on the ground that the FTT had not acknowledged a request for an oral hearing only then to withdraw that objections once an oral hearing had been arranged.

18. The second part of the *Willow Court* approach is to decide, if the party against whom the cost application is made has acted unreasonably, whether an order for costs be made. The answer to this second part of the test in my view is that an order should be made. The unreasonable conduct was quite extreme and was clearly designed to frustrate the Applicant's legitimate use of the FTT's process in order to confirm that it had acquired the right to manage the Property. This was not a case of the Respondent/Mr Davidoff raising sensible objections in good faith to the right to manage claim. The unreasonable conduct caused the Applicant to incur significant extra cost, caused long delays to the right to manage being confirmed and clearly also caused much aggravation to the leaseholders involved in the Applicant company. Therefore, it is clear top me that a cost order should be made.

19. The third part of the *Willow Court* approach is to work out, if an order should be made, what the terms of the order should be. The Applicant is claiming the amount of £1,550.00 and has provided copy invoices totalling this amount. There are possible questions as to whether all of this amount should be awarded, for example whether some of these costs would have been incurred anyway, although it is clear from *Willow Court* that the correct approach to a Rule 13 cost application is not necessarily to limit the cost award to those costs which have been caused by the unreasonable conduct in question. There is also a possible question as to whether £1,550.00 is a reasonable amount for the matters to which it relates, as the mere fact that costs have been incurred does not by itself make them fully recoverable.

20. The above arguments and others might have been made by the Respondent/Mr Davidoff, but they have not been. Indeed, the Respondent/Mr Davidoff have not made any representations at all in response to the Applicant's cost application. In the absence of any objections from them and on the basis of the evidence before me I consider it appropriate to award the Applicant the full £1,550.00. The conduct of the Respondent/Mr Davidoff has been particularly poor, it has caused significant unnecessary delay and anguish and £1,550.00 does not seem to me to be an unreasonable sum in the circumstances in the absence of any objections.

21. The Applicant has asked that the cost award be made against both the Respondent and Mr Davidoff personally, but I do not see anything in the legislation which allows me to make the award against Mr Davidoff personally. It is the Respondent who was the opposing party in this case, albeit that Mr Davidoff was making decisions as sole director, and it is therefore the Respondent's conduct alone in respect of which the cost award has to be made.

Section 20C application

22. The Applicant together with its members in their capacity as leaseholders has also applied for a cost order under section 20C of the Landlord and Tenant Act 1985 ("**Section 20C**"). The relevant parts of Section 20C read as follows:-

(1) "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 … the First-tier 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 tenant …".

23. The Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the Respondent in connection with these proceedings cannot be added to the service charge.

24. To the extent that the Respondent has incurred any costs then it is self-evidently right that it should not be entitled to recover those costs from leaseholders. I therefore make an order for the benefit of all of the members of the Applicant company in their capacity as leaseholders that none of the costs incurred by the Respondent in connection with these proceedings (including the proceedings relating to the Main Application) can be added to the service charge.

Paragraph 5A application

25. The Applicant together with its members in their capacity as leaseholders has also applied for a cost order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**"). The relevant parts of Paragraph 5A read as follows:-

"A tenant of a dwelling in England may apply to the relevant … tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs".

26. The Paragraph 5A application is therefore an application for an order that the whole or part of the costs incurred by the landlord in

connection with these proceedings cannot be charged direct to the relevant tenant as an administration charge under the Lease.

27. To the extent that the Respondent has incurred any costs then again it is self-evidently right that it should not be entitled to recover those costs from leaseholders. I therefore make an order for the benefit of all of the members of the Applicant company in their capacity as leaseholders that none of the costs incurred by the Respondent in connection with these proceedings (including the proceedings relating to the Main Application) can be charged direct to any tenant as an administration charge under their lease.

Name: Judge P. Korn **Date:** 23rd November 2021

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.