HM Courts & Tribunals Service

Property Chamber
London Residential Property
First-tier Tribunal

10 Alfred Place, London, WC1E 7LR
Telephone: 020 7446 7700
Facsimile: 01264785060
E-mail: rplondon@hmcts.gsi.gov.uk
DX: 134205 Tottenham Court Road 2

Direct Line: 0207 446 7810

Residents' Association of Canary Riverside
Berkeley Tower Canary Riverside
48 Westferry Circus
London
E14 8RP

Your ref:
Our ref: LON/00BG/LDC/2016/0141

Date: 29 January 2019

Dear Sirs

RE: Landlord & Tenant Act 1985 - Section 20C
Rule 13 Costs

PREMISES: Phase 1 Canary Riverside, Westferry Circus, London, E14

The Tribunal has made its determination in respect of the above application(s) and a copy of the document recording its decision is enclosed. A copy is being sent to all other parties to the proceedings.

Any application from a party for permission to appeal to the Upper Tribunal (Lands Chamber) must normally be made to the Tribunal within 28 days of the date of this letter. If the Tribunal refuses permission to appeal you have the right to seek permission from the Upper Tribunal (Lands Chamber) itself.

If you are considering appealing, you are advised to read the note attached to this letter.

Yours faithfully

Ms Jacqueline Benjamin
Case Officer

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LDC/2016/0141**
Property	:	**Canary Riverside Estate**
Applicant	:	**Alan Coates, Manager**
Representative	:	**Downs Solicitors LLP**
Respondents	:	**Various Leaseholders as identified in the schedule accompanying the application**
Representative	:	**In Person**
Interested Persons	:	**(1) Canary Riverside Estate Management Limited ("CREM");** **(2) John Christodoulou** **(3) Everest Investments Trading Limited ("Everest")** **(4) Octagon Overseas Limited ("Octagon)**
Representatives		**Freeths LLP solicitors for CREM and Mr Christodoulou** **Everest – In Person**
Applications	:	**Orders: (a) under s.20C Landlord and Tenant Act 1985; and (b) for Rule 13 costs**

Tribunal member	:	**Judge Amran Vance**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16 January 2019**

DECISION

NB: Numbers in square brackets and in bold below refer to page numbers in the hearing bundle supplied by the Applicant's solicitors.

Background

1. On 8 December 2016, the applicant, who is the tribunal-appointed Manager of property at Canary Riverside, Westferry Circus, London E14 ("the Estate") sought dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") from all of the statutory consultation requirements in relation to his proposed entry into a 10-year energy metering rental agreement with Energy Controls Ltd ("Energy"). The agreement constituted a Qualifying Long Term Agreement ("QLTA") for the purposes of the 1985 Act.

2. Mr Coates was appointed as Manager by order of the tribunal dated 15 September 2016, effective from 1 October 2016. Octagon Overseas Limited ("Octagon") is the freeholder of the Estate. Canary Riverside Estates Management Limited ("CREM") is the head leaseholder of a large part of the Estate, including the residential towers. Mr Christodoulou is the leaseholder of two residential flats on the Estate, 211 and 212 Berkeley Tower. Everest is the leaseholder of 16 flats on the Estate. He is also the director of Yianis Group, the parent company of Octagon and CREM.

3. Directions in respect of the dispensation application were issued by the tribunal on 19 December 2016 **[234]** and 10 February 2017, and the application was listed for hearing on 2 March 2017. The application was not, however, heard on 2 March 2017, as the hearing that day was taken up with dealing with an application for variation of the Management Order made by Octagon, CREM and Palace Church 3 Limited concerning who was responsible for insuring the Estate.

4. In April, May and June 2017, there were several hearings concerning the application made for variation of the Management Order. The dispensation application was not addressed at those hearings and no substantive procedural steps took place in respect of the application until 20 November 2017, when the tribunal received an application from Mr Coates seeking to amend his original application.

5. Directions were issued in respect of the amended dispensation application on 6 March 2018 following a case management hearing that day. These

provided for the application to be determined on the papers unless a party requested an oral hearing. By letter dated 27 March 2018 **[278]** the solicitors for CREM and Mr Christodolou requested an oral hearing because their clients considered that Mr Coates had not properly explained his costings in respect of the proposed rental agreement, entry into which they considered inappropriate given the cheaper costs of outright purchase of replacement metering equipment. An oral hearing was listed to take place on 31 May 2018 but because of my subsequent unavailability on that day was re-listed to 30 July 2018.

6. By notice dated 15 June 2018, Mr Coates applied to withdraw his dispensation application pursuant to rule 22 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"). The tribunal consented to the withdrawal on 19 June 2018.

7. This decision concerns two applications:

   (a) an application by CREM, Mr Christodolou and Everest ("the s.20C applicants) for an order under s.20C of the 1985 Act, that none of the costs incurred by Mr Coates in connection with his s.20ZA dispensation application are to be regarded as relevant costs to be taken into account when determining the amount of any service charge payable by them; and

   (b) an application by Octagon and CREM for an order under Rule 13(1)(b) of the 2013 Rules seeking an order that the applicant pay their costs incurred as a result of Mr Coates' now withdrawn application.

The Law

8. Section 20ZA of the 1985 Act enables an application to be made to this tribunal for dispensation from all or any of the statutory consultation requirements in relation to qualifying works or a QLTA. The tribunal may make grant dispensation if it is satisfied that it is reasonable to dispense with the requirements.

9. Section 20C of the 1985 Act provides as follows:

> " A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

10. The court or tribunal to which a s.20C application is made may make such order on the application as it considers just and equitable in the circumstances.

11. Rule 13 of the 2013 Rules provides that the tribunal may make an order in respect of costs only:

(a) .....

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) .....

(ii) .....

(iii) a leasehold case

(c) .....

The Section 20C Application

12. CREM and Mr Christodoulou's position can be summarised as follows:

(a) CREM accepts that the electricity meters on the Estate required replacement. However, it opposed the dispensation application from the outset because it considered Mr Coates' original proposal to rent equipment on a 10-year agreement was more expensive than simple replacement, which was a point it says it would have pursued if consultation had taken place. In addition, it objected to the lack of proposals to protect its rights when management of the Estate reverted to it at the end of the Management Order. By way of example, it suggested that it could be forced to manage the electricity metering system under onerous contracts entered into by the Manager;

(b) there was no urgent need to carry out works and consultation should have taken place;

(c) Mr Coates should have, but did not, withdraw his application earlier than he did. In his witness statement dated 26 October 2018, Mr Lambros Hadjiioannou of CREM, suggests that Mr Coates should have withdrawn his application after commissioning further reports into the metering in January, March and May 2017;

(d) there was undue delay by Mr Coates in progressing his application, which was not withdrawn until very late in the day, after CREM had incurred significant costs in complying with the tribunal's directions.

13. Everest have made no substantive submissions in respect of the s.20C application other than stating in its letter seeking a s.20C order that there was no transparent explanation by Mr Coates as to how he reached his decision that renting the meters was preferable to purchasing them.

14. Mr Coates' position can be summarised as follows:

(a) CREM, as the landlord of the leases under which the costs of the s.20ZA application fall to be recovered by way of service charge, has no standing to pursue a s.20C application. He submits that a s.20ZA application can only be made by a tenant in respect of costs incurred, or to be incurred, by a landlord. He concedes, however, that both Mr Christodoulou and Everest have standing to pursue the application as both are leaseholders of flats on the Estate;

(b) his application was properly made. Prior to his appointment CREM and, its managing agents, Marathon Estates Limited ("MEL") had outsourced electrical wholesale provision and cost recovery to a company called Ineco. In turn, Inenco contracted with Energy to collect data from the electricity meters to enable Inenco to bill leaseholders for those costs. On 14 June 2016, MEL wrote to all leaseholders on the Estate **[165]** enclosing a Notice of Intention for the purposes of s.20 of the 1985 Act in respect of proposed major works to replace the existing electricity meters. It was stated that replacement was required because the meters were "approaching the end of their economical (sic) life" and because Inenco had stated that they would no longer be supporting non-MID compliant meters (MID is explained below). There was therefore an identified need to replace the existing meters prior to his appointment.

(c) following his appointment, he learnt that many of the meters were unreliable, malfunctioning or missing and that this impacted on the billing of residential leaseholders for electricity charges. Much of the information he needed to investigate the situation was held by Inenco or CREM itself and neither co-operated in providing the required information. He therefore instructed Energy to review the metering situation. Energy recommended replacing all metering and this led to his dispensation application. He states that the need to find a secure and reliable system was urgent given that high sums involved in the electricity supply to the Estate, the inaccuracy of the existing metering equipment and the lack of accurate historical data which was hindering him setting the service charge budget due on 31 March 2017;

(d) he did not delay in progressing the application. In the months that followed the hearing on 2 March 2017 he collected further information concerning the metering on the Estate and obtained a further detailed report on metering from a company called Aconco, who reported in September 2017 **[207]**. Aconco estimated that the costs of following an upfront purchase option amounted to an annual cost, over a 10-year period, of £85,977.60, whereas the costs of rental amounted to £107,996.33 per annum, a difference of £22,018.73 per annum.

(e) It was the contents of that report, that led Mr Coates to amend his application for dispensation in November 2017. After the amended application had been made residents then indicated to him that they considered purchasing replacement meters on a piecemeal basis was preferable to replacing all the metering at the same time. It was not, however, until after March 2018 that he had sufficient data to conclude that piecemeal replacement over a period of 2 to 4 years was the best

option and that there was therefore no need to continue to pursue the dispensation application.

(f) it would be inappropriate for a s.20C order to be made in any event as this would have the effect of imposing personal liability for costs upon him for decisions he took in good faith as a tribunal-appointed Manager.

Decision on the S.20C Application

15. I agree, as is contended by Mr Bates on behalf of CREM and Mr Christodolou, that CREM, as head leaseholder of all the residential towers on the Estate is a "tenant of a dwelling" for the purposes of the 1985 Act. This is for the reasons given by the Court of Appeal in *Oakfern Properties Ltd v Ruddy* [2006] EWCA Civ 1389, namely that despite its status as head landlord it is nevertheless a tenant of a building as well as a tenant of a dwelling.

16. However, in *Ruddy* this question arose in the context of a subtenant's ability to challenge costs incurred by a freeholder, Oakfern, that were then passed down by the intermediate landlord to subtenants, including Mr Ruddy, as service charge. The Court of Appeal concluded that Mr Ruddy had standing to challenge the costs demanded by Oakfern from the intermediate landlord.

17. The situation in *Ruddy* is in contrast with this case as CREM has no liability to pay service charge to Mr Coates. As the purpose of s.20C is to limit the recoverability of costs of proceedings when determining service charges payable by a tenant it would be a pointless exercise for CREM to pursue an application in solely respect of its own liability. However, s.20C(1) enables a tenant to may make an application for an order limiting the recoverability of service charge costs payable by "any other person or persons specified in the application." Usually, such an application is made by a leaseholder who shares liability to contribute towards service charge costs alongside other leaseholders but given the general wording of s.20C(1) I do not see any reason why CREM cannot make an application on behalf of Mr Christodolou, who Mr Coates agrees has standing to pursue such an order. That appears to me to be what CREM has done in this case, its written submissions being made on behalf of both itself and Mr Christodolou. However, for the reasons stated below I am not persuaded that it is just and equitable in the circumstances to make such an order in favour of any of the s.20C applicants.

18. CREM and Mr Christodolou both agree that as at the date of Mr Coates' appointment the meters on the Estate needed replacing. In my judgment the evidence clearly indicates that Mr Coates needed to take immediate steps to address that need given:

(a) MEL's confirmation to leaseholders in its letter dated 17 June 2016 that the meters were reaching the end of their economic life, and in its email of 25 July 2016 **[167]** that after 1 October that year Inenco would not support meters that were not Measuring Instruments Directive ("MID") compliant. This refers to the Directive 2004/22/EC of the European

Parliament and Council on measuring instruments in relation to active electrical energy meters, implemented in UK law through the Measuring Instruments (Active Electrical Energy Meters) Regulations 2006;

(b) the contents of Inenco's email to Mr Coates dated 18 October 2016 **[169]** in which it stated that the sub metering was "old and failing" and that two of the five local concentrators had failed in the previous week, meaning that it "lost a lot of data" which had delaying the billing of electricity costs;

(c) Mr Coates' evidence, which is not challenged by CREM or Mr Christodolou, that that those meters that were defective resulted in inaccurate meter readings and difficulties with billing leaseholders.

19. Given these billing inaccuracies and the fact that Mr Coates had to prepare a budget for the forthcoming service charge year by 31 March 2017, I do not consider it unreasonable for him to have made an application for dispensation from the need to comply with the statutory consultation requirements, which would have otherwise have led to a delay of several months before replacement equipment could be installed.

Purchase v Rental

20. In his grounds in support of his original application **[11]** Mr Coates made clear his view that the existing provision for measurement and re-charging of electricity was defective, with several meters having already failed, resulting in inaccurate calculation and billing of electricity costs payable by leaseholders. He rejected replacing defective meters on a piecemeal basis and suggested that his preferred option was rental of new equipment on a 10-year lease rather than purchase. He refers to one benefit of the rental option being that this should come with a service level and replacement agreement if equipment subsequently became defective. He also states that the rental option would avoid the need to obtain £50,000 per year by way of reserve fund contributions to finance renewal of the meters every 10 years, which would be required if the purchase option was pursued.

21. I accept, as CREM point out, that Mr Coates' grounds in support of his original application refer to dispensation being appropriate because of the lack of schematic drawings of the electricity supply on the Estate to give to a contractor and that a disproportionate amount of time would therefore be needed for a new contractor to familiarise itself with the system. However, when his application form and the grounds in support are read as a whole it is clear that he was contending that there was an urgent need to remedy the defective metering system so that he could set the budget for the forthcoming service charge year and bill accurately, which merited the grant of dispensation from the statutory consultation requirements.

22. Mr Coates contends at paragraphs 40-44 of his amended application that the purchase option would have resulted in: (a) estimated running costs over a 10-year period that exceeded the rental model by almost £300,000; and (b) responsibility for ensuring the reliability of meters and remedying faults lying with him as opposed to with a rental company. Mr Hadjiioannou,

however, challenges the asserted running costs of the purchase model, relying upon a report it commissioned from Mr Revell of Maleon dated 17 April 2018 **[93]** who states that the meters, when purchased should have a 10-year warranty.

23. CREM and its solicitors also queried Mr Coates's calculations as to the costs of the rental and purchase options, including in its letter of 27 March 2018 to the tribunal. At paragraphs 37-54 of Mr Hadjiioannou's witness statement dated 17 April 2018, he asserts that the estimated costs of purchase, in the sum of £260,000, were far cheaper than the costs of rental over 10 years, which Mr Coates estimated at paragraph 51 of his amended application to amount to £753,486.50 including VAT. He also contends that there should have been sufficient money in the reserve fund to fund the purchase option.

24. Although CREM and Mr Christodolou argue that purchase was the better and cheaper option as opposed to rental, I do not consider it was unreasonable for Mr Coates to pursue his dispensation application based on his preferred choice. It is clear from his grounds in support of the application that he considered the advantages and disadvantages of both options, concluding that rental was the more cost-effective and sustainable option. I do not agree with Mr Hadjiioannou's assertion in his witness statement that no cost benefit analysis was carried out by Mr Coates before making his application. One appears at paragraphs 46 to 64 of his original application. The fact that CREM disagreed with his choice, and challenged his dispensation application accordingly, does not mean that it was unreasonable for Mr Coates to have chosen the option that he did. His choice was, in my judgment within the range of options that were reasonably available to him and, moreover, was clearly a choice he exercised in good faith.

25. It is clear to me that there are strengths in the arguments advanced by both sides as to whether rental or purchase was the better option. However, CREM's and Mr Christodoulou's queries and challenges, whilst potentially relevant to the question of whether dispensation should have been granted do not, in my judgment, establish that it was unreasonable for Mr Coates to have pursued the dispensation application and that it is just and equitable to make a s.20C order in favour of the s.20C applicants.

26. Nor am I persuaded that the asserted lack of proposals by the Manager to protect CREM's rights when management of the Estate reverted to CREM means that the application was an unreasonable one for Mr Coates to have pursued.

27. If the dispensation application had proceeded to a final determination it is possible that it would have been refused by the tribunal for the reasons advanced by CREM and Mr Christodolou. However, the application has been withdrawn, with no assessment by the tribunal as to whether the evidence before it warranted dispensation. It is not for me to now weigh up the evidence and determine if the tribunal would have granted dispensation. It is my role to identify if in all the circumstances it is just and equitable to make a s.20C order.

Should Mr Coates have withdrawn his application earlier than he did?

28. CREM and Mr Christodolou assert in their statement of case that it should have been obvious by mid-July 2017 that it would have been quicker, easier and better for all parties for there to have been proper consultation and that despite this Mr Coates filed a significantly amended application in November 2017 and continued to pursue his application.

29. This application was due to be heard by the tribunal on 2 March 2017, but there was insufficient time to deal with it at that hearing. I see no reason to doubt Mr Coates assertion that in the months that followed he gathered further information on the metering situation. In the report he commissioned from Aconco, dated September 2017, it is stated that:

    (a) it attended onsite on 12 occasions during May, June and July 2017 in order to carry out a thorough investigation and review of the metering infrastructure;

    (b) it could only build up an incomplete picture of the current infrastructure from the limited number of technical drawings the Manager was able to supply, as most of these showed the infrastructure as at 2000, and it was clear that significant alterations had been made since that date that were not reflected in the drawings provided. Mr Coates' position is that this is because he did not have access to a large cache of drawings previously held by MEL;

    (c) the reliability of some of the meters was questionable and should not be used for billing purposes;

    (d) other meters were obsolete with no access to spare parts;

    (e) most of the meters installed were not MID compliant;

    (f) several distribution boards in the electrical network did not have an independent electrical meter to measure their power consumption;

    (g) the options were to purchase and install meters with an upfront cost or to lease equipment for a period of 10 years. Installed meters would have a 12-months manufacturer's warranty. Data concentrators, which collect information from multiple meters and then forward the data onwards to the utility provider, needed to be upgraded as part of the meter upgrade programme. If leased, these would be provided free of charge for the entire Estate, but would come at a cost if the purchase model was adopted;

    (h) all existing communal services metering and those servicing commercial tenants required upgrading

    (i) the metering system on the Estate was in a fragile state, with most of the metering obsolete and with a large number of meters failing to produce a meter reading.

30. I consider it reasonable for Mr Coates to await the outcome of Aconco's detailed report before reviewing whether to continue with his dispensation application and so I do not accept Mr Bates' submission that he should have withdrawn his application in mid-July 2017.

31. Nor do I consider it unreasonable for him to have continued to pursue the application after receipt of the Aconco report. As indicated in that report there was still an urgent need to address the defective installation and, at that stage, the recommended options remained the same: upfront purchase or rental. Mr Coates states in paragraph 33 of his witness statement of 12 October 2018 that he considered both options but concluded that the service charge/reserve fund cash flow situation was such that it was not possible to pursue the purchase option and that rental was more attractive from a cash flow perspective.

32. In his letter to leaseholders dated September 2017 **[199]** Mr Coates stated that although the purchase option was cheaper overall than the rental option, the annual rental charge included a guarantee by the supplier that the system worked and is capable of reconciling costs and re-charges. However, if the system was purchased, his management team would have to ensure the reliability of the meters and take action to remedy any faults, the costs of which, would he would presumably seek to recover through the service charge. He explained that the rental option was preferable as it transferred risk to the supplier of the equipment. He also pointed out that there was a modest VAT benefit to the rental option over the purchase option.

33. It seems to me that the reasons given by Mr Coates for continuing to pursue his dispensation application, based on the rental option rather than the purchase option, were reasons that were reasonably open to him, given the long-standing problems with the installation and the issues he says that he experienced in billing. I do not consider it can be concluded that on receipt of the Aconco report Mr Coates should have have withdrawn his application and pursued statutory consultation instead rather than amending his application and seeking a determination from the tribunal.

34. Whilst I accept that the time in between receipt of his amended application and the date of the intended tribunal hearing in May 2018 would have been sufficient to allow statutory consultation to have taken place, that is looking back at matters with the benefit of hindsight. Normally his amended application would probably have reached determination within about two months. However, towards the end of 2017, and the beginning of 2018, Mr Coates and CREM were both heavily involved in separate applications, made by each of them, seeking variations of the Management Order. This led to a two-day hearing on 3 and 4 December 2018, a case management hearing on 6 March 2018 and a delay in the listing of the dispensation application that I do not consider can be blamed on inaction by Mr Coates.

Withdrawal of the application

35. Mr Coates signed a witness statement in support of his dispensation application in March 2018. In that statement he explained that in January 2018 he had managed to obtain a full year's metering data as transmitted to

Energy, which, although lacking data for 20 residential meters and only four out if 12 commercial units, was sufficient to enable him to bill many leaseholders for electricity costs. In his later witness statement dated 12 October 2018, he explains that a series of events after March 2018 led him to conclude that he should withdraw his application, namely:

(a) he discovered that some of the meters were recording accurately and that following discussions within his management team it was concluded in April 2018 that meters could be replaced on a piecemeal basis;

(b) billing data had been obtained for the period September 2015 to 2016 and reasonable date collected for October 2016 to March 2018. As faulty or missing meters were replaced, the data retrieved would become more accurate;

(c) piecemeal replacement would be manageable from a perspective of service charge cash flow;

(d) informal consultation with leaseholders indicated that they supported piecemeal replacement.

36. He concluded that piecemeal replacement was preferable which meant that either entry into a QLTA was not needed or, if one was, that statutory consultation could take place. He therefore applied to withdraw his dispensation application on 29 May 2018.

37. I do not consider that in the circumstances it can be said that it was unreasonable for Mr Coates to wait until 29 May 2018 before withdrawing his application. In my assessment, the evidence indicates that the metering situation was a complex and fluid one and I see no reason to doubt his evidence that it was not until after April 2018 that he was in a position to conclude that piecemeal replacement was a viable option.

38. Nor do I consider that it would be just and equitable to make a s.20C order on the basis that there was undue delay by Mr Coates in progressing his application. I accept that Mr Coates did not take active steps to progress his application after the 2 March 2017 hearing until after the tribunal issued directions on 29 September 2017, requesting details on whether the application was being progressed. However, there is a reasonable explanation for that given the various hearings that took place in April, May and June 2017 in relation to CREM's application to vary the tribunal's Management Order. In fact, Mr Hadjiioannou's position, as stated in paragraph 12 of his witness statement dated 26 October 2018, is that CREM's application was rightly heard first as it was filed before Mr Coates' own application to vary the Management Order and before his amended dispensation application. That being the case, I do not consider CREM can justifiably complain of undue delay by Mr Coates in progressing his application.

39. In all the circumstances, I do not consider it just and equitable to make a s.20c order in this case. In my judgment, the evidence before me suggests that Mr Coates, at all times, acted in good faith to find a solution to a serious

problem that impacted on his ability to set the budget due on 31 March 2017 and his ability to bill leaseholders for electricity costs. These were issues that impacted directly on his ability to effectively manage the Estate.

40. Furthermore, when considering whether it is just and equitable to or not to make a s.20C order, the financial consequences of doing so are a relevant consideration. In this case, there are no financial consequences for CREM as it has no liability to pay towards the costs incurred by Mr Coates in pursuing this application. Mr Christodolou and Everest are potentially liable to contribute towards such costs but both have an alternative remedy in that they can challenge costs that they consider were not reasonably incurred by Mr Coates by making an application under s.27A of the 1985 Act on the basis that the costs are not properly recoverable having regard to s.19 of the 1985 Act. However, if a s.20C order is made Mr Coates is likely to have a personal liability for any costs incurred by him that are not recoverable from leaseholders through the service charge, which may include the legal costs incurred in instructing solicitors to pursue his application. In my judgment, this is likely to have practical implications on his ability to effectively manage the Estate and is an additional reason as to why it is not just and equitable to make a s.20C order.

The Rule 13(1)(b) application

41. Clarification as to how this tribunal should approach a rule 13(1)(b) costs application has been provided in the detailed decision of the Upper Tribunal in in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC). At paragraph 24 of its decision, it approved the guidance given in *Ridehalgh v Horsefield* [1994] Ch 205 which described "unreasonable" conduct as including conduct that is "vexatious, and designed to harass the other side rather than advance the resolution of the case. It was not enough that the conduct led, in the event, to an unsuccessful outcome.

42. The Upper Tribunal then went on to set out a three-stage test for rule 13 costs orders. The first stage is whether a person has acted unreasonably. This is an essential pre-condition of the power to award costs under the rule. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable. This requires the application of an objective standard of conduct to the facts of the case. The second and third stages involve the exercise of discretion on the part of the tribunal. At the second stage the tribunal must consider whether, in the light of the unreasonable conduct identified, it ought to make an order for costs. The third stage is what the terms of the order should be.

43. Octagon and CREM seek an order under Rule 13(1)(b) of the 2013 Rules on the basis that Mr Coates is a sophisticated, legally represented litigant, who failed, without reasonable explanation, to progress his application for two years and who also should have withdrawn his application much earlier than he eventually did.

44. I have read and considered the statement of case submitted by Octagon and CREM and the witness statement of Mr Hadjiioannou in support of the Rule 13(1)(b) application dated 19 October 2018. However, for the reasons stated

above, I do not accept that it is appropriate to make a rule 13(1(b) costs order. As explained above, I consider there is a reasonable explanation for the delay in progressing the application and for Mr Coates waiting until 29 May 2018 to withdraw his application.

45. In my judgment, this application fails at the first stage of the test in *Willow Court* as I do not accept there has been unreasonable conduct on behalf of Mr Coates. I am also conscious that at paragraph 143 of its decision in that case the Upper Tribunal stated that that:

> *It is legally erroneous to take the view that it is unreasonable conduct for claimants in the Property Chamber to withdraw claims or that, if they do, they should be made liable to pay the costs of the proceedings. Claimants ought not to be deterred from dropping claims by the prospect of an order for costs on withdrawal, when such an order might well not be made against them if they fight on to a full hearing and fail.*

46. I accept that there may be some circumstances in which a late withdrawal may amount to unreasonable conduct but this is not such a case. Mr Coates' conduct does not, in my view come close to the type of conduct described in *Ridehalgh v Horsefield* and I therefore refuse the application for an order for costs under Rule 13(1)(b).

Amran Vance

16 January 2019

Annex - 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).

First-tier Tribunal, Property Chamber
Residential Property

GUIDANCE ON APPEAL

1) An appeal to the Upper Tribunal against a decision of a First-tier Tribunal (Property Chamber) can be pursued only if **permission to appeal** has been given. Permission must initially be sought from the First-tier Tribunal. If you are refused permission to appeal by the First-tier Tribunal then you may go on to ask for permission from the Upper Tribunal (Lands Chamber).

2) An application to the First-Tier Tribunal for permission to appeal must be made **so that it is received by the Tribunal within 28 days after the date on which the Tribunal sends its reasons for the decision.**

3) If made after the 28 days, the application for permission may include a request for an extension of time with the reason why it was not made within time. Unless the application is made in time or within granted extended time, the tribunal must reject the application and refuse permission.

4) You must apply for the permission **in writing**, and you must:
   - identify the case by giving the address of the property concerned and the Tribunal's reference number;
   - give the name and address of the applicant and any representative;
   - give the name and address of every respondent and any representative
   - identify the decision or the part of the decision that you want to appeal;
   - state the grounds of appeal and state the result that you are seeking;
   - sign and date the application
   - send a copy of the application to the other party/parties and in the application record that this has been done

The tribunal may give permission on limited grounds.

5) When the tribunal receives the application for permission, the tribunal will first consider whether to review the decision. In doing so, it will take into account the overriding objective of dealing with cases fairly and justly; but it cannot review the decision unless it is satisfied that a ground of appeal is likely to be successful.

6) On a review the tribunal can
   - correct accidental errors in the decision or in a record of the decision;
   - amend the reasons given for the decision;
   - set aside and re-decide the decision or refer the matter to the Upper Tribunal;
   - decide to take no action in relation to the decision.

If it decides not to review the decision or, upon review, to take no action, the tribunal will then decide whether to give permission to appeal.

7) The Tribunal will give the parties written notification of its decision. **If permission to appeal to the Upper Tribunal (Lands Chamber) is granted**, the applicant's notice of intention to appeal must be sent to the registrar of the Upper Tribunal (Lands Chamber) so that it is received by the registrar within **28 days** of the date on which notice of the grant of permission was sent to the parties.

8) **If the application to the Property Chamber for permission to appeal is refused**, an application for permission to appeal may be made to the Upper Tribunal. An application to the Upper Tribunal (Lands Chamber) for permission must be made within **14 days** of the date on which you were sent the refusal of permission by the First-tier Tribunal.

9) The tribunal can **suspend the effect of its own decision**. If you want to apply for a stay of the implementation of the whole or part of a decision pending the outcome of an appeal, you must make the application for the stay at the same time as applying for permission to appeal and must include reasons for the stay. You must give notice of the application to stay to the other parties.

These notes are for guidance only. Full details of the relevant procedural provisions are mainly in:

- the Tribunals, Courts and Enforcement Act 2007;
- the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013;
- The Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010.

You can get these from the Property Chamber or Lands Chamber web pages or from the Government's official website for legislation or you can buy them from HMSO.

The Upper Tribunal (Lands Chamber) may be contacted at:

5th Floor, Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Tel: *0207 612 9710*
Goldfax: *0870 761 7751*

Email: *lands@hmcts.gsi.gov.uk*

The Upper Tribunal (Lands Chamber) form (T601 or T602), Explanatory leaflet and information regarding fees can be found on www.gov.uk/appeal-upper-tribunal-lands.