

Setting a high standard

The Upper Tribunal has provided clarification on when costs will be awarded for 'unreasonable' behaviour. Sarah Heatley explains



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'Martin Rodger QC and Siobhan McGrath, deputy and chamber president of the First-tier Tribunal respectively, were asked to consider what constitutes "unreasonable behaviour" under r13, and how it should be applied in practice.'

The Upper Tribunal (Lands Chamber) has handed down its long-awaited decision in a number of conjoined appeals: *Willow Court Management Company (1985) Ltd v Alexander; Sinclair v 231 Sussex Gardens Right to Manage Ltd; Stone v 54 Hogarth Road, London SW5 Management Ltd* [2016].

Each appeal concerned the First-tier Tribunal (Property Chamber)'s power to award costs against a party that has acted 'unreasonably' and they were listed together so that the tribunal could consider, for the first time, the jurisdiction conferred by r13(1)(b) (r13), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (2013 Rules) and provide guidance as to how it should be exercised. It was hoped that the decision would provide much-needed clarity as to what constitutes 'unreasonable behaviour' in bringing, defending or conducting proceedings in the lower tribunal, a nebulous phrase which has lacked definition since the tribunal costs regime was amended in 2013.

Martin Rodger QC and Siobhan McGrath, deputy and chamber president of the First-tier Tribunal respectively, were asked to consider what constitutes 'unreasonable behaviour' under r13, and how it should be applied in practice. Going forward, tribunals will have to adopt a more systematic approach using a three-stage test that should be applied at the substantive hearing. They will also be expected to use their case management powers to avoid applications under r13 at an early stage and such applications should

be reserved for the clearest cases, rather than becoming a matter of routine. In the light of this decision, it will now be significantly harder to recover costs from an opponent who appears to have behaved unreasonably and it will therefore be necessary to manage clients' expectations about the likelihood of recovering costs in the tribunal arena.

Tribunal and costs rules

As residential property practitioners will recall, the First-tier Tribunal (Property Chamber) absorbed the jurisdictions of the Residential Property Tribunal Service, the Adjudicator to HM Land Registry and the Agricultural Land Tribunal and was established in an effort to simplify the court and tribunal service in England and Wales. Each particular section of the First-tier Tribunal must abide by the same set of procedural rules and its ability to award costs is set out in s29 of the Tribunal, Courts and Enforcement Act 2007 (2007 Act). Pre 2013 this power was limited, there was a strict £500 ceiling and costs could only be awarded where a party's conduct was found to be frivolous, vexatious or was otherwise an abuse of process. The position was amended significantly by the introduction of the 2013 Rules, which removed the £500 cap and allowed the tribunal to make an order in respect of costs 'if a person has acted unreasonably in bringing, defending or conducting proceedings' under r13. The ambiguity of this rule is, perhaps, one of the reasons for the increase in costs applications in recent times,

particularly in service charge cases. Indeed, all of the subject appeals arose out of a dispute over service charges payable under the lease of a flat.

Appeals

The facts of each of the conjoined appeals differ, but all contained an element of unreasonable behaviour on the part of the respondent.

Willow Court Management Company (1985) Ltd v Alexander

The First-tier Tribunal determined that the management company had incorrectly implemented the procedure in Mrs Alexander's lease for determining the level of service charges she was liable to pay. Rather than instruct a surveyor to certify quarterly service charges, as was required by the lease, the amount payable by the lessees was instead agreed at a general meeting of the company by way of resolution. The company also used its chartered accountant rather than a surveyor to certify the difference between the amount of service charges actually collected each year and the total annual expenses incurred.

The parties had been involved in litigation relating to the same issues several times in the past and at each juncture the management company had been advised by the particular court or tribunal that the procedural errors set out above could easily be rectified and the service charges then properly demanded.

Following an application for costs under r13 by Mrs Alexander's solicitors, it was held that the company had behaved unreasonably by bringing and continuing determination proceedings without having first complied properly with its contractual obligations. Substantial costs under r13 were awarded and the management company subsequently lodged an appeal.

The Upper Tribunal reversed the costs decision on the basis that the lower tribunal had applied a standard of unreasonableness falling well short of the threshold it considered to be appropriate in

cases of this nature. When dealing with the matter of costs, the Upper Tribunal also made clear that the First-tier Tribunal is a costs-shifting jurisdiction by exception only, and that parties should usually expect to bear their own costs.

Sinclair v 231 Sussex Gardens Right to Manage Ltd

In this case it was the lessee who was required to pay the 'Right to

decision had been procedurally unfair on two grounds and should be set aside as a result. First, Ms Sinclair had been given insufficient notice of the allegations upon which the company's application for costs was based. The company had failed to provide her with a properly particularised statement of case until the day before the hearing and this was held to be a particularly grave omission because Ms Sinclair was unrepresented.

The catalogue of criticisms levelled at Ms Sinclair at the costs hearing did not seem to the Upper Tribunal to be a solid foundation for the finding of unreasonable behaviour.

Manage' company's costs at first instance. It was felt that Ms Sinclair, who was unrepresented at the substantive hearing, had generally behaved unreasonably throughout the process by defending herself on spurious, vague grounds and by producing evidence which was 'thin at best'. The First-tier Tribunal also found that her version of events was unreliable and decided that her conduct clearly passed the high unreasonableness test.

Ms Sinclair's appeal was granted by the Upper Tribunal. It found that the First-tier Tribunal's

Secondly, the reasons used by the First-tier Tribunal for awarding costs were contained within its substantive determination. This meant that Ms Sinclair had had no prior knowledge of them and had therefore been unable to defend the challenge to the reasonableness of her conduct.

In addition to the procedural irregularity the Upper Tribunal also held that the unreasonable conduct alleged at the first hearing had not been enough to warrant a costs award against the appellant. In its judgment the Upper Tribunal made clear that only behaviour

Rule 13, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

13.

(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 —

- (i) an agricultural land and drainage case,
- (ii) a residential property case, or
- (iii) a leasehold case...

relating to the proceedings themselves can be relied on at the first stage of the three-stage test which it has decided should govern costs decisions, albeit that they did not wish to make this limitation too strict. The lower tribunal had also disregarded Ms Sinclair's own testimony and honesty. Furthermore, it decided that the evidence which she had presented had not been adequately evaluated by the tribunal and,

received reimbursement payments from the company in respect of his original complaints and had also been advised by LEASE that he had little prospect of success on the major works point as he had been unable to obtain supporting evidence. Notwithstanding the fact that substantive proceedings had been brought to an end without the need for a hearing, the company made an application for costs by reason of the manner

defeat and nor should it necessarily be evidence of unreasonable behaviour. They went on to state that claimants should not be deterred from dropping claims because an order for costs might then be made against them, when such an order may well not be granted if a matter proceeded to a full hearing and failed at that stage.

Guidance and the future for tribunal costs

The Upper Tribunal begins its judgment with a forceful discouragement of rule 13 applications:

Such 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.

The Upper Tribunal decided that 'unreasonable' conduct includes conduct which is vexatious and designed to harass the other side, rather than advance the resolution of the case.

ultimately, the catalogue of criticisms levelled at Ms Sinclair at the costs hearing did not seem to the Upper Tribunal to be a solid foundation for the finding of unreasonable behaviour.

Stone v 54 Hogarth Road, London SW5 Management Ltd

In the last of the three test cases to be considered, the appellant had applied to the First-tier Tribunal for a determination of his liability to pay service charges on the basis that the company should not have retained as a reserve fund overpayments he and other lessees had made over the course of several years. Mr Stone also sought to argue that historic major works had been carried out to a poor standard, that the budget for them had been excessive and that the company had failed to comply with the statutory consultation requirements prior to the works being put in hand.

Following the lodging of the application, without prejudice negotiations between the parties had ensued and Mr Stone subsequently took steps to withdraw his application by way of a letter to the tribunal a day or so prior to the hearing. He had

and timing of the withdrawal. The First-tier Tribunal cited Mr Stone's delay in this connection as being one of the main motives for the making of an award of costs against him. It found that he should have been aware that he would not be able to compile sufficient evidence to support his case in time and had put the respondent to additional costs, acting unreasonably within the scope of r13, in so doing.

The Upper Tribunal did not uphold this decision and found that Mr Stone had not acted sufficiently unreasonably so as to warrant a costs order. Although it is clearly unreasonable to bring a fanciful claim or one that the appellant knows will not be successful, the Upper Tribunal found that Mr Stone's claims had been genuine. As a litigant in person he had taken advice from LEASE, an organisation which provides assistance to unrepresented parties in disputes of this nature, and it was impossible to say categorically that he had delayed for an unreasonably long time before withdrawing his claim in relation to the major works. Furthermore, the Upper Tribunal was careful to note that the abandonment of a claim should not be denounced as an admission of

Despite hearing numerous submissions to the contrary, the Upper Tribunal has made clear that it favours the guidance given in *Ridehalgh v Horsefield* [1994] in relation to the language and approach of r13. This case concerned a decision relating to the tribunal's wasted costs jurisdiction and, although terms such as 'improper' and 'negligent' as well as 'unreasonable' were considered in a slightly different context, it was felt that the wording of r13 was sufficiently illuminated by this decision.

Following the guidance in *Ridehalgh* the Upper Tribunal decided that 'unreasonable' conduct includes conduct which is vexatious and designed to harass the other side, rather than advance the resolution of the case. It also considered that the behaviour should be judged within its context and placed emphasis on the need for the First-tier Tribunal to actively engage with their case management powers to discourage potentially unreasonable behaviour, particularly when so many inexperienced litigants in person are involved in tribunal proceedings. The decision also makes it clear that the behaviour expected of parties should not be set at an unrealistic level.

In view of the permissive and conditional wording of r13, the Upper Tribunal has suggested a systematic approach to applications:

Ridehalgh v Horsefield & anor
[1994] EWCA Civ 40
Willow Court Management Company (1985) Ltd v Alexander; Sinclair v 231 Sussex Gardens Right to Manage Ltd; Stone v 54 Hogarth Road, London SW5 Management Ltd
[2016] UKUT 290 (LC)

- The first stage should query whether a person has acted unreasonably by applying an objective standard of conduct to the facts of the case. If there can be no reasonable explanation for the behaviour then it will properly be adjudged to be unreasonable (para 23):

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.

Although it may also be relevant to the preceding to some extent, it is really here that it will be necessary to take into account whether a party is legally represented or not. 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, and with an increasing number of litigants in person appearing before the tribunal, this distinction will be an important one when the issue of costs arises.

- For the second stage (para 28):
... it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not.

If r13 is engaged at stage one, then the discretionary power of the tribunal will be engaged and it will need to decide whether an order for costs should actually be made without prejudice to the fact that unreasonable behaviour has occurred. When exercising its discretion, the

Upper Tribunal said that it will not be necessary for a tribunal to find a causal link between the costs incurred and the behaviour to be sanctioned. Unreasonable conduct is all that is required to trigger stage two.

- The third and final stage concerns the terms of the order to be made. Even if stages one and two are satisfied, the judgment makes clear that an order for costs on the

to take into account, but other circumstances will clearly also be relevant...

The Upper Tribunal highlighted, in particular, the need for the First-tier Tribunal to keep the overriding objective in r3 in mind, which enables it to deal with cases fairly and justly. This includes dealing with cases proportionately, and it therefore does not follow that payment of the whole of a party's

The unreasonable conduct threshold is extremely high and, as a result, rule 13 costs orders will only be made in exceptional circumstances.

standard basis is not inevitable. At paras 29-30 the Upper Tribunal stated that:

The only general rules are found in section 29(2) to (3) of the 2007 Act, namely that 'the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid', subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3 [of the 2013 Rules], which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case 'in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties of the Tribunal'... the nature, seriousness and effect of the unreasonable conduct will be an important part of the material

costs will be appropriate in every case.

While it is clear from this decision that it is virtually impossible to establish a 'one size fits all' definition for 'unreasonable behaviour', the determination provides useful guidance and a clear methodology to be followed when a tribunal is deciding whether a party's conduct is truly unreasonable and this is likely to be universally welcomed. It has also been made clearer than ever that the unreasonable conduct threshold is extremely high and that, as a result, rule 13 costs orders will only be made in exceptional circumstances. The Upper Tribunal's elucidation on this point is unlikely to be popular with represented parties, who effectively have to meet a higher standard of behaviour than litigants in person, and it is also likely that we will see a marked reduction in the number of costs applications. ■

The three-stage test

- The first stage of the tribunal's assessment of the alleged unreasonable behaviour should query whether the party has acted unreasonably by applying an objective standard of conduct to the facts.
- If r13 is engaged at stage one, then the tribunal has discretion to actually make a costs award.
- The third and final stage concerns the terms of the order. Even if stages one and two are satisfied, an order for costs on the standard basis is not inevitable.