

How unreasonable?

Tom Carpenter-Leitch discusses guidance from the Upper Tribunal (Lands Chamber) on the threshold and procedure for awards of costs for 'acting unreasonably'



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The First-tier Tribunal (Property Chamber) (FTT) is a 'no costs' jurisdiction where costs can only be awarded if a party has 'acted unreasonably'. What threshold of conduct applies and what procedure should be followed before costs can be awarded? The Upper Tribunal (Lands Chamber) has recently given welcome and important guidance in the joined case of *Willow Court Management Company (1985) Ltd v Alexander LRX/90/2015*.

The FTT deals with a wide range of residential and leasehold property disputes, land registration matters, and agricultural land and drainage issues. Generally, costs can only be awarded against a party under the limited circumstances of rule 13(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, where the party has 'acted unreasonably in bringing, defending, or conducting proceedings' before the FTT.

At one end of the scale, the highly restrictive view, following that in the 'wasted costs' arena and *Ridehalgh v Horsefield* [1994] Ch 205, has prevailed; at the other, there has been a lower threshold approach more akin to small claims track cases in the county court under Civil Procedure Rules 27.14(2)(g). The Upper Tribunal took the opportunity to consider three joined appeals in order to give its guidance for the future.

The Upper Tribunal sets out the procedure to be followed. The application should normally be made after the substantive decision – applications at an interim stage or before a decision are discouraged.

It is for the applicant to make and prove its case. The applicant should clearly particularise the misconduct relied upon. Only if there is a *prima facie* case to answer should the respondent reply to the criticisms made and offer any explanations or mitigation.

The FTT should determine the application in three distinct and sequential stages:

- Whether the party has acted unreasonably;
- Whether, in the light of the unreasonable conduct found, it ought to make an order for costs or not; and
- What the terms of any costs order should be.

The first stage is not the exercise of a discretion but a value judgment applying an objective standard of conduct to the facts of the case. The second and third stages are the exercise of a

judicial discretion having regard to all relevant circumstances (including the nature, seriousness, and effect of the unreasonable conduct).

The application should be considered summarily and preferably without a hearing. A dismissal can be explained briefly. A decision to award costs need not be lengthy and need only identify the unreasonable conduct found and list the factors taken into account in exercising the two discretions.

The Upper Tribunal expressed the required 'objective standard' in different ways: 'Would a reasonable person in the position of the party have conducted themselves in the manner complained of?' or 'Is there a reasonable explanation for the conduct complained of?'

The threshold of 'unreasonable' is, of necessity, case specific, but clearly intended as a very high one and only passed in the exceptional cases of clear misconduct. It was stressed that the standard in such proceedings 'ought not to be set at an unrealistic level' or overzealously.

For example:

- Losing a case is not determinative. Although it might reinforce a view on unreasonable conduct, it is not a factor which should be given undue weight;
- The impugned conduct must normally relate to the 'conduct of the proceedings' themselves and not more general behaviour (although this is perhaps relevant at the discretionary stages);

- The withdrawing of unmeritorious claims or the making of concessions is to be encouraged. While fanciful claims, those which the party knows are bound to fail, or those which are brought solely for the purpose of causing expense and inconvenience may be unreasonable, the bringing of genuine disputes before the FTT is not. If an otherwise genuine case is withdrawn or conceded, that is not in itself unreasonable; and
- That a party is an unrepresented litigant is relevant in determining the standard of conduct required – it is to be judged by the standards of a reasonable person having the level of legal advice or knowledge of the particular litigant.

Attention was drawn to the FTT's case management powers to require the parties to cooperate with the FTT and with each other. The FTT should in future, and perhaps as an alternative to relying on costs orders to control conduct, use its powers more actively 'to encourage preparedness and cooperation, and to discourage obstruction, pettiness, and gamesmanship'.

The Upper Tribunal has very clearly signalled that the incidence of costs for 'unreasonable conduct' is to be severely constrained, which is likely to favour tenants over landlords. While clarity is always to be welcomed, the lack of any real costs sanction on litigants is concerning. **SJ**