FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LBC/2015/0013 & 0014**
Property	:	**Flats 2 and 3, 135 Ladbroke Grove, London, W11 1PN**
Applicant	:	**Queensbridge Investments Limited ("the landlord")**
Representative	:	**Forsters LLP, solicitors**
Respondents:	:	**(1) Puja Chandra Davda & Konrad Patricio Callao Heksel (Flat 2)** **(2) Sara Arora (Flat 3) ("the tenants")**
Representative	:	**Northover Litigation, solicitors**
Type of application	:	**Rule 13 Cost application**
Tribunal members	:	**Angus Andrew** **Mrs E Flint DMS, FRICS, IRRV**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**19 August 2016**

DECISION

Decision

1. The landlord's are to pay the tenants' assessed costs of £9,615.12 by 16 September 2016.

Background and application

2. By a decision dated 7 May 2015 we found that the tenants were not in breach of the subletting restrictions contained in their leases.

3. On 4 June 2015 the tribunal received the landlord's application for permission to appeal our decision.

4. On 5 June 2015 the tenants applied for costs of £12,397.20 pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and requested that the application be dealt with by way summary assessment on paper.

5. On 30 June 2015 we refused the landlord's application for permission to appeal. At the same time we stayed the tenants' cost application until the landlord's appeal against our substantive decision of 7 May 2015 had been exhausted.

6. On 14 July 2015 the landlord applied to the Upper Tribunal for permission to appeal our decision of 7 May 2015.

7. On 13 October 2015 the Deputy President of the Upper Tribunal refused the landlord's application for permission to appeal.

8. On 13 November 2015 Judge Andrew lifted the stay on the rule 13 cost application and issued directions with the intention that the costs application would be determined without an oral hearing during the week commencing 11 January 2016.

9. By letter of 4 December 2015 the landlord wrote to the Chamber President requesting that the cost application be dealt with by a differently constituted panel. The Chamber President delegated consideration of the request to regional Judge Powell. He refused the request by letter of 9 December 2015 because he considered that the request amounted to an unwarranted interference in the judicial independence of the tribunal members. In his letter he wrote that he would leave it to us to decide if we should recuse ourselves from consideration of the cost application.

10. The document bundle, in connection with the cost application, was received on 29 December 2015, pursuant to Judge Andrew's directions of 13 November 2015. The tenants' statement in reply included a request to transfer the cost

application to the Upper Tribunal pursuant to rule 25(1) of the 2013 rules. By a letter dated 4 January 2016 the landlord supported that request.

11. We refused the request because an award of costs involves the exercise of a discretion and should in the first instance be decided by the tribunal that heard the case. We said however that he would defer issuing our decision on the cost application until the Upper Tribunal issued a decision on a number of conjoined appeals. The Upper Tribunal decision in Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 0290 (LC) was issued on 21 June 2016.

12. By letter of 30 June 2016 we lifted the stay previously imposed and gave each party the opportunity to make supplemental submissions by 13 July 2016. Submissions were received from both parties and we have taken them into account in reaching our decision.

13. In their statement in reply the tenants claimed a further £2,286.60 incurred in responding to the landlords objections to their cost application. In their supplemental submissions they claim an additional £1,014 incurred in the preparation of those submissions. Thus in summary the tenants claim a total of £15,697.80: £12,397.20 incurred in connection with the original section 168 application and £3,300.60 in connection with the rule 13 cost application.

Reasons for our decisions

14. We first consider whether we should recuse ourselves. In essence the landlord's request that the cost application be dealt with by a different tribunal is based on its objection to our finding, at paragraph 33 of the 7 May 2015 decision, that the section 168 proceedings *"were brought by the landlord principally in retaliation for the tenants application for the appointment of manager and to that extent may be regarded as an abuse of process"*.

15. The landlord's disagreement with that finding cannot be a sufficient reason to recuse ourselves from determining the cost application. If the argument were taken to its logical conclusion no judge or tribunal could determine costs flowing from a decision to which the paying party objects. Having reread our decision of 7 May 2015 we can detect nothing in it that suggests any bias against the landlord. We are satisfied that there has been no bias or indeed any conflict that might cause us to recuse ourselves from considering the cost application.

16. Turning to that cost application we are mindful of the Upper Tribunal's guidance at paragraph 43 of the Willow Court decision. In particular that rule 13 cost applications *"should not be allowed to become major disputes in their own right"* and that *"a decision to award cost need not be lengthy and the underlying dispute can be taken as read"*.

17. Unfortunately this cost application has become a major dispute in its own right largely because of the lengthy and detailed submissions made by both parties.

In terms of quantity the paper work on the cost application exceeds that which we considered at the hearing of the substantive application and the process has increased the tenants' original costs by more than 25%. It is an example of the sort of satellite litigation that appellate courts have frequently disapproved.

18. On the basis of the Willow Court decision we must first decide whether the landlord acted unreasonably. If we decide that the landlord has acted unreasonably we may then exercise our discretion in deciding whether to award cost. Finally, if we do decide to award costs we must then decide what order to make.

19. As far as the first stage is concerned the tenants' case rests on our finding that the landlord's section 168 application was retaliatory and in itself an abuse of process. The landlord disputes that finding and its objection is supported by a witness statement made Serap Tekman, a director of the landlord.

20. Our disputed finding goes to the landlord's motive in bringing the forfeiture proceedings. At paragraph 95 of the Willow Court decision the Upper Tribunal observed that *"it may, for example, sometimes be relevant to consider a party's motive in bringing proceedings, and not just their conduct after the commencement of the proceedings"*. Consequently it follows that we can legitimately consider the landlord's motive in deciding whether the landlord acted unreasonably.

21. In determining whether a party's behaviour is unreasonable the Upper Tribunal in Willow Court cites with approval the judgement of Sir Thomas Bingham MR in Ridehalgh v Horsefield [1994] Ch 2005. It does so at paragraph 24 of its decision in these terms:

""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?".

22. In disputing our findings that the section 168 proceedings were retaliatory the landlord is attempting to re-litigate the original section 168 proceedings. In doing so it seeks to rely on additional witness evidence that was not before us at the original hearing and which cannot be tested by cross examination, at least not without a further oral hearing the cost of which would be disproposionate.

23. In any event we find Mr Tekman's statement unhelpful. His references to other unauthorised lettings that have involved dangerous dogs and prostitutes appear to be little more than an attempt to tarnish the tenants by association. Furthermore his reference to *"unauthorised sublettings"* is misconceived: as we explained in our decision of 7 May 2015 the leases do not prohibit the

subletting of whole nor do they require the landlord's approval of a proposed subtenant.

24. As the Deputy President of the Upper Tribunal observed in refusing permission to appeal our decision of 7 May 2015 the root cause of this protracted dispute was the landlord's failure over a period of some 4 years to fulfil its repairing obligations. That failure resulted in a successful application by the tenants for the appointment of a manager and in the section 168 proceedings. The landlord having chosen not to call any witness evidence at the hearing it cannot now seek to challenge our findings by producing an untested witness statement of fact.

25. In the context of this dispute and the landlord's failure to fulfil its repairing obligations we remain satisfied that its decision to launch the section 168 proceedings was indeed intended to *"harass the other side rather than advance the resolution of the case"*. We are satisfied that no reasonable landlord, being aware of its prolonged failure to fulfil its repairing obligations and the impact of that failure on the tenants, would initiate the section 168 proceedings brought by this landlord. A reasonable landlord would have made good the disrepair for which it was responsible thus enabling the tenants, in the words of Mrs Arora, *"to get on with their lives"*.

26. Consequently and for each of the above reasons we find that landlord acted unreasonably. Consequently we now consider whether we should make a cost award.

27. In their submissions the tenants suggest (in requesting that the case be transferred to the Upper Tribunal) that regard should be had to the decision in The Freeholders of 69 Marina, St Leonards on Sea v Oram [2011] EWCA Civ 1258. In effect the tenants suggest that in deciding whether to exercise our discretion in making an award we should have regard to the landlord's ability to recover the cost of the proceedings in any event either because the section 168 application was made in contemplation of a forfeiture application or under an express provision in the lease for the recovery by the landlord of its costs.

28. The tenants were successful in the section 168 proceedings and it would be both unfair and unjust if they were to find themselves having to pay not only their own costs but also the landlord's costs. Nevertheless we do not consider that we can have regard to a potential 69 Marina cost application when considering whether to make an award under a rule 13 cost application. At this stage no such application has been made and we have heard no argument that would enable us to decide whether it would be successful. The two types of application are separate and distinct. Consequently and for each of the above reasons we have not taken the possibility of a 69 Marina application into account in deciding whether to make a cost award.

29. 69 Marina apart the section 168 proceedings caused the tenants considerable distress: it put them in fear of losing their flats: it prolonged the litigation: it put them to considerable and unnecessary cost and it extended the period during which they were unable to sell their flats. For each of these reasons we

are satisfied that it is appropriate to exercise our discretion and make an award of costs in respect of the 168 proceedings.

30. Different considerations apply however in respect of the rule 13 cost proceedings. If costs are awarded in respect of rule 13 cost proceedings it will serve only to encourage satellite litigation. Furthermore it will encourage a degree of complexity in rule 13 cost applications that is unnecessary and was disapproved of by the Upper Tribunal in paragraph 43 of the Willow Court decision. Indeed both parties in this case have added to the complexity of what should have been a relatively simple exercise and the additional costs claimed by the tenants are disproportionate. Consequently and for each of these reasons we decline to make an award of cost in respect of the rule 13 cost proceedings.

31. Finally we must asses the tenants' costs of the section 168 proceedings that are to be paid by the landlord. The claim cost can be summarised as follows:

Profit cost of Northover Ltd		£6,831.00
VAT on above at 20%		£1,366.20
Counsel's fees for advice	£1,500	
Counsel's fees for hearing	£2,000	
Subtotal		£3,500.00
VAT on counsel's fees		£700.00
Total costs		£12,397.20

32. The basis of assessment of rule 13 costs is not entirely clear. We have however proceeded on the basis that we must assess costs reasonably incurred and of a reasonable amount and that any doubt should be resolved in favour of the paying party. That is we have assessed costs on the standard basis. The landlord makes a large number of objections to the claimed costs most of which are bald assertions that either the time sent or the amount charged was too great. We do not propose to deal with every such objection but only those of significance.

33. The work throughout was undertaken by a partner who has charged at an hourly rate £345. The landlord proposes an hourly rate of £250. Legal aid practitioners who run profitable businesses on the basis of hourly rates of less than £100 might look askance at both figures. That however is not the benchmark that we must apply. The Supreme Courts Costs Office guideline

hourly rate for a grade A fee earner in London W1 is £317 and we can see no reason to depart from that figure.

34. 15.80 hours was spent in the preparation of the case and 4 hours in attending the hearing that lasted for just on 2 hours. Witness statements were obtained from both tenants and counsel was instructed. In terms of preparation the time spent is reasonable and we allow it in full.

35. Although it might have been possible, as the landlord suggests, too delegate certain aspects of the case to a more junior fee earner we do not consider that that would have produced any saving because the time spent would have increased. Furthermore the room for delegation in a compact case of this nature is small.

36. Although we appreciate that the tenants preferred the attendance of a partner at the hearing it was an unnecessary luxury and it is unreasonable to visit the increased cost on the landlord. We allow £126 per hour for the attendance of a paralegal or trainee solicitor. Thus in terms of solicitor's costs we allow 15.80 hours at £317 per hour and 4 hours at £126: that is £5,512.60.

37. We now turn to counsel's fees. It was not a particularly difficult case. The hearing lasted for just on two hours and the only issue of any substance was that of waiver of the tenants' covenants. Although we are not given the time spent by counsel it is unlikely that it would have exceeded a day and half. In that context total fees of £3,500 appears excessive and we reduce them to £2,500.

38. Consequently we allow cost of £9,615.12 as follows:

Solicitors profit costs	£5,512.60
VAT at 20%	£1,102.52
Counsel's fees	£2,500.00
VAT and above at 20%	£500.00
Total cost allowed	£9,615.12

39. The above costs to be paid within 28 days.

Name: Angus Andrew **Date:** 19 August 2016

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).