12028

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AJ/LBC/2016/0051** **LON/00AJ/LSC/2016/0269**
Property	:	**First Floor Flat (65A)** **Second Floor Flat (65B)** **The Grove, London W5 5LL**
Applicant	:	**John Janusz Chelminski**
Representative	:	**Mills Chody LLP**
Respondents	:	**George Caldeira (65A)** **Maria Polachowska (65B)**
Representative	:	**Prince Evans solicitors**
Type of Application	:	**Breach of covenant** **Liability to pay service charges**
Tribunal	:	**Judge Nicol** **Mr CP Gowman MCIEH MCMI**
Date of Hearing	:	**10th February 2017**

DECISION

---

(1) The Tribunal accedes to the Applicant's request to withdraw his application.

(2) The Tribunal refuses the Respondents' application for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the reasons set out below.

Background

1. The Applicant made two applications against both Respondents, the first seeking a determination under section 168 of the Commonhold and Leasehold Reform Act 2002 that they are in breach of covenants in

© CROWN COPYRIGHT

their leases and the second seeking a determination under section 27A of the Landlord and Tenant Act 1985 that certain service charges are payable.

2. There was a case management conference on 2nd August 2016. In its directions order, the Tribunal noted that the allegations of breaches of covenant are extensive, some dating back to 2000. The Applicant, who was then representing himself, was directed to provide a schedule of allegations. During the hearing, he was also warned that he should exclude matters decided in previous court proceedings ("res judicata") and consider carefully whether to include matters which were trivial.

3. A further case management conference was held on 11th October 2016. Following an analysis of the Applicant's schedule, some items were excluded on the basis that they were res judicata or prior to the Applicant's ownership of the freehold. Directions were given for the determination of four preliminary issues and, on 16th November 2016, the Tribunal decided them as follows:

   (a) The Applicant sought to recover a charge for his administration of the property, which the Respondents had paid at least some of in the past. The Tribunal held that the lease makes no provision for the landlord to recover his own costs of management. Therefore, any administration charge sought in respect of the applicant's own time is not payable.

   (b) The Applicant complained about the Respondents' lack of maintenance of the front porch. The Tribunal held that it does not form part of the demised premises and, therefore, there is no responsibility on the Respondents to repair or maintain that area.

   (c) The Applicant made allegations of violence against the Respondents. The Tribunal held that they did not come within clauses 2(17) or (27) of the lease but might come within clause 2(29).

   (d) The lease provided for the ground rent to increase from £50 to £100. The Respondents interpreted the lease to say that the increase took effect on 1st January 2014. The Tribunal held that the Applicant was correct that it actually took effect from 1st January 2013.

4. The remaining allegations were listed for hearing on 11th January 2017. In the meantime, the Applicant obtained legal representation and both parties were represented by counsel at the hearing. The Applicant's counsel provided a Skeleton Argument in which 8 matters were said to be outstanding, 3 of which only applied to the First Respondent:

   (a) Non-payment of ground rent;

   (b) Non-payment of insurance;

   (c) The cost of a letter before action for unpaid service charges;

(d) Nuisance and damage caused by the First Respondent practising martial arts in his flat;

(e) Refusal of access;

(f) Keeping a cat in breach of the covenant not to do so without written consent;

(g) Failure by the First Respondent to give notice to the Applicant of the transfer of the lease to him when he acquired his flat; and

(h) Carrying out building works without consent just after the purchase in 2009.

5. This list did not match the schedule which the Applicant had prepared himself. Mr Stephen Evans, the Respondents' counsel, argued that a number of these matters should be struck out as a preliminary issue, including for lack of merit. Discussion of these issues took the entire morning. The Tribunal concluded it needed to hear the evidence and the Applicant and his witnesses gave evidence in the afternoon. It was not possible to complete the hearing and the matter had to be adjourned part-heard to 10th February 2017.

6. In the meantime, by letter dated 1st February 2017 the Applicant's solicitors purported to give "a notice of discontinuance" and asked for confirmation that the hearing on 10th February 2017 had been vacated. By letter dated 2nd February 2017 the Respondents' solicitors opposed the discontinuance and asked that the hearing be retained so that they could make an application for costs.

7. By order made on 3rd February 2017 the Tribunal refused to permit the application to be withdrawn under rule 22 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and made directions for a hearing of the costs application on the already listed date of 10th February 2017. Both parties submitted written representations as directed and the Tribunal was duly grateful for their ability to do so in the short time available. At the hearing the Applicant represented himself and the Respondents were again represented by Mr Evans.

The relevant law

8. The relevant parts of rule 13 state:

> (1) The Tribunal may make an order in respect of costs only—
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
> (iii) a leasehold case; ...

9. The Upper Tribunal considered rule 13 in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 0290 (LC). They quoted with approval the following definition from *Ridehalgh v Horsefield* [1994] Ch 205 given by Sir Thomas Bingham MR at 232E-G:

"Unreasonable" ... 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. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

10. The Upper Tribunal in *Willow Court* went on to say:

24. ... 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. We see no reason to depart from the guidance given in *Ridehalgh* at 232E, despite the slightly different context. "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?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically

include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship.

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only ... if a person has acted unreasonably...." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. ...

31. One circumstance which may often be relevant is whether the party whose conduct is criticised has had access to legal advice. It was submitted on behalf of the respondents in each appeal that no distinction should be drawn between represented and unrepresented parties in the context of rule 13(1)(b). In support of those submissions reference was made to the decision of the Court of Appeal in *Tinkler v Elliott* [2012] EWCA Civ 1289 which concerned an application under CPR 39.3(3) to set aside a judgment entered after a party had failed to attend a hearing. Such a judgment may only be set aside if, amongst other things, the applicant has acted promptly. At paragraph 32 Morris Kay LJ considered the relevance of the fact that the applicant was unrepresented:

> "I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that the litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence."

We entirely accept that there is only one set of rules which applies both to represented and to unrepresented parties but we do not consider that *Tinkler v Elliott* has any relevance to these appeals. Whether a person has acted promptly involves a much more limited enquiry than whether a person has acted unreasonably.

32. In the context of rule 13(1)(b) we consider that the fact that a party acts without legal advice is relevant at the first stage of the inquiry. When considering objectively whether a party has acted reasonably or not, the question is whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way in which that party acted. In making that

assessment it would be wrong, we consider, to assume a greater degree of legal knowledge or familiarity with the procedures of the tribunal and the conduct of proceedings before it, than is in fact possessed by the party whose conduct is under consideration. 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. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings.

11. Mr Evans relied on the following additional passages,

> 62. Although in some cases, the fact that a party has been unsuccessful before the Tribunal in a substantive hearing might reinforce a view that there has been unreasonable behaviour, that failure cannot be determinative on its own. ...
>
> 66. We also consider that the decision of the FTT in this case illustrates why a staged approach to awarding rule 13 costs is required. Here the FTT decided that there had been unreasonable behaviour (stage 1) but did not then go on to consider whether, in its discretion, it ought to make an order or not (stage 2). Instead it appears that having found unreasonable behaviour the FTT moved straight to considering the quantum of the costs which should be awarded. If it had paused to consider matters such as proportionality and the conduct of the parties more generally, ... the FTT may have decided in all of the circumstances not to make an award at all. ...
>
> 95. ... Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis. We qualify that statement in two respects. We do not intend to draw this limitation too strictly (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) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct. Secondly, once unreasonable conduct has been established, and the threshold condition for making an order has been satisfied, we consider that it will be relevant in an appropriate case to consider the wider conduct of the respondent, including a course of conduct prior to the proceedings, when the tribunal considers how to exercise the discretion vested in it. ...
>
> 98. Nor was any assessment made of Ms Sinclair's honesty. It is one thing to find that a witness with a poor understanding or recollection of events has given an account which is contradicted by contemporaneous documents; it is an entirely different thing to find that a witness has deliberately given false evidence with the intention of misleading the tribunal and has been found out by inconsistencies and contradictions. Lying to a tribunal could be grounds for a finding of unreasonable conduct; having a poor memory or an incomplete or confused understanding of events, management structures, or legal documents could not. ...

12. Mr Evans also highlighted how the Tribunal concluded at paragraphs 125, 131, 140 and 142 that the Applicant in one of the cases considered by the Upper Tribunal had withdrawn his application late but did not behave unreasonably in the circumstances. He contrasted the reasoning with the current case.

Stage 1 – has the Applicant acted unreasonably in the proceedings?

13. Mr Evans set out at paragraph 21 of his Submissions eight points at which he said the Applicant's behaviour reached the necessary threshold.

14. Firstly, he maintained a point he had made at the hearing on 11th January 2017 that the Applicant has sought determination of breaches notwithstanding the prospects of obtaining forfeiture thereafter were desperate. He asserted that coming to the Tribunal purely as a matter of principle would be unreasonable conduct.

15. Although the procedure under section 168 of the Commonhold and Leasehold Reform Act 2002 is intended to be an additional procedural threshold on the way to forfeiture, there is nothing in the legislation limiting its use in that way, even as a matter of policy. Obtaining a finding that there has been a breach of covenant may have value to a party outside its use as a ground for forfeiture and, of itself, bringing this kind of application without having forfeiture in mind as a possible end result cannot, by itself, constitute unreasonable behaviour.

16. In relation to the substance of the Applicant's allegations, the Tribunal made clear at the hearing on 11th January 2017 that some of them appeared to be obviously weak or had little merit, particularly in the light of the evidence the Applicant had been able to muster:

    (a) The First Respondent is a karate exponent. The Applicant has seen him in his flat in his karate clothes. He also claimed to have seen him practising karate. From his own knowledge of karate, the Applicant understood there to be occasions when there would be considerable downforce. The ceiling below had a crack in it. Using his experience as a builder, the Applicant concluded that the nature of the crack was most consistent with the First Respondent's karate having been the cause. The Tribunal was not impressed with this line of reasoning as it contained a tenuous chain of causation, with many equally credible alternative explanations, and expert evidence for which his qualifications were unclear and the Tribunal had not given permission.

    (b) The Applicant alleged that the First Respondent had failed to give notice to him of the transfer of the lease to him when he acquired his flat in 2009. The problem was that he had never raised this as an issue in the intervening period, despite being fully aware of the First Respondent's ownership and occupation

of the property, and, unsurprisingly therefore, had no evidence to support his allegation.

(c) The Applicant alleged that the First Respondent had carried out structural alterations in carrying out works in 2009. However, the only evidence he had were that the works were said to involve the installation of a new kitchen and a new bathroom and he had personally observed timber which could be used for structural purposes waiting to be taken into the flat as part of the works. He claimed that he had no further evidence because he had been refused access but, in fact, he has had 8 years to obtain the evidence, during which he could have obtained access by court order.

17. At the hearing on 10th February 2017 the Applicant expanded on his case on these three items. The Tribunal maintains its view that the Applicant would almost certainly not have succeeded on any of them due to the inadequacy of his evidence. However, that is far from suggesting that his conduct was unreasonable in the requisite sense.

18. Mr Evans pointed out that the Applicant had disclosed a letter dated 21st November 2016 in which his solicitors had revealed that their advice had been that he was not entitled to the management fees, as the Tribunal found on 16th November 2016. He suggested that this demonstrated that the Applicant acted unreasonably in not following sensible advice. However, as the Tribunal pointed out and Mr Evans conceded, we don't know whether the solicitor's judgment was expressed as being finely balanced, absolutely certain or somewhere in between. Many litigants reasonably seek a court or tribunal determination in circumstances where their legal representatives are pessimistic as to the outcome.

19. Mr Evans pointed out that the Tribunal had warned him at a case management conference as to the apparent weakness of some of his points but, given that the Tribunal cannot possibly have formed a definitive view at such a preliminary stage, failing to withdraw points in the face of such warnings would rarely constitute unreasonable conduct, if ever.

20. Mr Evans criticised the Applicant for carrying on with his remaining points after the preliminary determination. However, the Tribunal struggles to see how this is unreasonable – by definition, the remaining points must be the ones for which there is no obvious knockout blow and, therefore, are likely to be the more meritorious points.

21. Mr Evans submitted that the liberty granted unrepresented litigants by the Upper Tribunal should not be extended to the Applicant because he did have legal representation towards the latter stages of the proceedings. However, the Applicant still did much of the work himself in order to limit his financial outlay. He revealed that his business is struggling, with income coming under the tax threshold in his recently completed annual accounts. The schedule of allegations was his own

work and, having heard his presentation, it is neither surprising nor blameworthy that they were well short of the standard to be expected from lawyers.

22. By letter dated 30th November 2016 the Respondents' solicitors invited the Applicant to withdraw. The Applicant's solicitors refused and indicated that he did not wish to settle. However, the Respondents' offer was conditional on the Applicant paying their reasonable costs, for which he would not normally be liable in Tribunal proceedings. His refusal to withdraw on the basis of the Respondents' offer cannot be categorised as unreasonable conduct.

23. Mr Evans submitted that some of the Applicant's allegations were revealed as spurious, vexatious or plainly false under cross-examination:

    (a) The Applicant referred to an incident in which he had been attacked by the cat owned by one of the Respondents. He then produced stills from a video of the cat. It turned out that the Applicant was on the other side of a closed door and was in no danger of attack while taking this video. However, he clarified that he had received a "nasty scratch" on his hand from the cat while pushing something through the letterbox on another occasion. It seems to the Tribunal that the Applicant's point on being subject to a cat attack was more confused in its presentation than involving a falsehood. Moreover, Mr Evans skipped over the point that the presence of the cat would appear to be clearly in breach of covenant since his client has never obtained written permission.

    (b) The lack of evidence of causation for the cracking to the ceiling has been dealt with above.

    (c) The previous owner of the building used to allow the lessees to arrange the building insurance. When the Second Respondent suggested reverting to this practice, the Applicant perceived this as "mocking". Objectively, this allegation appeared spurious but the Tribunal concluded that the Applicant's feelings were genuine. The Tribunal is unable to hold that including this allegation constituted unreasonable conduct, particularly given that it was a relatively small part of the Applicant's case.

    (d) The Applicant insisted on a final determination as to the payability of the ground rent despite the Tribunal's finding in his favour and the resulting payment to him by the Respondents of the outstanding sum. The Applicant was genuinely puzzled as to why anyone would think him unreasonable, given that he was entitled to it. This did not involve any additional cost to either party so the Tribunal cannot hold it to be unreasonable conduct.

    (e) and (f) The lack of evidence for the First Respondent's alleged failure to give notice and carrying out of unauthorised works has already been dealt with above.

24. In the Tribunal's opinion, the Applicant brought an extremely weak application. He could have bolstered parts of it with more evidence but made inadequate efforts to obtain it. At times his behaviour was puzzling and so understandably distressing to the Respondents. Mr Evans submitted that the totality of this evidence suggested that the Applicant had brought proceedings for vexatious motives. However, in the end, although the Applicant's behaviour inconvenienced the Respondents for little apparent gain, the Tribunal is satisfied that it does not quite cross the requisite threshold to be regarded as unreasonable conduct.

Stage 2 – should the Tribunal exercise its discretion to order costs?

25. The Respondents' application for costs did not get past the first stage and so there is no discretion to exercise. Having said that, the Applicant did two things outside the proceedings which would have been taken into account against him if stage one had been passed.

26. Firstly, he complained to the Second Respondent's employer, the BBC, about her alleged conduct. Since the BBC had no jurisdiction to contribute to a resolution of the issues, this could only have been aimed at undermining the Second Respondent's job. This is outrageously improper conduct for a freeholder to carry out against his lessee and it is to be hoped that it is not repeated.

27. Secondly, in seeking to obtain evidence as to the First Respondent's karate activities in his flat, the Applicant admitted trying to film him without his knowledge or consent through his window. Again, this is outrageously improper conduct for a freeholder to carry out against his lessee and it should also not be repeated.

Stage 3 – the quantum of costs

28. Again, since stage 1 was not passed, there is no need to consider the amount of costs claimed by the Respondents in their solicitors' two schedules. Having said that, there was a charge included for the solicitor to send the £50 ground rent which the Tribunal had found the Respondents owed which it was conceded should not have been included. The Tribunal would also not have been minded to allow four items arising from an unsuccessful adjournment application or the Respondents' solicitor's attendance behind counsel at various hearings. The rest of the costs claimed appeared to be reasonable and proportionate.

Conclusion

29. In the circumstances, the Respondents' application for costs must be refused.

Name: NK Nicol **Date:** 13th February 2017