



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

**Case Reference** : CHI/45UG/HMF/2021/0039

**Property** : 63 The Warren, Burgess Hill, West Sussex,  
RH15 0EA

**Applicants** : David Soanes

**Representative** : N/A

**Respondent** : Eileen Comar (1)  
Kevin Comar (2)

**Representative** : N/A

**Type of Application** : Application by Tenant for a Rent  
Repayment Order- section 40 to 46  
Housing and Planning Act 2016  
Application for costs under rule 13

**Tribunal Member(s)** : Judge J. Dobson  
Mr M J F Donaldson FRICS  
Ms T Wong

**Date of Decision** : 9th January 2023

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**DECISION  
re Rule 13 costs application**

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## **Summary of Decision**

1. **The Applicant's application for an order that the First and/ or Second Respondent pay the Applicant's costs pursuant to rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 is dismissed.**

## **Background**

2. By an application dated 28th November 2021, the Applicant applied for a rent repayment order in respect of the rent paid for a tenancy during the period 23rd August 2020 to 11th December 2020 against both of the Respondents. Directions were given towards a hearing to be conducted remotely on 31st March 2022.
3. That hearing proceeded and a rent repayment order was made against the First Respondent, in a sum agreed between the Applicant and the Second Respondent acting as her representative. There would have been an argument for not making an order and simply recording the agreement between the parties but in the event that was not the approach considered most appropriate by the Tribunal.
4. It should be added that the Tribunal made various findings of fact, most notably that the Property ought to have been the subject of a licence for a licensable House in Multiple Occupation (HMO) but was not. The Tribunal also determined that the only allegation of behaviour which could found the basis of a rent repayment order pursuant to the Protection from Eviction Act 1977 and which had been advanced in the Applicant's case as presented in a short statement of case not supplemented by a witness statement was an incident on 15th November 2020, which was more than twelve months prior to the date of the rent repayment order application. The Tribunal also determined there to be no basis for making a rent repayment order against the Second Respondent.
5. As part of the agreement between the parties as to settlement, the Second Respondent admitted incidents on 10th and 11th December 2020. The Tribunal noted in its Decision some concern as to an admission of a matter not within the Applicant's statement of case. There was no admission on his behalf of anything rendering the First Applicant liable for a rent repayment order as a consequence of those, nor any such admission by the First Respondent herself. If the Tribunal might otherwise have needed to reconsider the relevant period of harassment in respect of making an order against the First Respondent, in that event no such need arose.
6. The Applicant has applied thereafter for an order for payment of costs of the proceedings. The application is made pursuant to rule 13(1)(b) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

7. The costs which the Applicant seeks to recover are not costs incurred by solicitors or other professional advisors but rather are principally the time spent by the Applicant himself and at the rate at which he asserts his time is charged when contracted with as a freelance IT Support & Online Marketing Consultant, of £40 per hour, being £1120 out of a total claim of £1218.83. The remaining £98.83 comprises principally the cost of 4 months subscription to Adobe PDF of £60.68, with the balance being miscellaneous other expenses. The cost of the Adobe subscription is evidenced.
8. Directions were given dated 5th July 2022, setting out the steps to be taken by the parties to enable a determination of the application by the Tribunal. The Directions also observed that the application did not explain how the relevant requirements for an order for costs had been met and identified that it would be difficult for the Respondents, or the relevant one of them, to respond unless and until further detail was provided.
9. The Directions also identified that whilst it is sometimes more appropriate to consider the questions of whether a costs award should be made and then to consider the amount of such order separately, particularly in more substantial or lengthy cases, in this case the Tribunal would determine all matters at the same time and with the advantage of details of the costs sought in the event that an order were to be made requiring the Respondent to pay any such costs.

### **The Law**

10. Save to the extent that costs are recoverable as between parties pursuant to Rule 13 of the Rules, costs are not payable as between parties to proceedings before this Tribunal, absent contractual entitlement.
11. The basic power of the Tribunal to award costs is found in section 29 of the Tribunals, Courts and Enforcement Act 2007, which states that costs shall be in the discretion of the Tribunal but subject to, in the case of this Tribunal, the Rules. The Rules then proscribe that discretion substantially.
12. Rule 13 provides that:  
  
The Tribunal may make an order in respect of costs only –
  - a) where there are wasted costs
  - b) if a person has acted unreasonably in bringing, defending or conducting proceedings.....
13. The leading authority in respect of the rule 13 (b) is the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Alexander* (and linked cases) [2016] UKUT 290 (LC) (referred to below as “*Willow Court*”). It is worth bearing in mind the status of the

guidance given by the Upper Tribunal in its decision. It is not uncommon to hear practitioners refer to the *Willow Court* “rules” or “tests”. But that is strictly speaking wrong. Although the Upper Tribunal’s decision in *Willow Court* was intended to be of general application, it does not purport to lay down any “rules” at all.

14. The position was explained in *Laskar v Prescott Management Company Ltd* [2020] UKUT 241 (LC), that *Willow Court* suggested “an approach to decision making which encouraged tribunals to work through a logical sequence of steps, it does not follow that a tribunal will be in error if it does not do so.” The question is “whether everything has been taken into account which ought to have been, and nothing which ought not, and whether the tribunal has explained its reasons and dealt with the main issues in such a way that its conclusion can be understood, rather than by considering whether the *Willow Court* framework has been adhered to”. The Upper Tribunal emphasised:

“That framework is an aid, not a straightjacket.”

15. In *Willow Court*, the Upper Tribunal suggested three sequential stages should be worked through, summarised as follows:

Stage 1: Whether the party has acted unreasonably. 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.

Stage 2: Whether the tribunal ought (in its discretion) to make an order for costs or not. Relevant considerations include the nature, seriousness, and effect of the unreasonable conduct: see para 42.

Stage 3: Discretion as to quantum. Again, relevant considerations include the nature seriousness and effect of the conduct: see para 42.

16. Whilst it is not strictly necessary to work through those stages because there is no imposed “straightjacket”, the Tribunal considers that in this instance, and indeed in most instances, taking up the suggestion of the Upper Tribunal is the appropriate course to adopt.
17. The burden is on the applicant for an order pursuant to rule 13. And it is undoubtedly the case that orders under r.13(1)(b) are to be reserved for the clearest cases.
18. Rule 13(1)(b) is quite specific that an order may only be made “if a person has acted unreasonably in ... defending or conducting proceedings”. Under the Tribunal Procedure Rules, the word “proceedings” means acts undertaken in connection with the application itself and steps taken thereafter (rule 26).
19. Such an application does not therefore involve any primary examination of a party’s actions before an application is brought (although pre-commencement behaviour might be relevant to an

assessment of the reasonableness of later actions in “defending or conducting proceedings”).

20. The provisions in respect of wasted costs would apply in relation to costs incurred in relation to acts and omissions of a legal or other representative and then would be directed against the representative. The Tribunal considers that scenario has not arisen and so does not set out the relevant law at any greater length.
21. The Tribunal is mindful that the Second Respondent acted as the First Respondent’s representative in respect of the hearing of the substantive application but he had not identifiably been her representative more generally and the Tribunal is unable in the matters raised by the Applicant and referred to below to identify any unreasonableness asserted in respect of the hearing itself.

### **The parties’ cases**

22. The essence of the Applicant’s case against the Second Respondent (which in the main the Applicant sets out before setting out allegations about the First Respondent and where the allegations against the Second Respondent are longer and more detailed and so which the Tribunal considers first) is that the Second Respondent acted unreasonably for the following reasons:
  - i) He caused damage to the door of the Applicant’s bedroom and he entered the Applicant’s bedroom, which can be inferred from his agreement to pay £75 for the damage to the door;
  - ii) He committed perjury by claiming that:
    - a) Aaron Lowry and Ryan Healy stayed over at the property but only for a brief period and were not considered as lodging- they were associates of the other tenants who needed a bed for a few nights and
    - b) there was only one incident on 15 Nov 2020 when he entered the applicant’s room without consent;
  - iii) He failed to admit to Mid Sussex District Council and the Tribunal promptly that firstly he was running jointly and severally with his mother Mrs Comar an unlicensed HMO and secondly that he entered the applicant’s room twice on 10th & 11th December 2020 (which second allegation the Applicant refers to on two separate occasions in his application);
  - iv) He tricked the applicant into viewing the subject property by fraudulent non- disclosure in the Gumtree advertisement online, in breach of 6(1) (a) and (b) the Consumer Protection from Unfair Trading Regulations 2008. that there were persons living at the subject property. The said advertisement did not disclose that the respondents were running an HMO business, in breach of Schedule 1 Consumer Protection from Unfair Trading Regulations 2008;
  - v) He failed to make full and frank disclosure in his response to various assertions from the application of harassment or other

conduct as set out from paragraph 15 to paragraph 20 in the “Application for Costs” document- as apparently a further relevant set of assertions; and

- vi) He has deliberately “obfuscated matters and deceived this Honourable Tribunal” by making reference in his response to Tribunal case CHI/43UE/HMF/2019/0016 (re 11 Haywards, Crawley, RH10 3TR) and not disclosing that there was a judicial review application pending in the High Court and further by making reference to an extended civil restraint order against the Applicant, where that did not relate to the application for a rent repayment order against the Second Respondent.
23. The allegations which the Tribunal can identify are firstly made towards the start of the Applicant’s document up to paragraph 6 and then from paragraph 10 to paragraph 13 and then again, the Tribunal has assumed, from paragraphs 15 to 20, although given the way in which the document is drafted, the position is less than perfectly clear.
24. The essence of the Applicant’s case against the First Respondent is that the Second Respondent acted unreasonably for the following two reasons:
- vii) She tricked the Applicant into viewing the subject property by fraudulent non- disclosure in the Gumtree advertisement online, in breach of 6(1) (a) and (b) the Consumer Protection from Unfair Trading Regulations 2008. that there were five persons living at the subject property and
  - viii) On 21 Aug 2020, she tricked the Applicant by fraudulently not disclosing that the subject property was also occupied by the Second Respondent, the First Respondent’s son (rather she only disclosed that Mark Lafferty and Ryan Healy and herself were living there), in breach of 6(1) (a) and (b) the Consumer Protection from Unfair Trading Regulations 2008.
25. The Respondents have not responded in any way to the Applicant’s costs application. It necessarily follows that none of the Applicant’s assertions have been refuted, although that is not of itself the end of the matter, given the restricted circumstances in which rule 13 entitles the Tribunal to make a costs order and the need for the Applicant to satisfy the Tribunal that the requirements have been met.

### **Consideration**

26. The Tribunal does not seek to specifically deal in this Costs Decision with every single point made, it appearing to the Tribunal unnecessary to do so, albeit that all aspects of the Submissions received were considered prior to this Costs Decision. That said, whilst the Tribunal acknowledges the invitation given by the Upper Tribunal in *Willow Court* to be brief, necessarily explanation for the decision reached is required. As and where the Tribunal refers to specific paragraphs in its

substantive Decision it does so by providing the numbers of the paragraphs in square brackets, as so [ ].

27. An obvious and significant difficulty for the Applicant as against the Second Respondent is that the Applicant's substantive application failed [44]. The Applicant was unable in the substantive proceedings to demonstrate that the Second Respondent was someone against whom a rent repayment order could be made.
28. Whilst the Tribunal accepts that it is not beyond the realms of possibility for an award of costs to be made against a Respondent because of their unreasonable conduct of proceedings and in favour of an Applicant who was unsuccessful against that Respondent, it will necessarily be part of the prism through which the Tribunal views conduct that the Respondent succeeded in defending the application and the Applicant seeking costs failed.
29. It is even more relevant to an argument that costs should be awarded against a party for unreasonableness in defending the proceedings more generally that the defence by that party succeeds. There will be only limited situations in which there is a realistic prospect of a successful argument that a party was unreasonable in defending proceedings who defended successfully. Indeed, in the overwhelming majority of situations, it will easily be identified that defence of proceedings where that defence was successful was thereby reasonable and it will be unnecessary to go beyond that.
30. The Tribunal has considered in this instance whether there may be an unreasonable defence of the proceedings by the Second Respondent despite that defence being successful. The Tribunal is unable to identify any.
31. The Tribunal identifies that the Applicant argues for costs with no sense of him having taken account of the case as he advanced it in the substantive proceedings or having taken account of the findings and determinations made by the Tribunal. Most of what he relies upon goes some distance beyond that. Nevertheless, in all of the circumstances, the Tribunal turns to the specific allegations in terms of unreasonable conduct, taking each in turn.
32. In respect of **i)- Damage to door and related**, the allegation relates to conduct during the period of the tenancy. Whilst it is noted above that may have relevance at stage 2, it cannot amount to unreasonable conduct in defending the proceedings.
33. The allegation **ii) that the Second Respondent committed perjury** is a very serious one. The assertion is of the commission of a significant criminal offence where the Tribunal would be required to at least be mindful of the criminal standard of proof, albeit that standard is not directly applicable in rent repayment order proceedings other

than in respect of whether the offence on which the wider application for such an order is founded is made out.

34. However, there was no finding in the substantive proceedings that the Second Respondent committed perjury. There was no need for the Tribunal to make findings beyond the admission of there being at least five occupiers at any relevant time and so the Tribunal did not do so [36]. The evidence as to the period for which the two particular persons occupied the Property was not tested and no finding was made that the Second Respondent's account was incorrect. The Applicant seeks to pin a costs application on the basis of unreasonable conduct on an assertion which was not the subject of a positive finding. That basis necessarily fails.
35. In respect of the Second Respondent only admitting in the proceedings the incident on 15th November 2020, the Tribunal has previously found that to be the only incident within the Applicant's case as he chose to advance it, as noted above and in previous Decisions in this case. The Tribunal rejects the assertion that it is unreasonable conduct to fail to admit a matter which the other party had not chosen to advance. It cannot be a surprising result that the Tribunal finds that the failure to admit an allegation not substantively made does not amount to unreasonable conduct. The Tribunal also determined criticism by the Applicant of a lack of response to an allegation which had not been made to be "wholly inappropriate" in the substantive Decision.
36. By allegation **iii)**, the Applicant relies on the Second Respondent **failing to promptly admit he was running an unlicensed HMO jointly and severally with the First Respondent and the two incidents 10th and 11th December 2020.**
37. The first is premised on the Applicant so running and is again a matter in relation to which no finding was made in the substantive proceedings on which to base the assertion. The Applicant's case was put broadly on that basis: the Tribunal found against the specific assertions made and that the Second Applicant did not have control of the Property or manage it more generally [42 and 43]. Hence, the Applicant cannot even potentially succeed on that limb.
38. In relation to the second limb, the Tribunal repeats paragraph 35 above. It is addressed in the Tribunal's substantive Decision, that the Applicant had not raised the allegations until mentioned in the midst of a case management application in relation to disclosure and similar, which was refused and which refusal was not challenged. As the Tribunal held, the matters was never raised in the Applicant's substantive case [80].
39. The Tribunal observes, although it is not strictly necessary to, that admission of the particular conduct earlier would not of itself have resulted in a rent repayment order against either of the Respondents or identifiably altered the course of the proceedings. No order was made



against the Second Respondent in any event as previously observed: as against the First Respondent, the Tribunal specifically found against the Second Respondent's actions having occurred at the instigation of the First Respondent or in any other way which rendered the First Respondent liable for them [82]. No finding was otherwise made as to relevant conduct, which reflected the agreement between the parties as to the sum to be paid by the Second Respondent.

40. The Applicant's fourth assertion as against the Second Respondent on which basis he contends for a costs order is that **iv) the Applicant was tricked into viewing the Property by a fraudulent non-disclosure**. That assertion also cannot succeed, for a number of reasons.
41. There was no finding of any such fraudulent non-disclosure. Indeed, for there to have been any such finding, the Tribunal would have been required to find that there had been dishonesty in relation to the placing of an advert and the Tribunal would have been likely to consider the relevance of that. It is also notable that it is the viewing of the Property to which the Applicant refers, rather than the tenancy that he subsequently took. It is unclear how that might have assisted him in respect of a rent repayment order other than even if the Tribunal had found it to be conduct relevant to the amount of an award, which it did not. The assertion is therefore a further attempt by the Applicant to rely on something which was not found in his favour, or about at all, in the substantive proceedings. Even ignoring all of those matters, the advert pre-dated the tenancy and significantly pre-dated the proceedings. The Applicant has wholly failed to demonstrate anything which would amount to unreasonable conduct of the proceedings arising from an advert long before them.
42. In respect of **v) failure to make full and frank disclosure in his response to various assertions from the application of harassment or other conduct** even insofar as that may go beyond duplicating assertion iii) or advancing a matter beyond the second limb of assertions ii) and iii), the observations and determinations made by the Tribunal in paragraphs 35, 38 and 39 again apply. It is unnecessary to repeat them or add to them.
43. Finally, as against the Second Respondent at least, with regard to **vi) deliberately "obfuscated matters and deceived" the Tribunal**, the Tribunal does not agree that the Second Respondent did so. It is right to say that the Second Respondent did not inform the Tribunal there was a judicial review application pending in the High Court in respect of the other Tribunal case mentioned or that the extended civil restraint order made against the Applicant did not relate to the application for a rent repayment order against the Second Respondent.
44. However, the existence of an extended civil restraint order is a matter of fact. There is no evidence advanced by the Applicant that the Second Respondent was aware that the order did not extend to these

proceedings, the Applicant did not seek to test in the proceedings whether the Second Respondent was so aware and no finding was made by the Tribunal. The Applicant has not demonstrated that the Second Respondent's conduct in making reference to the extended civil restraint order in force was unreasonable conduct.

45. In a similar vein, and without repeating the above paragraph at length, the Applicant has not demonstrated that the Second Respondent was aware of the application for judicial review such that he could have disclosed that to the Tribunal. The Tribunal has no difficulty in finding a lack of evidence of deceit about either element and therefore in rejecting that part of the allegation.
46. Taking the effect of the above determinations together, this is by no means one of the clearest cases of unreasonable conduct. Indeed, no element of the conduct of the proceedings has been found to be conduct which is unreasonable. The Applicant's case goes nowhere remotely close to being sufficient for the Applicant to succeed.
47. In relation to the assertions regarding the First Respondent, those can be dealt with in brief terms.
48. They are both allegations of fraud. **vii)** is a similar assertion to that against the Second Respondent in relation to the advert placed on Gumtree, save that the fraud is said to be that the **non- disclosure was that there were five persons living at the Property**. It is again the viewing of the Property to which the Applicant refers, rather than the tenancy that he subsequently took. No reference is made to whether the number of people living at the Property was apparent on undertaking the viewing. No finding was made by the Tribunal in the substantive proceedings, nor was any sought by the Applicant. A specific finding of dishonesty would have been required if relevant. Even ignoring all of that and as noted in relation to allegation **iv)** against the Second Respondent, the advert bears no relation to the much later conduct of proceedings.
49. Allegation **viii) fraudulently not disclosing that the subject property was also occupied by the Second Respondent** is not dissimilar. Comments about the other allegations of dishonesty apply and need not be repeated save that it merits repeating the obvious point that the allegation again has nothing to do with conduct of the proceedings. The Tribunal notes the Applicant's reference to a page he accepts was not included in the bundle (paragraph 10 of the document), and so which was not before the Tribunal. No finding was made on which this asserted ground for unreasonable conduct can be based.
50. There is therefore no conduct of the First Respondent demonstrated to be unreasonable. Indeed, the Applicant has again not gone remotely close to so demonstrating.

51. Whilst therefore the Respondents have failed to respond to the Applicant's application and that is a matter which must at least be given weight, where the Applicant has on his own case comfortably failed to clear the hurdle to enable a costs order to be made pursuant to rule 13, and so falls at stage 1, the Tribunal considers that it cannot properly make any such order.
52. It can be briefly observed that wider circumstances may have been somewhat relevant to the exercise of the discretion of the Tribunal had consideration progressed beyond stage 1 but would also have required findings supporting the Applicant. However, there is no merit in additional comment as to that, particularly not in what would also be speculation as to the outcome which may have been produced.
53. It follows from the application failing to get past stage 1 that there is no need to address exercise of discretion to make any costs order and there is no assessment of the appropriate level of any costs order to be undertaken.
54. However, and for the sake of completeness, the Tribunal very briefly deals with those elements. In respect of discretion, the Tribunal would not have exercised its discretion to allow for the time spent by the Applicant taking the circumstances in the round. In addition, if a costs assessment had taken place, the Tribunal does not consider the Applicant to have demonstrated that he suffered loss- for example the fact that when he receives work that is charged at a given rate does not go to show that he lost work of that or any other value because of the time spent. Any potential relevance of the costs in question being calculated on the basis of the time involved on the part of the Applicant as opposed to costs paid to a representative and any evidence of the appropriateness of the rate does not require detailed consideration. The Tribunal additionally considers that any other expenses are not evidenced- there are invoices for four months use of Adobe but insufficient evidence that was additional expenditure arising from the proceedings.
55. It follows that even if the Tribunal had found there to be unreasonable conduct on the part of one or other or both of the Respondents, no rule 13 costs order in favour of the Applicant would have been made.

### **Decision**

56. The Applicant's application accordingly fails and is dismissed.

## **RIGHTS OF APPEAL**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case by email at [rpsouthern@justice.gov.uk](mailto:rpsouthern@justice.gov.uk)
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28- day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.