



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00FY/LIS/2020/0048**

HMCTS : **CVP**

Property : **Apartment 11, One Fletcher Gate, Adams Walk, Nottingham NG1 1QP**

Applicant : **Dr Lellis Francis Braganza**

Respondent : **One Fletcher Gate RTM Company Ltd**
Managing Agent : **In Residence Block Management**
Representative : **Nelsons Solicitors**

Interested Party : **Fairhold Appollo Limited (Landlord)**

Type of Application : **To make an order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**

Tribunal : **Judge JR Morris**
Mr D Satchwell MRICS

Date of Application : **11th December 2020**
Date of Hearing : **29th April 2021**
Date of Decision re Section 27A Landlord & Tenant Act 1985 : **14th June 2021**
Date of Decision : **12th July 2021**

DECISION

© CROWN COPYRIGHT 2021

Decision

1. The Tribunal makes an Order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the Applicant to make a payment of £500.00 towards the Respondent's costs by 9th August 2021.

Reasons

Application

2. An Application was made on 11th December 2020 by the Applicant under section 27A of the Landlord and Tenant Act 1985 ("the Section 27A Application") as to the reasonableness and payability of service charges for the period 15th November 2019 to 31st December 2019, and for the costs to be incurred for the year ending 31st December 2020 and for the year ending 31st December 2021, Directions were issued and a Hearing was held on 28th April 2021. A Decision was issued on 14th June 2021. Both parties indicated in their Statements of Case that they were making applications under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. At the Hearing Counsel for the Respondent asked that the parties be permitted to submit statements in support of their respective Rule 13 applications after the Decision had been made as there was 'without prejudice' correspondence, to which the parties intended to refer, which it was considered would not be appropriate to be made known to the Tribunal until the decision on all other issues had been made. The Tribunal agreed and Directions regarding submissions were included in the Decision.
3. With regard to the Section 27A Application made on 11th December 2020, heard on 28th April 2021 the decision issued on 14th June 2021 was as follows:
 - 1) The Tribunal determined that the Estimated Service Charges for the costs to be incurred for the period 15th November 2019 to 31st December 2019 and the years, 1st January 2020 to 31st December 2020 and 1st January 2021 to 31st December 2021 ("the years in issue") are reasonable.
 - 2) The Tribunal determined that the Estimated Service Charge for each of the years in issue is payable by the Applicant to the Respondent when apportioned 0.852% in relation to the Residential Charges and 0.780% in relation to the Estate Charges in accordance with the Lease.
 - 3) The Tribunal made no order under Section 20C of the Landlord and Tenant Act 1985.
4. Cross Applications were made under the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("2013 Rules"). The Respondent applied for an Order for costs under Rule 13(1) of the 2013 Rules ("the Costs Application").

5. The Applicant applied for an Order for reimbursement of fees under Rule 13(2) (“the Fees Application”).

The Law

6. Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Rule 13 (1) states that:

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-*

(ii) *a residential property case*

Rule 13(2) states:

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.

Costs Application

Respondent’s Case

7. The Respondent referred the Tribunal to the three questions set out in the case of *Willow Court Management (1985) Limited v Alexander* [2016] 0290 UKUT (LC) which must be addressed by the Tribunal of: -
 - a. Has the paying person acted unreasonably? This will be satisfied if there is no reasonable explanation for the conduct complained of;
 - b. If so, should an Order be made taking into account the nature, seriousness and effect of the unreasonable conduct; and
 - c. If so, what should the Order be, which does not need to be confined to or attributable to the unreasonable conduct.

Has the paying person acted unreasonably?

8. With regard to the first question the Respondent submitted that the Applicant acted unreasonably in proceeding to the Hearing on 29th April 2021 because the Respondent had sent to the Applicant a “without prejudice” letter on 12th April 2021 (copy provided) (“the Letter”) after the parties’ respective positions had been pleaded within their respective Statements of Case. The points of which were summarised by the Respondent as follows:
 - a. For the extensive reasons set out within the Applicant’s Statement of case the Section 27A Application was entirely without merit;
 - b. To the extent that the RTM Company had fallen short in respect of their service standards (which likely caused the Section 27A Application to be issued in the first place), they apologised;
 - c. If the matter were to proceed to the Hearing, the likely outcome would be that: -
 - i. the Section 27A Application would be unsuccessful; and

- ii. Costs would be claimed against him;
 - d. Since all of the information that had been requested as part of the Section 27A Application had been provided, it would be unreasonable to proceed to the Hearing;
 - e. The RTM Company was willing to: -
 - i. Allow the Section 27A Application to be withdrawn under Rule 22; and
 - ii. not to pursue the costs it had incurred.
 - f. The Letter also warned that if the Section 27A Application was pursued the RTM Company would seek to pursue costs incurred under Rule 13.
- 9. The Respondent submitted the warning regarding the result was justified by the Tribunal's determination and therefore there was no reasonable explanation to continue to a Hearing. Reference was made to Paragraphs 113 and 114 of the FTT's Decision which stated "...The Tribunal found that there was no merit in the Respondent's arguments that the Applicant is not entitled to issue Service Charge Demands... 4 ...Also, the arguments with regard to the payability of the Estimated Service Charge demands were with one exception also not well founded..."
- 10. The Respondent said that the Applicant:
 - a. Had been told that the Section 27 Application was fundamentally flawed (both in the Letter and in the Applicant's Statement of Case); and
 - b. Had the option of seeking legal advice and chose not to do so.

Should an Order be made?

- 11. With regard to the second question, it was submitted that the nature of the unreasonable conduct was made clear in the legal reasoning set out in the Statement of Case as well as the common-sense reason that to claim that no valid service charge demands have been made would result in a tenant benefitting from a well maintained and managed Building for nil consideration.
- 12. As to the seriousness and effect of the unreasonable conduct complained of, in pursuing the Section 27A Application the Applicant was unsuccessful and increased the Respondent's costs which, in the absence of a Rule 13 Order being made against him, will have to be paid for by all of the other leaseholders who have never taken issue with the Service Charge in the same way.
- 13. The Respondent did acknowledge that the FTT found that the Service Charge Demands ought to be apportioned to show the Residential and Estate Charges within the Estimated Service Charge demands but, other than that one point (which does not alter the fact that the Respondent "is" able to issue such demands which have now been deemed "reasonable" by the FTT), the Applicant's Application failed on all grounds. The FTT actually go on to say after the extracts quoted above (at paragraphs 113 and 114 of the Decision) that: - "...If [the query over the apportionment] had been the only issue it might have been settled without recourse to the Tribunal."

14. In this respect the Tribunal's attention was also drawn to a passage in the Letter in which the Respondent "... acknowledges that there have been times when their service standards have fallen short though failures to engage and/or address correspondence or enquiries in a timely manner. For that, our client can only apologise, but grievances relating to what appear to be historical, inadvertent omissions in circumstances where you have now been provided with all of the information you were seeking, should not be allowed to cloud your judgment in choosing how to proceed."

What should the Order be?

15. With regard to the third question, the Respondent submitted that it has sought to be reasonable and referred the Tribunal again to the Letter in which it was said that:

"...whether or not you proceed to the Hearing, [the RTM Company] has no intention of pursuing you for the costs that it has incurred to date as a result of responding to the FTT proceedings. The reason for this is twofold: -

- a. As we say at paragraph 2 above, our client acknowledges that there have been times where their service has fallen short and that may have led, even to a small degree, to you issuing the FTT proceedings out of pure frustration; and
- b. Our client hopes that this first act can be seen as a demonstration of reasonableness and of their willingness to set aside your differences and try to move on from this unpleasantness....in the interests of reasonableness, our client would limit the costs claimed to the costs incurred in the preparation for and representation at the Hearing only."

16. It was submitted that the Applicant be ordered, under Rule 13, to pay the Respondent's costs associated with the preparation for and representation at the Hearing after proceeding after the clear warning set out within the Letter and an up-to-date costs schedule was provided for the purposes of summary assessment.
17. Finally, it was submitted that a Rule 13 Order should be made due to the complete failure of the Applicant's Section 27A Application

Applicant's Case

18. The Applicant stated that the Letter dated 12th April 2021 was not an offer to settle as it did not address the substantive issues raised.
19. Rule 13(1) only empowers a Tribunal to make a costs order against a person who has acted unreasonably in bringing, defending or conducting the proceedings.
20. The Applicant said that he had made the Application against a background of having made several reasonable demands for information relating to the service charge demands and the budgets which had elicited no response from the Right to Manage Company or their representatives or agents and was left with no option but to make an application under section 27A.

21. He submitted that in his Statement of Case he had given a complete description of the background facts leading to the section 27A Application and made legitimate contentions as to the validity of service charge demands referring to the Respondent's apparent breach of its Articles of Association and the Companies Act. He said he considered he had the right and indeed the obligation to explain the full background that might be relevant to the section 27A matters and that it is up to the Tribunal to decide on those contentions which are within its jurisdiction.
22. The Applicant submitted that although the Tribunal found some of the contentions not to be within its jurisdiction, this should not be given much weight as he had been largely successful in those matters which fall under Section 27A.
23. The Tribunal found in the Applicant's favour that a Tenant has the right under the Lease to pay the Estimated Service in equal quarterly instalments without charge (see paragraphs 77 and 80 of the Decision).
24. The Tribunal found in the Applicant's favour that wording of the Lease appears clear that a reserve or sinking fund can be created for any Service Charge purpose (see paragraph 95 of the Decision).
25. However, the Applicant said that his main contention was that his share of the Service Charge had not been apportioned in accordance with the Lease (see paragraph 93 of the Decision) and that it was not payable until it was correctly apportioned. He said that this was his principal substantive issue (see paragraphs 87 to 93 of the Decision).
26. The Applicant said that the Tribunal had found the Respondent's description of the apportionment not to be the correct approach so far as the Lease is concerned (see paragraph 87 of the Decision). He outlined the procedure as follows.

Step 1: At the end of the year the accounts for the whole Development should be produced. These will be the gross costs.
28. The Applicant added that according to the lease, he does not have use of a parking space and requests that the costs incurred for the car park form a clear sub-set of the gross costs and broken down into e.g. electricity (lights, roller door, CO2 fans), caretaker services, general maintenance, gate maintenance, ventilation maintenance, major works provision (reserve fund).

Step 2: Any apportionment between the stakeholders should take place to produce a set of accounts, certain costs of which will have been reduced as a result of the contribution of the stakeholders. These will be the net cost for Tenants of Ocean Island and One Fletcher Gate.
29. It is understood the other stakeholders in the Development include the commercial units, a car parking company and an adjacent building and most

of the shared costs to be for the usage of the car park (see paragraph 63 of the Decision).

30. Step 3: The net costs are apportioned between the Tenants of Ocean Island and One Fletcher Gate and then charged to the Applicant in the proportions as set out in his lease i.e., 0.852% of Residential Charges and 0.780% of Estate Charges.
31. The Applicant says that he understands that, as his flat is located in Ocean Island and does not have access to the inner courtyard of One Fletcher Gate (See paragraph 16 of the Decision), the maintenance costs for the inner courtyard are to be fully allocated to the tenants of One Fletcher Gate. Equally, the Applicant does not have use of a parking space and it would be unreasonable and unfair to allocate Car Park costs to him.
32. The Respondent does not provide explanations and accounts disaggregated to a level enabling verification that the approach prescribed by the Tribunal in apportioning the Applicant's share of the Service Charge has been reasonably followed.

Fees Application

Applicant's Case

33. The Applicant stated during the Hearing that he did not wish to make an application under Rule 13(1). He stated that he wished to make an application under Rule 13(2) for reimbursement of the Tribunal fees (i.e., £100 application fee and £200 hearing fee) to be paid by the other party.
34. Reimbursement of fees does not require the Applicant to prove unreasonable conduct on the part of an opponent but this should not be given much weight in determining the re-imbursement of his Tribunal fees since the Applicant was successful on the main issues.

Respondent's Case

35. The Respondent did not make any specific representations with regard to the Applicant's Application for reimbursement of fees however it was apparent from the Respondent cross Application for costs under Rule 13(1) that it contested the Rule 13(2) Application.

Decision re Costs

36. The Tribunal starts from a position that its jurisdiction is one in which costs are generally not awarded. The only exception being where a party has acted unreasonably. The Civil Procedure Rules do not apply to tribunals including the provision relating to costs and "*there is no equivalent general rule that the unsuccessful party will be ordered to pay the costs of the successful party*" as per paragraph 28 of *Ridehalgh v Horsefield* [1994] Ch 2015.

37. In addition, paragraph 43 of *Ridehalgh v Horsefield* states that a costs application “*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*”.
38. The Tribunal applied the three-stage test in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015 considering:
- (i) Whether the Applicant had acted unreasonably, applying an objective standard;
 - (ii) If unreasonable conduct is found, whether an order for costs should be made or not;
 - (iii) If so, what should the terms of the order be?
39. The Tribunal also took into account the meaning of “unreasonable” in *Ridehalgh v Horsefield* [1994] Ch. 205 which dealt with a wasted costs order, the principles of which we consider apply in this case:
- “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 judgement, but it is not unreasonable.*
40. The Tribunal considered whether the Applicant *has acted unreasonably in bringing, defending or conducting proceedings*.
41. The Tribunal found that the Section 27A Application related to the payability of the Service Charge. The Applicant had contested the Service Charge Demands because 1) the Respondent was not entitled to issue Demands and 2) the Demands were not payable.
42. Firstly, the Applicant said that the Respondent was not entitled to issue Service Charge Demands because:
- a) The Respondent failed to acknowledge receipt of the Applicant’s Notice of Assignment upon acquisition;
 - b) The Respondent does not comply with its Memorandum of Association;
 - c) The Respondent does not comply with the Companies Act 2006.
43. As stated in its Decision of 14th June 2021, it found that there was no merit in the Applicant’s arguments that the Respondent is not entitled to issue Service Charge Demands. The Tribunal found an Application under section 27A of the

Landlord and Tenant Act 1985 was not the correct form of Application for the contentions that were submitted.

44. The Tribunal then considered whether the Applicant had acted unreasonably, particularly after receipt of the Respondent's Statement of Case, in pursuing the argument that the Respondent was not entitled to issue Service Charge Demands for one or more of the three reasons.
45. With regard to the first reason, at the time of the Application on 11th December 2020, taking into account the Applicant's past experience as described at the Hearing, and the lack of response to the Directions issued on 17th December 2020, the Tribunal found that the Applicant's concerns regarding the failure to acknowledge receipt of the Applicant's Notice of Assignment on Acquisition, which the Respondent conceded, provided a background to the Section 27A Application.
46. However, the Tribunal could not find a justification for the Applicant's claim, that failure to acknowledge receipt of the Notice of Assignment on Acquisition was a basis for the Respondent not being entitled to issue Service Charge Demands, other than the Applicant's irritation at the lack of response from the Respondent.
47. With regard to the latter two reasons regarding company law compliance, the Tribunal took the view that the Applicant had sufficient knowledge and understanding to know that the explanation in the Respondent's Statement of Case indicated that the points raised were not within the Tribunal's jurisdiction under a Section 27A Application or alternatively, that the Applicant should seek legal advice.
48. The Tribunal did not consider that the Applicant's persistence in these submissions was reasonable and that they lacked a rational explanation in respect of the Section 27A Application that was being made.
49. The Tribunal then considered whether an Order should be made under Rule 13.
50. The Applicant's reason regarding the failure to acknowledge the Notice of Assignment appeared to be intended to disconcert the Respondent. The Applicant was aware that the points raised with regard to the alleged failure to comply with company law were technical and that the Respondent would be obliged to seek legal advice incurring additional costs. Therefore, the Tribunal determined that an order should be made.
51. Secondly, the Applicant said that the Service Charge demands that had been issued by the Respondent are not payable or reasonable. The Applicant raised five issues as follows:
 - (i) Failure to issue End of Year Accounts in accordance with the Lease;
 - (ii) Failure to respond to Section 21(4) Landlord & Tenant Act 1985 Request;
 - (iii) The Service Charge Demands are not issued four times a year in accordance with the Lease;

- (iv) The Budget does not fulfil the requirements of the Estimated Service Charge as stated in the Lease;
 - (v) The Respondent is not entitled to establish a reserve or sinking fund and if it is, the amount demanded is not reasonable.
52. These are all points that the Tribunal comes across on a regular basis.
53. In the course of questioning the reasonableness and payability of service charges, tenants sometimes raise as an issue, the timeliness of the end of year accounts recording the actual costs. The availability of the actual costs is an important matter for tenants when assessing their financial commitments and the tribunal finds it a reasonable issue to raise and argue notwithstanding that it does not have jurisdiction to enforce a section 21(4) Landlord & Tenant Act 1985 request.
54. A number of tenants are under the impression that the provision to pay by two or four instalments in a lease means they must be demanded this number of times, which is generally not the case. What was of concern here, was that the demand issued by the Respondent appeared to require payment in total or by monthly instalments on payment of a fee, whereas the lease made provision for four instalments. The Tribunal found that it was not unreasonable to raise this point.
55. The provision of the reserve fund is the subject of section 27A applications by both landlords and tenants. The Tribunal found that the reason for questioning it was not unreasonable.
56. Lastly the Tribunal found that it was reasonable to raise the issue of the apportionment of Service Charge as shown in its Decision and Reasons of the 14th June 2021.
57. It is always difficult to know whether, if circumstances had been different, the issues might have been settled without a hearing. Whether or not this would be the case the Tribunal did not find that the Applicant had acted unreasonably in respect of the second issue.
58. With regard to the submissions, the Tribunal found that the Respondent's Letter was not an offer for settlement, but a proposal that it would not seek costs under Rule 13 of the 2013 Rules if the Applicant withdrew the Application. The Applicant was not unsuccessful in so far that the issue regarding the demands in four instalments and the apportionment between the Residential and Estates Charges were determined, which is likely to be to the benefit of both parties.
59. The Applicant's submissions largely identified the points on which he was successful. However, certain comments are made which are beyond what was determined by the Tribunal.
60. Having determined that an Order should only be made with regard to the entitlement to issue Demands the Tribunal considered the costs schedule which was provided by the Respondent to assess the amount of the Order. The

costs said to be incurred at the time of the Hearing were £2,249.80. The Respondent subsequently claimed £3,582.60 to take account of the Rule 13 Application. The Tribunal could not see how the additional costs had been incurred as the parties should have been ready to make their submissions on Rule 13 at the Hearing which were only delayed at the Respondent's request in order that it could include a "without prejudice" document.

61. The Tribunal makes an Order under Rule 13 for the Applicant to make a payment of £500.00 towards the Respondent's costs.

Decision re Fees

62. The Tribunal considered whether an Order should be made for the reimbursement of fees. The Tribunal found that the Applicant had made no Service Charge payments. If he had not brought these proceedings the Respondent would very likely have brought proceedings against him for non-payment. The Tribunal therefore found that this was pre-emptive action that was to the advantage of the Applicant.
63. The Tribunal makes no order for reimbursement of fees under Rule 13(2) of the 2013 Rules.

Judge JR Morris

ANNEX 1 - 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.