FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/HMF/2020/0250**
Property	**:**	**28 Hainthorpe Road, London SE27 0PH**
Applicants	**:**	**(1) Ricardo Freitas** **(2) Todor Spasov** **(3) Danail Asenov**
Respondent	**:**	**Huseyin Duhan Seherli**
Type of application	**:**	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	**:**	**Judge T Cowen** **Ms S Coughlin MCIEH**
Date of Decision	**:**	**16 February 2022**

COSTS DECISION

The Tribunal orders that:

The Applicants' application under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 for an order for costs is refused.

REASONS FOR ORDER

1. On 3 November 2021, this Tribunal found that the Respondent had committed offences under the Housing Act 2004. The Tribunal ordered the Respondent to make rent repayment orders to each of the Applicants and to reimburse the Applicants' tribunal fees. That order and decision followed three separate days of evidence and submissions during which the Tribunal heard submissions from Mr Bolton, the Applicants'

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representative, and Mr Masemola, the Respondent's counsel, as well as evidence from all of the parties. The evidence of one of the Applicants was given through an interpreter.

2. On 5 November 2021, the Applicants applied for a costs order under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules").

3. The relevant part of rule 13 of the Rules reads as follows:

> "(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 …(ii) a residential property case…".

4. A case brought under the Housing Act 2004 is a "residential property case" according to the definitions in rule 1 of the Rules.

5. In considering an application for costs on the grounds of unreasonable conduct, we have reminded ourselves of the guidance given by the Upper Tribunal in *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC).

6. The grounds for the Applicants' costs application can be stated as follows. The Applicants claim that false and misleading evidence provided by the Respondent required the Applicants' representatives to spend extra time and thus incur further costs.

7. The false and misleading evidence referred to is the first witness statement of the Third Applicant, Danail Asenov. The content and provenance of that statement is dealt with in detail in our substantive decision. It is correct to say that the Tribunal did not accept the content of that statement, which had been produced and was relied upon by the Respondent. It is also true to say that we had serious concerns about the way in which the Third Applicant came to sign that statement and the role played by the Respondent in that process. We shall not repeat those findings here.

8. Paragraphs 40-42 of *Willow Court* addressed the issue of causation and concluded that it is not necessary for the cost-claiming party to prove that there is a causal nexus between the alleged unreasonable conduct and specific costs incurred. However, the Applicants' representative has framed his application in those terms. He contends that the creation and

production of the first witness statement of Mr Asenov was unreasonable conduct which caused the Applicants' representative to spend an additional 9 hours in preparation of the case. They claim those costs at an hourly rate of £96 making a total costs claim of £864.

9. Another important aspect of the decision in *Willow Court* is that it stressed that the ultimate source of the Tribunal's jurisdiction to award costs is section 29(1) of the Tribunals, Courts and Enforcement Act 2007 which states that the costs of all proceedings in the First-tier Tribunal shall be in the discretion of the Tribunal in which the proceedings take place. At paragraph 12 of *Willow Court*, the Upper Tribunal framed it as follows:

> "The general principle is laid down by section 29(1) : costs of all proceedings are in the discretion of the FTT, which has full power to determine by whom and to what extent the costs are to be paid, subject to the restrictions imposed by the 2013 Rules. Those restrictions prohibit the making of an order for costs except in the circumstances described in rule 13(1)."

10. The important idea here is that it is not for the costs applicant simply to prove that there has been unreasonable conduct (under rule 13) in order to be entitled to a costs order. Overall, costs are in the discretion of the Tribunal, but in the case of residential property cases (amongst others), there is a bar to any order being granted unless unreasonable conduct has been established. In other words, a finding of unreasonable conduct is simply a gateway to the general discretion of the Tribunal on costs. Paragraph 27 of *Willow Court* makes the same point.

11. We therefore need to decide whether there was any unreasonable conduct at all (which is a non-discretionary finding) and then address the question of general discretion to decide whether to make a costs order.

12. The test for determining what constitutes unreasonable conduct for the purposes of rule 13 is set out in paragraph 24 of the Upper Tribunal's judgment in *Willow Court* as follows:

> 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?

13. Was there unreasonable conduct in this case? It is true that we rejected the contents of the first witness statement of the Third Applicant and we had concerns about the manner in which it was created and signed. But that is not an unusual feature of litigation. Frequently one party is unsuccessful in a dispute because their witness evidence is regarded by the Tribunal or Court as less reliable than the witness evidence of the other side. Applying the view of the Upper Tribunal in *Willow Court,* that unreasonable conduct should be regarded as the exception rather than the rule, means that unreliable witness statements are not of themselves unreasonable conduct. In addition, the Respondent's creation and use of the witness statement was not vexatious or designed to harass the Applicants. The Respondent was not deliberately trying to disrupt the proceedings. He was trying to obtain evidence to support his case and we decided that the way he did so made the evidence unreliable. We therefore find that it was not unreasonable conduct for the purposes of rule 13.

14. Even if it did amount to unreasonable conduct, then we would exercise our general discretion on costs against making a costs order in favour of the Applicants for the following reasons:

    14.1. One thing which immediately strikes us about this application is that 6 of the 9 hours claimed relate to the Applicants' representatives taking their own witness evidence from Mr Asenov, and thereafter applying for him to become the Third Applicant. As a result, the Tribunal awarded Mr Asenov a rent repayment order in the sum of £2,285.53. If Mr Asenov had not applied to become an Applicant, then that amount would never have been awarded at all. Prior to Mr Asenov becoming an Applicant, the Applicant's representative was under the mistaken impression that the Second Applicant, Mr Todor Spasov, could apply for a rent repayment order on Mr Asenov's behalf. In a sense, therefore, the Applicants profited overall from being

prompted, by the questionable witness evidence, to add Mr Asenov to the proceedings.

14.2. Although, as we have stated above, it is not appropriate to consider this costs application on a strict causation basis, it is appropriate to note that three hours are claimed by the Applicants for dealing with the false evidence at the hearing. In our judgment, however, that time was greatly outweighed by the time wasted as a result of the Applicants' failure to have applied for an interpreter for Mr Asenov before the first day of the hearing. The fact that the Applicants' representative attempted to call Mr Asenov (who could not speak, read or understand English) to give oral evidence on the first day of the hearing, without an interpreter, was an extraordinary oversight. As a result the hearing had to be adjourned, the rest of the day's sitting time was lost and several weeks elapsed while an interpreter was obtained and a further hearing date was found. It is also worth noting that Mr Danail Asenov's second witness statement, procured by the Applicants' representative, was also unreliable on its face, because it was also obtained without the benefit of an interpreter, although its content was later confirmed during the hearing and accepted by the Tribunal.

14.3. In other words, both of the witness statements of the Third Applicant (one from each side) were obtained in unsatisfactory circumstances and costs were wasted by the Applicants' failure to make proper provision for the hearing. It would not be a fair or just exercise of our discretion to penalise the Respondent in costs for these problems.

14.4. Finally, we remind ourselves that we have already taken account of the manner in which the Respondent went about obtaining evidence when considering the landlord's conduct as part of the rent repayment order calculation itself. In a sense, therefore, the Tribunal has already reflected its view of this conduct in the substantive penalty. See paragraph 77.4 and 78 of our substantive decision.

14.5. Applying the overriding objective under the Rules and the Tribunal's general costs discretion, it would be neither fair nor just to make a costs order in favour of the Applicants in all of these circumstances.

15. It would be normal to request submissions from the Respondent before considering a rule 13 costs application by the Applicants. We have

decided however, to save the further delay and costs which would be incurred by such a procedure since we have already reached the conclusion that this is not a suitable case for a rule 13 order on the face of the Applicants' application and without needing to see any submissions by the Respondent.

Dated this 16th day of February 2022

JUDGE TIMOTHY COWEN

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).