Costs in the First-tier Property Tribunal

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This article gives an overview of the law in relation to how applications for legal costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 are approached in the Property Tribunal.

The Tribunal's jurisdiction

The Tribunal's jurisdiction to award costs is contained within s.29(2)-(3) of the Tribunal, Courts and Enforcement Act 2007, namely, that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid."

Rule 13(1)(b) ("Rule 13") of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), which came into force on 1 July 2013, provides that the Tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case or a leasehold case. An application under s.27A of the Landlord and Tenant Act 1985 to determine whether a service charge is payable comes under the definition of "leasehold case".

Rule 13(5) of the 2013 Rules provides that 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 (1) its decision notice, or (2) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings. In practice, most applications for legal costs under Rule 13 are made within 28 days of the Tribunal's decision notice.

Under rule 13(6), the Tribunal may not make an order for costs against a person without first giving that person an opportunity to make representation. Thus, where a party has made representations but these have not been considered by the Tribunal in making its decision on costs, this would be appealable. In *Akorita v Pickard*, (unreported, 30 September 2019), for example, the First-tier Tribunal revisited its decision on costs after the unrepresented party's costs' submissions were not included in what ought to have been an agreed bundle to be sent to the Tribunal, and had not initially been received by the Tribunal when making its original decision on costs.

Under rule 7, the amount of costs to be paid may be determined by (1) summary assessment (2), agreement or (3) detailed assessment. In practice, summary assessment is most common. The Tribunal must be mindful of the overriding objective. Under rule 3 of the 2013 Rules, the Tribunal must deal with cases fairly and justly which includes, amongst other things, dealing with a case "in ways proportionate to the importance of the case, complexity of the issues and the anticipated costs and resources of the parties and of the Tribunal." It, therefore, does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

Three stage test

The Tribunal is generally a "no costs" jurisdiction. By contrast with the County Court, residential property tribunals are designed to be "a largely costs-free environment": see, *Union Pension Trustees Ltd, (2) Mr Paul Bliss v Mrs Maureen Slavin* [2015] UKUT 0103 (LC). However, the case of *Willow Court management Company (1985) Ltd v Alexander, Sinclair v 231 Sussex Gardens Right to Manage Ltd, Stone v Hogarth Road London SW5 Management Ltd* [2016] UKUT 290 (LC) ("*Willow Court*") provided some much needed guidance for First-tier Tribunal judges in relation to applications under Rule 13, including a three stage test: (1) has the person against whom an order is sought acted unreasonably? (2) in light of the unreasonable conduct, should an order for costs be made? and (3) if so, what should the terms of the order be?

The first stage – has there been unreasonable conduct?

Determining whether conduct has been unreasonable involves 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 have been crossed: *Willow Court*, at [28]. "Unreasonable" conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case - would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or, applying Sir Thomas Bingham's "acid test", is there a reasonable explanation for the conduct complained of?: see, *Ridehalgh v Horsfield and Anr* [1994] Ch. 205 24.

What if a party is unrepresented? When considering an application for costs against a litigant in person, different principles apply. A lay person who is unfamiliar with the substantive law, the Tribunal procedure or who fails properly to appreciate the strengths or weaknesses of their own or their opponent's case, or who lacks skills in presentation, or performs poorly in the Tribunal room, should not be treated as being unreasonable: *Willow Court*, at [25]. 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: *Willow Court*, at [32]. Further, the Upper Tribunal emphasised in *Willow Court* that it is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised and as a justification for a claim for costs: *Willow Court*, at [35].

In *Ernesto Garcio Cancino v Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC), McCloskey J emphasised that an appropriate balance must be struck in every case. Every unrepresented litigant must, on the one hand, be permitted appropriate latitude. On the other hand, no unrepresented litigant can be permitted to misuse the process of the tribunal. The overarching principle of facts sensitivity looms large once again: C*ancino*, at [26].

The second stage – should an order for costs be made in light of the unreasonable conduct

If there has been unreasonable conduct, the second stage is to consider whether or not an order for costs should be made in light of the unreasonable conduct. Both the nature, seriousness, and effect of the unreasonable conduct is relevant: *Willow Court*, at [28]-[30]. Furthermore, of relevance is whether the party whose conduct is criticised has had access to legal advice: *Willow Court*, at [31]. There is no need to establish a causal nexus between the costs incurred and the unreasonable conduct: *Willow Court*, at [40].

The third stage – what should the terms of the order be?

The third stage involves the FTT exercising its discretion as to the precise terms of the order and usually involves a summary assessment of costs.

Willow Court makes it clear that Rule 13 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": see, at [43]. Furthermore, Rule 13 should be reserved for the "clearest cases" and in every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable: see *Cancino*, at [34].

Post Willow Court

Since *Willow Court*, there have been four further reported cases of relevance. In *Matier v Christchurch Gardens (Epsom) Ltd* 2017 UKUT (LC), the Upper Tribunal upheld an adverse costs' order made against a tenant who had ignored the First-tier Tribunal's clear directions about the presentation of evidence, had failed to respond constructively when this was pointed out by the other side, and had sought to rely on excessive written material by way of witness evidence and submissions. Even though he had acted without legal representation, the material he had provided to the Tribunal "exceeded by a considerable distance what was reasonable and proportionate to deal with the six discrete issues raised in the proceedings" and contributed very significantly to the inability to stick to the time estimate of a day and a half: at [36].

In *Primeview Developments Ltd v Ahmed and Ors* [2017] UKUT 57 (LC), the Upper Tribunal considered whether the First-tier Tribunal had erred by not treating a refusal to mediate as unreasonable conduct when considering an application under Rule 13. It held, at [47], that all the circumstances of the case were relevant and the First-tier Tribunal was in a much better position than the Upper Tribunal to assess the significance of the appellant's refusal to mediate. The Court of Appeal's guidance in *Halsey v Milton Keynes General NHS Trust* [2004] 1 W.L.R. 3002, which provided that the two most relevant factors in this case were cost and the prospects of success, was relevant. The First-tier Tribunal was entitled to conclude from the evidence before it that the prospects of success were slight and that the costs of mediation were likely to be disproportionately high. However, the Upper Tribunal held that the First-tier Tribunal had erred in making an order for costs under Rule 13 as although Primeview had adopted an unattractive hectoring tone, the object was consensus rather than dispute: see, at [68].

The Upper Tribunal emphasised in *Laskar v Prescot Management Ltd* [2020] UKUT 241 (LC) when setting aside an order for costs made under Rule 13 that it is necessary to have regard to the whole context when considering allegations of unreasonable conduct. An unattractive feature of this particular case included the fact that an application under Rule 13 had been made at the same time as the application under s.27A setting out the history of litigation including in the County Court.

There is also some similarity between an application under Rule 13 and an application for costs in the small claims court. In *Dammerman v Lanyon Bowdler LLP* [2017] EWCA Civ 269, the Court of Appeal set out the principles in relation to orders for costs made on the Small Claims Track in the County Court under CPR 27.14(2)(g) against a "party who has behaved unreasonably". The Court of Appeal held that rejecting a "generous" offer was not "unreasonable" and, at [32]: "it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs."

(a) Cases in the First-tier Tribunal since Willow Court where costs were awarded

A judge sitting in the First-tier Tribunal is not bound by the decision of another First-tier Tribunal judge, and each case will invariably turn on its own facts; however, there are a number of decisions which have emerged in the First-tier Tribunal since the guidance in *Willow Court* which have provided some insight into the way costs' applications under Rule 13 are approached.

Failing to attend the substantive Tribunal hearing without a reasonable explanation has been held to cross the threshold of unreasonable conduct in a number of cases. In *Calabar Estates Ltd v Hakham*, (unreported, 26 February 2015), the party who was ultimately penalised in costs under Rule 13 had notified the Tribunal the day before the hearing was listed that an oral hearing was no longer necessary, having requested an oral hearing for a matter which would ordinarily be dealt with on the papers. The same party had failed to notify the other side of this when engaging at 5pm the day before and the other side's evidence, which was accepted, was that the solicitor would not have attended the hearing had he been alerted in due time. The case of *Ahmed and Ness v Victory House Trafalgar Street Ltd*, (unreported, 20 February 2017) also involved non-attendance at the substantive hearing, in conjunction with other behaviour held to be cumulatively unreasonable.

In *East Thames Group Ltd v Khalil*, unreported, 19 October 2016), non-attendance at the hearing, combined with multiple other misdemeanours, also crossed the threshold for the making of an adverse costs' order. These included failing to respond to the application, failing to comply with directions, failing to agree that the matter could be dealt with on the papers and not being prepared to mediate when the other side was willing to mediate.

Having little or no regard to the Tribunal's resources may result in a costs' order under Rule 13. In *Fairhold Properties (various) v Marina View Fazely Ltd*, (unreported, 13 August 2020), a costs' order was made in which a "hopelessly misconceived" s.27A application was made against strangers to the lease, based on erroneous legal arguments derived from an obvious misconstruction of the Landlord and Tenant Act 1995 to make up a shortfall from its own tenants. It was relevant that the applicants were property management companies with in house legal teams, and a Tribunal judge had already raised serious concerns about the application.

Making an application to the Tribunal with ulterior motives may well result in an adverse costs' order under Rule 13. In *Confue v Croydon (Unique) Ltd*, (unreported, 3 March 2021), the aim of an application under s.27A was to buy time to delay the payment of service charges due (as opposed to a genuine application to determine the reasonableness of service charges) and the bringing of the application was, therefore, held to be unreasonable. In *Confue*, the applicant had not paid service charges for four years, was letting out the property and had the resources to pay the service charges. In view also of the applicant's response to the pre-action letter to issue the s.27A application, costs under Rule 13 were awarded against the applicant.

Similarly, in *Renton v 22/23 Hyde Park Place Freehold*, (unreported, 16 March 2020), the purported reason for a third application to appoint a manager under s.24 of the Landlord and Tenant Act 1985 was in relation to alleged leaks for which the appropriate claim for financial loss could have been met by issuing a claim in the County Court. However, the actual motivation behind the application to the Tribunal was found to be that the applicants were not getting the level of service they wished and were using the s.24 application process to obtain better service. This was met with an adverse costs' order under Rule 13.

Ignoring clear case management directions can also cross the threshold of unreasonable conduct. In *Canary Riverside Estate*, (unreported, 24 February 2020), a party sought to rely on parts of a witness statement which were irrelevant/unfair at a substantive hearing where the Tribunal had previously exercised its case management powers to exclude the vast majority and was penalised in costs for so doing.

(b) First-tier decisions where costs orders have not been made under rule 13

There have been a significant number of cases in which an application for costs under Rule 13 has been unsuccessful. Discontinuing or withdrawing an application, which may have caused the other side to incur costs, will not necessarily be deemed to have crossed the threshold of unreasonable conduct, particularly where there is a reasonable explanation for having made the application. In *Tejuoso v Howard de Walden Estates*, (unreported, 18 August 2022), the tenant, who was the owner of four out of eight flats in a building, made an application to proceed with leasehold enfranchisement. After the landlord had incurred costs and disbursements, the tenant did not proceed with the original application as he was going ahead with a collective enfranchisement claim.

The case of *Lewis v Taylor* (unreported, 20 November 2020), is another example where there was no penalty in costs where a party had made and discontinued an application under s.168 of the Commonhold and Leasehold Reform Act 2002 to establish a breach of a lease. In *Grainger Invest No. 2 LLP v various leaseholders of flats 1-30, Davidson Gdns, London SW8 2XB* (unreported 17 December 2021), the applicant made an application for dispensation that was withdrawn shortly before the hearing, having relied on the evidence of its own surveyor. It was held there a reasonable explanation for making the application and as a result, no adverse costs' order was made in either case.

A delay in complying with Tribunal directions will not necessarily cross the threshold of unreasonable conduct, particularly if the delay is short. The same applies where there is a longer delay, provided that there is a reasonable explanation for the delay, for example, if there are difficulties in obtaining instructions or special circumstances including a cyber-attack: see *IMYH Ltd v LB Hackney*, (unreported, 10 April 2022).

Bringing a genuine and understandable claim against the wrong party has also not crossed the threshold of unreasonable conduct, see *Senn v GHL (Leegate) Ltd*, (unreported, 4 August 2022), a case involving a leasehold extension claim under the Leasehold Reform, Housing and Urban Development Act 1993.

Conclusion

What can be seen from the case law since *Willow Court* is that the general principle stands that costs are not to be routinely awarded merely because there is some evidence of imperfect conduct. Although each case will turn on its own facts, the threshold for an award of costs under Rule 13 is high. The First-tier Tribunal has refused to make an award for costs in the majority of applications under Rule 13 since *Willow Court*.

However, parties would be wise not to be overly complacent that adverse costs' orders will never be made against them, particularly if judicial and court resources are wasted by non-attendance at the substantive hearing, case management directions are wilfully ignored, or there is a refusal to engage with the process, without good reason.

A party wishing to make an application under Rule 13 would also be well-advised to consider whether it is worth the time, energy, and cost of making an application for costs given the high threshold. However, if faced with behaviour which may cross the threshold of unreasonable conduct, an application under Rule 13 can be strengthened by:

- Setting out in correspondence why the conduct is unreasonable, the effect of the unreasonable conduct, and the correct position as to the law or procedure if this has been misunderstood;

- If the other side is unrepresented, advising them to seek legal advice; and

- Informing the other side that, if the conduct continues, an application will be made under Rule 13.

The law is stated as at 14 June 2023.