FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/18UG/LSC/2018/0036
Property:	61b Church Street, Kingsbridge, Devon TQ7 1BY
Applicant:	Mr S J Dowden
Representative:	In Person
Respondent:	Mr R G A Lewis
Representative:	Mr R James of counsel
Type of Application:	Application for Costs
Tribunal Members:	Judge A Cresswell (Chairman) Mr T Dickinson FRICS
Date of Consideration:	18 January 2019
Date of Decision:	21 January 2019

DECISION

Costs

The Background

1. The Respondent has made an application for his costs in the proceedings. This Decision must be read in the light of and as following the Tribunal's earlier Decision of 12 November 2018 ("the substantive Decision"). The Tribunal has retained the same names for the parties in this Decision, i.e. the Respondent being Mr G A Lewis and the Applicant being Mr S J Dowden.

The Law

2. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 reads, so far as is relevant, 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—
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> (ii) a residential property case; or
>
> (iii) a leasehold case;
>
> (2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
>
> (3) The Tribunal may make an order under this rule on an application or on its own initiative.
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> (4) A person making an application for an order for costs—
>
> (a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
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> (b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.
>
> (5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
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> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
>
> (b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
>
> (6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by——

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(a), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(b) and the County Court (Interest on Judgment Debts) Order 1991(c) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

The Application and Response

4. The application by the Respondent for costs has been considered, accordingly, on the basis of whether the Applicant had acted **unreasonably,** in accordance with Rule 13(1)(b) above, **in bringing, defending or conducting proceedings**.
5. The Respondent's application was received by the Tribunal by email on 18 December 2018 and was accompanied by documents to support the Respondent's arguments. It was not accompanied by documents to support the sums he claimed.
6. The Applicant was given an opportunity to respond to the application for costs and did so in an email of 8 January 2019, which was accompanied by documents to support the Applicant's arguments.
7. Both parties were informed that the Tribunal intended to make its Decision without a hearing and neither party requested a hearing.

The Respondent

8. The Respondent referred to Rule 13.
9. He argued that the Applicant is a professional landlord familiar with landlord and tenant legislation.
10. He brought the proceedings either to cause significant expense to the Respondent, having to instruct lawyers due to his absence for work or take advantage of that absence in proceedings.
11. He succeeded only in relation to the roof repair issue and only when the Respondent conceded it when the Applicant made his position clear.
12. It was not reasonable to bring and pursue the other matters and no reasonable person would have done so.
13. He wrongly sought to assume responsibility for the guttering and was unreasonable in his approach to practicality of the repair. His challenge to a

more extensive and appropriate quote from an independent contractor was unreasonable conduct.

14. He clearly knew the Respondent was the landlord. He had had personal dealings with him and had gone to extraordinary lengths to contact him, including trying to conceal his identity to email him.
15. On 22 March 2018, the Applicant was served with a compliant demand. The application was brought after this, on 3 April 2018, when the compliant demand must have been fresh in his mind; to do so was wholly unreasonable conduct.
16. The lease provided for the employment of managing agents and the recovery of their fees and the Respondent sent him a copy of Wembley Stadium v Wembley London; yet he sought to challenge this. He must have known his comparables were not true comparators. His challenge was unreasonable.
17. The threshold of unreasonable conduct is easily surpassed and a costs order should be made. Costs are in the sum of £11,539.39.

The Applicant

18. The Applicant asserted the refusal by the Respondent to communicate directly with him since before 2009. This was contrary to legal advice he received so as to reduce legal costs.
19. A court claim by the Respondent for management fees in 2017 was struck out when he failed to pay a hearing fee. The Applicant agreed to mediation, but the Respondent did not agree.
20. After the strike out, the Applicant again sought mediation, but the Respondent was unwilling to take part, indicating that the case would have to be resolved in court.
21. In anticipation of a further claim against him, the Applicant brought the present case. He again applied for mediation.
22. It appears that it was the Respondent who was determined to have a judicial hearing.
23. He has never had special knowledge of the relevant law.
24. He indicated willingness for a paper determination, which would have avoided a hearing.
25. The Respondent could have used his third managing agent rather than a lawyer. He had time to prepare for and attend the hearing.
26. The date of hearing was set to meet the Respondent's availability.
27. The roof repair claim was successful.
28. In respect of the gutter repair, there was no evidence to show a different form of access to the original quotation. The Respondent's case made no reference to extra work.
29. The issues leading to the acceptance of the higher quote became apparent only at the hearing.
30. Only £800 of £1100 claimed was found to be payable for management fees. Accordingly, it was reasonable to make the application.
31. The Respondent admitted that none of the disputed demands complied with Section 47(1) Landlord and Tenant Act 1987. This made the application reasonable.
32. No demand accompanied by a summary of the tenant's rights or obligations or containing the landlord's name and address had been received prior to the initiation of the claim and the Tribunal's Directions. No evidence of such a demand was produced until the hearing and that was found not to be clear. It was, accordingly, reasonable to make the application.

33. His interpretation of Beitov v Martin was reasonable.
34. The engagement of lawyers for a task which could have been conducted by the management company for the sum of £2,600 and at a cost of £11,539.39 was disproportionate.
35. The Respondent failed to appear despite the hearing being arranged for his availability.

Consideration by the Tribunal

36. The Tribunal considered the application by the Respondent for costs on the basis that the Applicant had acted unreasonably.
37. The Tribunal reminds itself that this jurisdiction is generally a "no costs" jurisdiction. By contrast with the County Court, residential property tribunals are designed to be "a largely costs-free environment": **(1) Union Pension Trustees Ltd, (2) Mr Paul Bliss v Mrs Maureen Slavin [2015] UKUT 0103 (LC).**
38. In **Harris v Academies Enterprise Trust & Ors UKEAT/0097/14/KN, Mr J Langstaff:** *Even if the Employment Tribunal is not in the same position as the civil courts because there is no cost-shifting regime, it was designed as a cost-free forum in so far as party-and-party costs were concerned. That is true of most Tribunals; it is a particular feature of most Tribunals.*
39. In **Willow Court Management Company (1985) Limited v Alexander** (2016) UKUT 0290 (LC), the following advice was given:
"At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case.
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."
"At the second stage 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" "the nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account"
"The only general rules are found in section 29(2)-(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, 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 and of the Tribunal." but other circumstances will clearly also be relevant…"
When considering the order to make, there is no need to show that the unreasonable conduct caused any identifiable loss on the part of the innocent party: see paras 40-41. The order need not be confined to the costs: "attributable to the unreasonable conduct".
"…[Applications] should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. We consider that submissions are likely to be better framed in the light of the tribunal's decision, rather than in anticipation of it,

and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation."

"A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding that it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid."

"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. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings."

"When exercising the discretion conferred by rule 13(1)(b) the tribunal should have regard to all of the relevant facts known to it, including any mitigating circumstances, but without either "excessive indulgence" or allowing the absence of representation to become an excuse for unreasonable conduct."

40. In **Cannon v 38 Lambs Conduit LLP** (2016) UKUT371 (LC), the Upper Tribunal said: "*The point has been made time and again that the F-tT's residential property jurisdiction is essentially a no costs jurisdiction, or to put it another way, 'a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs' (see **Willow Court Management Co v Alexander** [2016] UKUT 290 (LC) at [62].) It is therefore understandable why the F-tT decided not to make a costs order against the tenants although the landlord had largely succeeded at first instance."*

41. The Tribunal has had regard to the word *"unreasonably."* The test is whether the behaviour permits of reasonable explanation: HH Judge Huskinson in **Halliard Property Company Limited and Belmont Hall and Elm Court RTM Company Limited LRX/130/2007 LRA/85/2008**. In **Ridehalgh v Horsfield** (1994) 3 All ER 848, Bingham LJ said:

"*Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable*".

42. The Tribunal commenced a two-stage approach. First to find whether the Respondent acted unreasonably and then, if we so found, to exercise our

discretion whether to order costs having regard to all of the circumstances, including the Tribunal's overriding objective.

43. The Tribunal examined the submissions of the Respondent which it has detailed above. It concentrated only upon those assertions which could have relevance to the issue in the preceding paragraph.
44. The Applicant was entitled to challenge the service charges. The Applicant was entitled to ask the Tribunal to determine if charges are reasonable; in the event, the Tribunal has determined that a number of the service charge elements were not payable by reason of timeliness and failure by the Respondent to follow statutory procedures.
45. The Tribunal viewed the Applicant as not being a lawyer, but rather an unrepresented person with limited knowledge from his small-scale involvement with rental property. Some of his submissions added to the basis for this conclusion.
46. The Tribunal noted the Applicant's attempts to resolve the issues via mediation and without the expense of a hearing.
47. The Respondent asserts that the Applicant brought the proceedings either to cause significant expense to the Respondent, having to instruct lawyers due to his absence for work or take advantage of that absence in proceedings. However, the Tribunal notes that it was only one week before the hearing that there was an indication that the Respondent may be unable to attend; this was in an email of 1 November 2018 from his solicitor: *"Mr Lewis has just forwarded an email to me indicating that he may be leaving for sea the day before the hearing, to be confirmed."*
48. The Tribunal finds that the Respondent came to his position presented at the hearing very late in the day, mostly due, it appears, to the guidance of counsel. The legal position of the Respondent prior to this appeared to the Tribunal to be ill reasoned in part (to put it politely). The Respondent had failed to comply with his statutory duties in respect of the name and address of the landlord and summary of tenant's rights and obligations; even at the hearing, the document relied upon by the Respondent was not produced.
49. The papers presented for the hearing gave a confusing impression as to when the Applicant might have been aware of the invoice for roof repairs. The letter in the Respondent's bundle of papers had been amended manually to read 19 December 2017, whereas the letter sent to the Applicant showed the date unamended as 19 December 2016, and was annotated by him as being received on 22 December 2017.
50. There was no evidence as to how the gutters were accessed for repairs to be made. It was the Tribunal, not the Respondent, which spotted the reference in the Respondent's invoice to further works.
51. The Tribunal finds that the Applicant has not acted unreasonably in bringing, defending or conducting proceedings.

A Cresswell (Judge)

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.

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.