FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LBC/2018/0049 & 0077**
Property	**:**	**Flat 116B Ashley Gardens, London SW1P 1HL**
Applicant	**:**	**Ashley Gardens Freehold Limited**
Representative	**:**	**William Sturges LLP**
Respondent	**:**	**(1) Flint Ltd** **(2) Surabhi Kapur**
Representative	**:**	**Fladgate LLP**
Type of Application	**:**	**Costs – rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**
Tribunal Member	**:**	**Judge L Rahman**
Date and venue of Hearing	**:**	**10/5/19 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**19/6/19**

DECISION

Decision of the tribunal

(1) The tribunal does not make an order for costs under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

The application

1. Following the tribunals decision dated 5/1/19, in which the tribunal determined that the applicant had been unsuccessful on all the disputed issues raised by the applicant, the respondent seeks an order for costs against the applicant under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("The Rules") on the basis that the applicant had acted unreasonably in bringing, defending or conducting those proceedings.

2. The tribunal considered that if neither party requested an oral hearing then it would be appropriate for the application to be dealt with without a hearing. At the request of the respondent, the matter was listed for an oral hearing.

3. At the hearing, the applicant was represented by Ms Petrenko of counsel and the respondent was represented by Ms Mattsson of counsel. The tribunal had before it an agreed 91 page bundle submitted by the respondent. The applicant submitted a further witness statement from Mr Walshe (with 51 pages of exhibits) a few days before the hearing. At the hearing, the respondent submitted an extract entitled "Pointless and wasteful litigation" and a copy of **Jameel (Yousef) v Dow Jones & Co Inc [2005] EWCA Civ 75**.

4. As a preliminary matter, the tribunal dealt with the respondents' objection to the applicant relying upon the witness statement of Mr Walshe.

5. The tribunal notes that Mr Walshe, a solicitor at William Sturges LLP, deals with developments at the relevant property since the tribunal's decision dated 5/1/19. The witness statement is dated 1/5/19. He states that he wrote to both the respondents and their legal representative in a letter dated 10/4/19, bringing to their attention that from 3/4/19 to date, the property had been used as a venue for parties which had taken place there almost uninterruptedly since that day "for days on end". In particular, he stated that this involved the playing of "ear splitting music throughout the night into the early hours of the morning", and then again during the following morning and into the evening, during each day and night. Large groups of people attended the non-stop parties, began fighting with each other within the block, thereby putting the residents of the block in fear for their personal safety. The police were called on a number of occasions to deal with the situation. A number of residents within the block had complained. The residents were further subjected to other disturbances, including the screams of young men fighting with each other, attendees at the parties conducting loud and raucous altercation amongst themselves, and the ringing of every single bell on the intercom system controlling access to the block. He further states that he had

not received a reply to his letter dated 10/4/19 and that it was his understanding that the disturbances continued until the weekend of 20th-22nd April 2019.

6. The applicant submitted that the contents of this witness statement were relevant to the tribunal's consideration of the second stage test as set out in **Willow Court Management Co (1985) v Alexander [2016] UKUT 290 (LC)** ("**Willow Court**"). It was the applicants understanding that the respondent was in agreement with the contents of the witness statement. In support, the applicant relied upon the contents of a letter dated 8/5/19 from the respondents' legal representative in reply to the applicant's letter dated 10/4/19.

7. (The tribunal notes that the letter dated 8/5/19 essentially states that the respondents were aware of the situation as set out in the letter dated 10/4/19 and that the respondents had already gone to great lengths to address the issues which had arisen. That the second respondent had been out of the country since early April 2019 but had recently returned. That the second respondent had ended her relationship with her partner in a very volatile manner and she had moved abroad in order to avoid any further confrontations whilst allowing her partner to make arrangements to vacate the premises. Unfortunately, after the second respondent had left the premises and whilst her ex-partner remained in the premises, he appears to have had a number of parties and caused significant damage to the property. The second respondent's ex-partner vacated the premises on or about 14 April 2019. After this the premises were broken into and squatters occupied the premises. The squatters caused significant damage to the premises and the fixtures and fittings therein. The respondent had successfully evicted the squatters from the premises and the respondents had arranged for the premises to be repaired and alarms to be fitted. The respondents had no reason to believe that the second respondent's ex-partner would return to the premises however it was difficult to provide any guarantees but the respondents had taken all reasonable steps to address the problem).

8. On behalf of the respondents it was argued that this letter was not an admission of the allegations made against the respondents. It was submitted that if Mr Walshe's witness statement were to be admitted, it was only fair that the respondents had the opportunity to provide a detailed reply in a witness statement. In the circumstances, the hearing should be adjourned and the applicant should pay for the wasted costs of the adjourned hearing. Ms Mattsson confirmed that the witness statement was received by the respondent's legal representatives 8 days before the hearing. When asked why objections were not raised prior to the hearing and why any relevant application to take further instructions and for the hearing to be adjourned were not made prior to the hearing, Miss Mattsson stated that she did not know. Miss Mattsson submitted that the tribunal had three options. It was either inappropriate to allow the witness statement to be adduced at such a late stage and therefore it should be ignored or if the witness statement were admitted the matter should be adjourned and the applicant should pay for the respondents wasted costs or the tribunal should admit the witness statement

and consider the respondents legal representatives letter dated 8/5/19 although this would be unfair to the respondents.

9. The tribunal informed both representatives that if the witness statement were admitted, there may be the need to adjourn the case to allow the respondents the opportunity to provide a witness statement in reply. However, neither side would get its wasted costs as the applicant had submitted the evidence late and the respondents could and should have written to the tribunal objecting to the witness statement and requesting that the hearing be vacated in advance of the hearing date thereby avoiding the wasted costs of attending today. Both legal representatives were given the opportunity and agreed to take further instructions.

10. Having taken instructions, on behalf of the applicant, it was submitted that the witness statement should be admitted. The witness statement was submitted late as the events had taken place in April 2019, after the deadline had passed for the applicant to provide all its evidence. The applicant's legal representative wrote to the respondents' legal representative in a letter dated 10/4/19. No response had been provided to that letter until the day before the hearing. Mr Walshe's witness statement had been served on the respondents on 2/5/19 but a reply was only provided the day before the hearing. The respondents had not objected to the witness statement until the day of the hearing. If the respondents wished to provide a detailed reply in the form of a witness statement, they had a week to do so. If they required more time, they should have sought an extension. The letter from the respondents' legal representative accepts that the parties had taken place.

11. On behalf of the respondents it was submitted that the evidence should not be admitted. The tribunal should focus on the evidence that was available at the time of its original decision in January 2019. Costs applications such as these should not allow subsequent and unproven allegations to be introduced unfairly without giving the respondents the opportunity to provide detailed witness statements in reply. However, if the evidence were admitted, although the respondents have the opportunity to seek an adjournment, the respondents would not be seeking an adjournment and would simply rely on the contents of the respondents' legal representative's letter dated 8/5/19.

12. Having considered the submissions made, the tribunal found as follows. The previous directions issued by the tribunal stipulated that the applicant shall provide its evidence by 22/3/19. However, the parties took place in April 2019 and therefore it was impossible for Mr Walshe's witness statement to have been submitted in March 2019. The letter from the respondents' legal representative dated 8/5/19 does in fact provide a response to the allegations raised by the applicant. The contents of Mr Walshe's witness statement can potentially be of relevance to the second stage of the legal test set out in **Willow Court**. If the admission of Mr Walshe's witness statement is unfair to the respondents, the respondents could and should have made any relevant application upon receipt of that witness statement eight days before the hearing. No explanation has been provided as to why that had not been done.

The respondents had the opportunity to seek an adjournment at the hearing, but have declined to do so. Although Mr Walshe's witness statement had been admitted, the parties can make any relevant submissions as to the weight to be attached to it.

The respondent's case

13. The material parts of the respondents' written legal submissions dated 8/3/19 can be summarised as follows.

14. The applicant made its application alleging breaches of the terms of the lease on 29/6/18. The application did not set out the alleged breaches but merely appended numerous witness statements. It was therefore impossible to understand the basis of the applicant's case. The respondents' solicitors repeatedly sought clarification but the applicant refused to provide a substantive response. The respondents were therefore forced to serve a response and try to clarify the applicant's case. The applicant then, without permission or warning, filed a further statement of case which made yet further allegations and introduced further evidence. The respondents were therefore put to the additional expense of responding to the application a second time.

15. On 16/8/18, the respondents wrote to the applicant to seek to resolve matters amicably, including asking the applicant to agree reasonable regulations in respect of the refuse collection. The applicant blankly refused.

16. On 1/10/18 the applicant made a further application alleging a further breach and requested that the matter be listed for consideration on the same date as the first application. This application, which related to the keeping of a dog in the flat, was made without any warning or letter before claim. The respondents admitted the breach relating to keeping a dog but denied that this was in breach of paragraph 1 of the schedule (the user covenant). The respondents suggested that the parties agree to a consent order but the applicant refused and insisted that the matter be determined at a hearing.

17. At the hearing on 8/11/18, the applicant sought to raise yet further allegations as referred to in the tribunal's decision at paragraph 62.

18. It was clear from the applicant's evidence that no consideration whatsoever had been given to the fact that the second respondent and her partner had three small children in nappies which meant that they had to take out their refuse on a regular basis. Instead, the applicant expressed great surprise that the second respondent and her partner disposed of "smelly nappies", suggesting they should be disposed of somewhere else. When the applicant's director Mr Simpson was asked what he proposed that the second respondent do with soiled nappies, his answer was that she could use the "special service" which allowed residents to call the porters and ask them to remove refuse on different days and times from the regulations. When asked questions about

this “special service”, Mr Simpson accepted that the service was only for “persons in the know” (such as himself). Mr Simpson also agreed that this “special service” was not general knowledge, nor put in writing as it might be used widely and / or might be “abused”. Mr Simpson accepted that at no point had the second respondent been told about this “special service”.

19. Mr Simpson also gave evidence that the applicant had no real intention of forfeiting the lease, stating that the applications were intended to get the respondents to “focus on the complaints”. This evidence was given in circumstances when the second application had been made without any warning and when the applicant refused to engage with the respondents regarding workable refuse regulations.

20. In particular, the respondents listed the following as evidence of unreasonable conduct.

21. Bringing a claim alleging a breach of the purported “refuse regulations”, which the tribunal found were “not reasonable regulations” and were “wholly unclear”, was inherently unreasonable.

22. Issuing an application without particularising the breaches complained of and then raising further allegations in a further statement of case and then yet further allegations at the hearing, despite the applicant being legally represented and the respondents repeatedly seeking clarification.

23. Not raising or particularising the complaints prior to commencing proceedings, particularly so with respect to the “dog application”.

24. Pursuing allegations which on the applicants own uncontested evidence did not constitute a breach as a matter of law, which the applicant must have known given that it had legal representation.

25. Pursuing an application for a s.168 determination without any intention of forfeiting the lease is inherently unreasonable in circumstances when it was crystal clear from the applicants own evidence that no regard had been given to the second respondents need to dispose of nappies nor informing her of the “special service” and the applicant blankly refusing to engage with the respondents prior to the hearing regarding “reasonable refuse regulations” when it was clear that the regulations were wholly unworkable.

26. Pursuing an application for a section 168 determination after the applicant had waived most of the alleged breaches and when its own evidence was that the applicant had no real intention of forfeiting the lease.

27. It was wholly unreasonable to pursue the “dog application” in circumstances when the respondent admitted the breach save that the respondent was in breach of the “private residence” requirement, which the applicant being

legally represented must have known was plainly and fundamentally misconceived as a matter of law.

28. Seeking to introduce evidence from seven witnesses and seeking a one day hearing without consulting the respondents was wholly unreasonable. The hearing only concluded in one day because the respondents took a pragmatic view and agreed that much of the applicant's evidence could be read.

29. The tribunal should exercise its discretion to award the respondents' costs as it was fundamentally unfair that the respondents had been put to the expense of defending these proceedings when considering the applicant's conduct [as particularised in the preceding paragraphs]. The tribunal should not condone the applicant's conduct. The tribunal should seek to deter the applicant from pursuing further unfounded and misconceived applications by ensuring that the applicant does not "get away" with its unreasonable conduct "scot-free".

30. The material parts of the oral submissions made on behalf of the respondents at the hearing can be summarised as follows.

31. Despite the outcome of the application [the tribunal finding no breach of covenant], the applicant only conceded to the respondent's application to prevent the applicant from recovering its costs under the lease either by way of service charge or administration charge, in a letter dated 8/5/19. Failing to make a reasonable concession at an earlier stage and only making a last-minute concession shows unreasonable behaviour.

32. The 24/2/18 was a one-off incident with no repetition yet the application was only made on 29/6/18, five months after the incident.

33. The allegations concerning the refuse regulations were ongoing and dated. Yet the application was only made in June 2018 therefore there was no urgency.

34. The applicant could have informed the second respondent about the "special service" with respect to the refuse collection in writing in reply to the respondent's letter dated 16/8/18.

35. It was conceded on behalf of the respondents that no correspondence had been sent to the applicant regarding any specific problems concerning nappies. However, it was suggested that in oral evidence Mr Zacharia had stated that he had smelt soiled nappies and therefore the applicant should have been aware that there were small children residing with the second respondent. The tribunal did not recall such oral evidence and requested that the respondent's representative consult her notebook. Miss Mattsson stated that she did not have her notebook but was told by her instructing solicitor what Mr Zacharia had stated in oral evidence. However, she conceded that she did not have a copy of her instructing solicitor's notes or any witness statement from her instructing solicitor to confirm this. The tribunal referred to its own note of the oral evidence and noted that Mr Zacharia was asked "If

[there were] dirty nappies, [should they be kept] within [the] flat for days". To which he replied "Yes. That's what [the] regulations say". The tribunal noted that Mr Zacharia was not asked whether, and did not state that, he had smelt soiled nappies. However, it was submitted on behalf of the respondents that the applicant should have known this as the second respondent had children and therefore it was common sense that she would need to dispose of nappies. When asked why the specific problem regarding nappies had not been raised in any correspondence sent to the applicant, Miss Mattsson stated "It's blatantly obvious therefore there is no need to say so".

36. The applicant had not set out its case properly. The tribunal merely gives directions regardless of pleadings. There is no explanation why the applicant had not set out its case in a concise manner so that the respondent's knew the allegations being made against them. At the hearing the applicant argued the "agency point" which had not been raised before. All of this should have been set out very clearly if the applicant wanted to forfeit the lease. The respondents incurred additional costs in seeking clarification. The applicant raised a new point at the hearing regarding the second respondent accepting paying guests. The applicant dropped its allegation with respect to the 3/4/18 incident at a very late stage. Although the tribunal was able to deal with the matter concerning whether the second respondent had accepted paying guests, this was irrelevant as the applicant was still at fault for a lack of clarity in its application and raising new allegations at the hearing.

37. With respect to the "dog application" the applicant did not ask the second respondent's legal representatives whether the breach was admitted. A reasonable landlord, legally represented, would not conduct a case in this manner.

38. Miss Mattsson stated that she did not know whether the dog was still at the flat.

39. This was a pointless case from the outset. Mr Simpson admitted that the applicant would not be seeking to forfeit the lease. (The tribunal noted that the parties disagreed as to precisely what Mr Simpson had stated in oral evidence. The tribunal referred to its own note of the evidence and informed both parties that the notes did not cover this aspect of Mr Simpson's evidence. Both representatives confirmed that neither had their notebooks. Miss Mattsson stated that precisely what was stated was irrelevant given that both parties agreed that Mr Simpson had stated that the applicant did not intend to forfeit the lease). The application was a precursor to forfeiture therefore having a very lengthy hearing with a number of witnesses was pointless. The respondents had already admitted to the breach concerning the dog. If the applicant wanted to get the respondent's attention, this was completely wasteful and therefore the proceedings were wholly unreasonable. Mr Simpson is a director of the applicant company and did not state that the applicant had mistakenly waived forfeiture but stated that the applicant did not intend to seek forfeiture. Therefore, it was unreasonable to bring these proceedings.(Both parties agreed at the hearing that neither party had asked

in cross examination or in re-examination at what stage the applicant had decided not to seek forfeiture of the lease. Whether it was before or after the application was made, and if after the application was made, precisely when, or why).

40. The applicant had failed on its own evidence without any evidence from the respondents.

41. The applicant alleges that parties have continued at the flat. However that is irrelevant to the issue of whether the applicant has behaved unreasonably.

42. On behalf of the respondents Miss Mattsson conceded that she could not say that there had not been any parties since the hearing. However, it was not the respondent's fault as the second respondents relationship had ended in a volatile manner with her partner.

The applicant's case

43. The material parts of the applicant's written legal submissions dated 20/3/19 case can be summarised as follows.

44. The applicant opposes the application and also resists the application to prevent the applicant from recovering its costs under the lease either by way of service charge or administration charge.

45. None of the matters complained of by the respondent's amount to unreasonable conduct. The applicant's applications were of course unsuccessful however this is insufficient to constitute unreasonable behaviour. A reasonable person in the position of the applicant, having regard in particular to the many complaints made about the second respondent by the other tenants in block nine, would have conducted themselves in the manner complained of. In any event, the tribunal should not exercise its discretion to award the respondents costs given that the second respondent continues to act in breach of the lease. Alternatively, if the tribunal were minded to award costs, the tribunal should apply a substantial percentage discount to reflect the matters referred to in the preceding paragraphs.

46. The first breach allegation took place on 24/2/18 when approximately 10 to 15 people attended block nine. These persons were noisy, drinking alcohol, littering within the block, and were accompanied by the second respondent's boyfriend. They were abusive and threatening to the block porter. As a result the police were called to attend the block. The incident also caused a neighbouring tenant to fear for her personal safety. Although the second respondent stated in her witness statement that she did not invite the people to be there, and the tribunal did not find that the second respondent was in breach of any covenants, the tribunal nevertheless disagreed with the second respondent's evidence and found that the group "was clearly invited into the block by the second respondent and her partner". The tribunal further found

that "the description of the groups behaviour at 10:30 AM and until they left at approximately 2:30 PM clearly amounted to a nuisance/annoyance/disturbance/created an obstruction in the building".

47. The next allegation of breach concerned the respondent's actions in relation to leaving rubbish outside the flat. The applicant alleged that the second respondent acted in breach of the rubbish regulations. This application was made following the receipt of numerous complaints by other tenants in the building. For example, Mr Zacharia referred to 6 complaints made by tenants in the block in the period 23rd March to 12 May 2018.

48. The second application was made on 1/10/18. This application concerned the keeping of a dog at the flat. An application had previously been made in relation to a dog being kept without consent in February 2018. This breach was admitted on 29/3/18 when the respondent's solicitors also claimed that the breach had been remedied. However, within a few months of this admission, a dog was again kept at the flat without consent and, as set out in Mr Simpson's evidence, multiple tenants complained about the noise. Following the issue of the second application relating to the keeping of the dog, on 26/10/18, the respondents admitted a breach of one of the covenants. However, the second respondent continues to keep a dog or dogs at the flat without consent. The applicant receives complaints from other tenants on a daily basis, both before and after the second application was made, about the incessant barking and yapping of the dog(s).

49. Although the applicant was unsuccessful at the hearing, this does not constitute unreasonable behaviour. The applicant would only have been unreasonable in bringing the proceedings if no reasonable person standing in the applicant's shoes would have brought the same. In the present case, on any view, the incident of 24/2/18 was a serious incident in which another tenant felt intimidated and a member of the applicant's staff was threatened. In bringing the application, the applicant was not being vexatious or harassing the respondents, but was seeking, as any reasonable landlord would, to protect the other occupiers and its employees from persons invited into the building by the second respondent and her partner. With respect to the bin regulations, numerous complaints were made by other tenants relating to the second respondent leaving rubbish in the corridor. On several occasions the applicant's employees orally informed the second respondent how to comply with the regulations. It was not until the hearing, that the respondent's advanced any meaningful explanation as to why they were unable to comply. Although the tribunal found that oral clarifications were not relevant, given that the lease required regulations to be in writing, in all the circumstances it was reasonable for the applicant, having received numerous complaints, having explained the position orally to the second respondent and without any explanation from the second respondent as to why she couldn't comply, to bring an application for breach. Despite having previously admitted a breach of the lease in March 2018, a few months later the second respondent kept a dog or allowed the same to be kept in the flat without consent. In the circumstances, it was plainly reasonable for the applicant to bring an application for breach of paragraph 7 of schedule 1 to the lease (which was

admitted). Although the applicant was unsuccessful in its application based on paragraph 1 of schedule one, this is insufficient to establish unreasonable conduct.

50. It was not unreasonable for the applicant to bring and pursue this application in circumstances where there were numerous complaints made by other tenants who did in fact comply with regulations, the second respondent had been orally informed of how to comply with the regulations, and the respondents did not give any explanation until the hearing as to any needs that the second respondent had in relation to the refuse. There has never been any suggestion that the second respondent notified the applicant or its employees as to why she was unable to comply with the standard procedure [because she had malodorous refuse she needed to dispose of immediately]. There is no such thing as a "special service" as referred to in the respondents written submissions. This does not exist and Mr Simpson does not recall suggesting this during the hearing. He denies there was a special service available only to him or people in the know. The applicant agrees that the lessees have not been informed in writing that they should phone the porters if they need assistance in removing refuse outside the allocated hours. However, if the second respondent had suggested to the applicant that the mechanism did not work for her this option could have been explained to her in writing.

51. Contrary to the suggestion by the respondents, the covenants relied upon were identified in the application and the annexed witness statements gave details of the matters set to give rise to the breaches of the covenants. Indeed on 9/7/18, the tribunal considered the application and made directions which suggested that the hearing could be disposed of without a hearing. This suggests that the tribunal was satisfied that the application had been adequately pleaded.

52. The respondents complained they were "forced to serve a response" and that the applicant filed a further statement of case. However, by the order of 9/7/18, the respondents were ordered by the tribunal to serve a response by 3/8/18 and the applicant was in turn given leave to serve a supplemental reply by 10/8/18. Both parties served the statements of case in accordance with the tribunal's order. The applicant's statement of 10/8/18 did not raise any new evidence. The applicant's position that a member of the group had stated that they had paid to stay in the flat was set out in their witness evidence which was filed together with the application. The respondents' further response, for which they did not have permission, made a number of legal points which the respondents could have made at the hearing and indeed did so. This was an unnecessary document and the respondent's choice to incur costs in filing it was a matter for them.

53. In any event, by the time of the hearing, the only point taken by the respondent's concerned whether the applicant was entitled to argue that the respondents had taken paying guests. The tribunal held that this specific point had not been raised by the applicant but did go on to state that given the lengthy and detailed submissions made, and the tribunal finding no adverse

consequence for the respondents, the tribunal was prepared to make observations on whether the second respondent was in breach. In the circumstances, even if there were a technical pleading issue, there was no prejudice to the respondents who knew the case they had to meet and any such issue does not constitute unreasonable conduct. In any case, this did not result in the respondents being put to any additional expenditure.

54. The applicant does not accept that it failed to raise or particularise a number of complaints prior to commencing proceedings and that it had merely notified the respondents that it had commenced proceedings (in respect of the dog application). On 28/9/18, the applicant's solicitors emailed the respondent's solicitors sending them a draft of the second application and informing them that the applicant would be seeking an order to have the two applications heard together. The respondent's solicitors were invited to comment. Therefore, the applicant did give the respondents an opportunity to comment before the application was issued on 1/10/18. In any event, given that the second respondent had previously admitted a breach in relation to the keeping of a dog in the flat without consent and given that the hearing had been listed for 8/11/18, it was reasonable for the applicant to issue this application with a view to having the matters heard together. The second application and the witness statement in support were served on the respondent's solicitors on 4/10/18, giving them ample time to take instructions and respond before the hearing on 8/11/18. The letter accompanying service of those documents invited the respondent's solicitors to confirm whether the evidence could be agreed "to curtail the length of the hearing". No response was received to that invitation until very shortly before the hearing.

55. Pursuing allegations, which the tribunal found on the applicant's own uncontested evidence did not constitute a breach of the lease as a matter of law, is insufficient to establish unreasonable conduct. For the reasons already given, it was reasonable for the applicant to bring the applications.

56. With respect to the respondent's claim to having the need to dispose of nappies, at no time prior to the hearing did the respondents give any explanation as to any needs they have in relation to refuse. It was not unreasonable in those circumstances to bring the application, particularly given the complaints made by other tenants. The respondents' complaint that the applicant "blankly refused" to resolve the dispute relating to the rubbish regulations is incorrect. In their email of 16/8/18 the respondent's solicitors asked for keys to the refuse area. In a response dated 17/8/18, the applicant's solicitors explained that this was not possible for several reasons, including health and safety concerns.

57. With respect to whether the applicant had any real intention of forfeiting the lease, Mr Simpson told the tribunal that it was the desire of the board of the applicant that it wanted the errant behaviour of the respondents to stop and that the board did not expect the respondents to be evicted from the flat and that they had been forced to take steps to issue the applications because no

amount of effort on their part to have the errant behaviour stopped were having any effect. The second respondent continues to keep dogs in the flat despite the applications and the 8/11/18 tribunal hearing. Mr Simpson's remarks about not intending to forfeit the lease simply recognise that even if the applications have been successful it was extremely unlikely that any County Court judge would make an unconditional order forfeiting the respondents lease. Making an application for determination of breach in the circumstances does not amount to unreasonable conduct.

58. With respect to whether it was reasonable to pursue the "dog application" at the hearing in circumstances when the respondents admitted the breach, the respondents did not admit the breach of paragraph 1 of schedule one of the lease until 26/10/18. It was also stated in the same letter that consolidation was unnecessary as the dog had been removed from the property. However, the second respondent continues to keep a dog in the flat without consent to this day. The fact that the applicant was unsuccessful in the second part of his application does not constitute unreasonable conduct. Further, the respondents did not serve any evidence in relation to the second application therefore any costs incurred in relation to this application must be de minimis.

59. The matter being listed for a one-day hearing was not unreasonable or the applicant's fault. The applicant had merely indicated in the application form that the matter was suitable for the fast track. It was the tribunal that determined that the matter be listed for a one-day hearing. With respect to the second application, the applicant indicated in its email to the tribunal dated 1/10/18 that it would add an hour and a half to the time estimate. After receipt of that email, the tribunal clerk informed both parties that the matter had been referred to a procedural judge who confirmed the one-day listing. As a matter of fact, the application was duly resolved in one day. The applicant was not responsible for the matter being listed for one day and in any event the matter was completed within the one-day allocated by the tribunal. If the respondents felt that the time estimate was incorrect, they could have written to the tribunal and asked for a longer time estimate.

60. Even if the respondents were able to demonstrate unreasonable behaviour, the tribunal should not exercise its discretion to award costs under the second stage of the Willow case guidance. The tribunal has a broad discretion. The second respondent continues to act in flagrant breach of the lease by keeping a dog or allowing the same to be kept without consent. This continues to disturb other residents. As regards the incident of 24/2/18, the tribunal found, contrary to the second respondent's evidence, that the second respondent and her partner invited a number of people into the building which resulted in a serious incident involving the police being called. In light of this, the tribunal should not exercise its discretion to award the respondents costs.

61. The material parts of the oral submissions made on behalf of the applicant at the hearing can be summarised as follows.

62. It was unclear why the respondents had requested an oral hearing concerning the costs application. The submissions made on behalf of the respondents at the hearing were not new and could have been contained in their written submissions. The respondents claim that the applicant behaved in a disproportionate manner yet the respondents requested an oral hearing which was unnecessary.

63. The applicant does not resist the s.20C / Para 5A application as the costs lie where they fall.

64. The applicant did not refuse to engage with the respondents' letter dated 16/8/18 with respect to the regulations. The applicant provided its response in a detailed email dated 17/8/18. It was only at the hearing that the respondents raised any issues concerning children and nappies. Some parents choose to keep nappies in what is called a "Nappy Genie", in which nappies can be kept for a few days without any associated smelts. It was reasonable to expect the second respondent to explain to the applicant if she was having any problems with nappies, but she failed to do so.

65. The applicant had pleaded its case clearly. The supplementary reply sets out the clauses referred to with respect to each of the witness statements. Although the agency point was not specifically raised, it was clear and obvious that it was a relevant matter as the first respondent is not a person.

66. The applicant should not be punished for not pursuing the 3/4/18 matter. The applicant decided that this specific matter was not of significance in light of all the other matters and therefore the applicant took the view not to pursue this particular incident.

67. With respect to the second dog application, given that the respondent previously admitted to a breach, the respondent's knew not to keep a dog without consent and yet the second respondent continued to do so. Therefore it was entirely reasonable to start the second proceedings. The admission was only made 25 days later. A draft copy of the application was sent on 28 September 2018 and the admission was only made on 26 October 2018.

68. With respect to Mr Simpson's evidence that the applicant did not intend to forfeit the lease, the tribunal should note that Mr Simpson is not a lawyer, he was receiving daily complaints, and the applicant wanted the respondents' behaviour to stop. Starting proceedings showed that the applicant was taking the concerns seriously and would result in the behaviour stopping. The applicant was receiving daily emails about the second respondent's behaviour from other tenants. In the circumstances it was reasonable to start proceedings against the respondents. However, Ms Petrenko conceded on behalf of the applicant that it was unclear why Mr Simpson had stated that the applicant did not intend to seek forfeiture as no further witness statements had been provided by him to provide any explanation.

69. The new witness statement from Mr Walshe and the continued presence of the dog was relevant to stage 2 of the test set out in Willow Court. The tribunal had a wide discretion and therefore the tribunal should consider the course of conduct after proceedings had been issued. The applicant had provided a sample of complaints about the continued presence of the dog (pages 74 to 91 of the bundle).(Miss Mattson conceded "I don't know whether or not there is a dog").

70. With respect to the 24/2/18 incident, the applicant wrote to the respondents in a letter dated 7/3/18 and a further letter dated 25/4/18, to which the respondents provided no reply (The tribunal notes that Ms Mattson did not challenge this).

The respondent's reply to the applicant's case

71. The material parts of the written submissions dated 4/4/19 can be summarised as follows.

72. The tribunal is invited to note that bringing proceedings which are a precursor to forfeiture of the respondents valuable lease, in reliance upon misconceived legal arguments and alleging breaches of unreasonable regulations which are wholly unclear, is unquestionably unreasonable conduct. This is particularly so when the applicant refused to engage in constructive discussions regarding the regulations. Instead, the applicant chose to put the respondents to the stress and costs of a section 168 application. The unreasonableness of the applicant's conduct is even more striking in circumstances where it was the applicants unequivocal evidence that it had no intention to forfeit the lease (evidence given in response to the question why the applicant had continued to demand and accept ground rent if it intended to forfeit the lease). The proceedings were therefore pointless and plainly an abuse of process under the "Jameel principle". It is difficult to envisage a more compelling case where "the game is not worth the candle" and the costs of the litigation is out of all proportion to the benefit to be achieved.

73. The respondent admitted to keeping a dog in the flat without permission prior to the hearing. Notwithstanding this, the applicant put the respondents to the cost of defending its section 168 application. The only outcome of these proceedings is therefore that the respondents have incurred substantial amount of legal fees. The fact that the applicant is seeking to justify its conduct on the basis of wholly unsubstantiated allegations that the second respondent had a dog in the flat on 24/2/19 exemplifies the applicant's unreasonable conduct throughout these proceedings. The applicant will continue to throw mud at the respondent and hope that something sticks. The tribunal should not condone this behaviour.

The tribunal's findings and conclusion

74. In **Willow Court** the Upper Tribunal provided guidance on how the tribunal should exercise its jurisdiction conferred by rule 13(1)(b). It emphasised that such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right (para 43). That rule 13(1)(b) should be reserved for the "clearest cases" (para 34).

75. In every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable (para 34).

76. The Upper Tribunal suggests a systematic/sequential approach. At the **first stage**, the question is whether a person has acted unreasonably. This 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. The **second stage** involves a discretionary power, namely, whether in the light of the unreasonable conduct it has found to have been demonstrated, the tribunal ought to make an order for costs or not. If the tribunal decides that it should make an order for costs, then at this **third stage** the tribunal determines the terms of any such order (paras 27 and 28). At both the second and third stage the tribunal is exercising a judicial discretion in which it is required to have regard to 'all relevant circumstances', which includes the nature, seriousness, and effect of the unreasonable conduct but can include other matters (para 30).

77. When determining whether the behaviour complained of was "unreasonable", the Upper Tribunal emphasised the "fact sensitive nature of the enquiry in every case" (para 22). The Upper Tribunal rejected the submissions put forward to treat as unreasonable the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. The Upper Tribunal stated that an assessment of whether behaviour is unreasonable requires a value judgement on which views may differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. 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? (paras 23 and 24). The Upper Tribunal found it improbable that (without more) the examples put forward would justify the making of an order. For a professional advocate to be unprepared may be unreasonable but for a layperson to be unfamiliar with the substantive law or with Tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponents case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable (paragraph 25). That tribunal's ought not to be overzealous in detecting unreasonable conduct after

the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings (e.g. using case management powers actively to encourage preparedness and cooperation and to discourage obstruction, pettiness and gamesmanship) (paragraph 26).

78. The word "unreasonable" is not defined, but in considering whether a person had acted unreasonably, the Upper Tribunal referred to **Ridehalgh v Horsefield [1994] 3 All ER 848**, in which it was held: *"'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 practitioners judgment, but it is not unreasonable."*

79. With respect to the incident on 24/2/18, the tribunal found that the description of the groups behaviour at 10:30am and until they left at approximately 2:30pm, clearly amounted to a nuisance / annoyance / disturbance / created an obstruction in the building / used the passageways for a purpose other than access to and egress from the property. The tribunal further noted the threat of violence towards one of the applicants' employees, some of the other tenants fearing for their safety, and the police having to be called to the property to deal with the group. Contrary to the second respondents' claim, the tribunal found that the group was clearly invited into the block by the second respondent and her partner. Given the gravity of the incident, the applicant reasonably and properly wrote to the respondents on 2 separate occasions, in a letter dated 7/3/18 and a further letter dated 25/4/18, to which the respondents provided no reply. In the circumstances, I do not find that the applicant had behaved unreasonably in starting proceedings in June 2018. Perhaps the application should have been made earlier. However, given the absence of any reply from the respondents, it was nevertheless reasonable for the application to be made, albeit in June 2018.

80. With respect to the refuse regulation, the evidence from Mr Zacharia was that the estate consists of 150 flats in total and none of the other 149 flats had complained that they did not understand the regulations, he had discussed the refuse regulations with the second respondent on three or four occasions in the last 2-3 years, he last spoke with the second respondent about the refuse regulations in June 2018, he asked her to ensure that the regulations were complied with, he had spoken with the second respondent and her partner, he told the second respondent to speak with him if she did not understand the regulations, he had provided the regulations/notice to her on various occasions, when confronted with the allegations the second respondent replied that she does what she needs to do and believes that she is doing the right thing, and the second respondent had not discussed with him the contents of the notice or raised any issues regarding any misunderstandings.

Furthermore, that he had specifically told the second respondent that refuse bags must be put outside the flat after 8pm as they are only collected after 8pm and not before and that the correct bags must be used. Mr Simpson stated that he had been living on the estate for 36 years, the regulations had always been the same, although he agreed that the written notice could have been clearer everyone else understood the notice except for the second respondent, and in any event Mr Zacharia had already verbally explained to the second respondent what was required. He further stated that the applicant did not provide a reply to the respondents' legal representatives letter dated 16/8/18 as the applicant was satisfied that the rules were clear and furthermore Mr Zacharia had a conversation with the second respondent and had explained what the regulations meant. I further note that the respondents had not specifically raised any issues concerning soiled nappies with the applicant in correspondence and had only raised this specific issue at the hearing. Given the circumstances, despite the tribunal ultimately finding that the written notice was not sufficiently clear and the notice was not in accordance with good estate management as it was too rigid and inflexible, I am satisfied that the applicant did not behave unreasonably in starting these proceedings as the notice was verbally explained to the second respondent, the second respondent was told that she was not adhering to the notice, the second respondent was given the opportunity but did not discuss with the applicant any concerns regarding the contents of the notice or raise any issues regarding any misunderstandings, the second respondent did not specifically raise any issues with the applicant concerning soiled nappies, yet she continued failing to complying with the applicants refuse regulations.

81. Given both the respondents' overall behaviour (not replying to the 2 letters raising concerns about the 24/2/18 incident and not complying with the applicants refuse regulations without explanation), the applicant was reasonably entitled to include the 3/4/18 matter in its application and to then not pursue the matter upon reflection, especially bearing in mind how insignificant it was by comparison to the 24/2/18 matter.

82. With respect to the second application concerning the breach of covenant arising from keeping a dog without consent, the respondents were clearly in breach given the subsequent admission. The criticism by the respondents, that they should have been given the opportunity to admit the breach before the applicant made its application, is unfair. Given the previous admission to a breach of covenant arising from the same facts, the previous assurance that the breach had been remedied, the failure to abide by that assurance, the failure by the respondents to reply to the 2 letters the applicant sent to the respondents concerning the very serious incident that took place on 24/2/18, it was not unreasonable for the applicant to have taken the view that there was no point in trying to engage with the respondents. In any event, the applicant did send a *draft copy* of the application on 28/9/18, informing them that the applicant would be seeking an order to have the two applications heard together, and inviting the respondents' solicitors comment. Therefore, the applicant did give the respondents an opportunity to comment before the application was issued on 1/10/18. However, the respondents only made an admission on 26/10/18. Despite the admission being made, it was not

unreasonable for the applicant to pursue the application on the basis that it was also a breach of paragraph 1 of schedule 1. Although the tribunal ultimately disagreed with the applicant, the answer was not obvious and required detailed consideration by the tribunal. In any event, I note that the respondents did not serve any evidence in relation to the second application. I therefore agree that any costs incurred in relation to this application must be de minimis.

83. The fact that the applicant had failed in its application despite any evidence from the respondents (given that there was no witness statement on behalf of the first respondent and there was no oral evidence on behalf of the second respondent and the tribunal therefore attaching very little weight to her witness statement) does not in itself suggest unreasonable conduct on the applicants part. For the reasons given in the preceding paragraphs, it was clearly reasonable to start and continue proceedings against the respondents.

84. Much has been made about Mr Simpson's oral evidence that the applicant did not intend to forfeit the lease. However, both parties agreed at the costs hearing that neither party had asked in cross examination or in re-examination at what stage the applicant had decided not to seek forfeiture of the lease, whether this was before or after the application was made, and if after the application was made then precisely when, and the reason behind this? In the absence of such evidence, the respondents have failed to demonstrate that the applicant had acted unreasonably in bringing or conducting those proceedings. In coming to my conclusion, I note that a decision to not intend to forfeit a lease does not necessarily imply that a s.168 application is unreasonable. For example, a party may wish to prove a breach whilst acknowledging that a County Court may not necessarily agree to forfeit the lease based upon that particular breach alone. However, having a decision from a tribunal may strengthen any future forfeiture applications by demonstrating a course of conduct / previous breaches and therefore strengthening any future forfeiture applications. In a case such as this, given the history and the ongoing complaints concerning the second respondent, it may not be unreasonable to start proceedings in the hope that it may result in the behaviour complained of stopping.

85. With respect to the respondents' claim that the applicant had failed to adequately set out its case, which resulted in the respondents having to waste time and incur additional costs having to seek clarification from the applicant, I find that the application clearly set out the relevant provisions of the lease and attached supporting witness statements. The applicant may not have set out its case in the way that the respondents may have preferred, but I am satisfied that the applicant had adequately set out its case. Furthermore, I note that upon receipt of the application, a tribunal judge considered the application and was satisfied that the application was sufficiently clear and in the circumstances issued Directions on 9/7/18 listing the matter for final disposal as a paper hearing. If the tribunal judge was of the view that the application was unclear, the matter would have been listed for a case management hearing.

86. Listing the matter for a one day hearing was a decision that was ultimately made by the tribunal, not by the applicant. If the respondents disagreed with the time estimate, suitable representations could and should have been made to the tribunal. The hearing in fact finished in one day. In the circumstances, it is difficult to understand how it can be argued that the applicant behaved unreasonably.

87. There is no merit in the respondents' argument that the applicant had without permission or warning filed a further statement of case which made yet further allegations and introduced further evidence thereby putting the respondents to additional expense of responding to the application a second time. The tribunal directed on 9/7/18 that the respondents serve a response by 3/8/18 and that the applicant may send a brief supplementary reply by 10/8/18. Therefore, although the reply from the applicant was seven pages in length, which may amount to more than a brief supplementary reply, it cannot reasonably be argued that this was submitted without permission. On the contrary, it is arguable that the respondents supplemental submissions, in reply to the applicants submissions dated 10/8/18, was in fact without permission or warning. Furthermore, I note that whilst the respondents claim in their reply that the applicant had introduced fresh evidence after the respondents response, the respondents do not identify any specific fresh evidence. Furthermore, I note that the respondents' supplemental submissions were very brief and barely took up two pages. I agree that the further legal points made by the respondents in their supplemental submissions could have been, and were in fact, made at the hearing. I therefore agree that the supplemental submissions were unnecessary and the respondent's choice to incur costs in filing it was a matter for them.

88. I note the claim by the respondents that on 16/8/18 they wrote to the applicant to seek to resolve matters amicably, including asking the applicant to agree reasonable regulations in respect of the refuse collection, which the applicant blankly refused. However, I note that the applicant provided its response in an email dated 17/8/18. I note that the applicant had properly raised its concern that the second respondent had "conspicuously" avoided explaining how a large group of people came to be in her apartment on 24/24/18. Furthermore, the applicant was correct in noting that the arrangements for refuse/recycling operated satisfactorily across the estate and that Mr Zacharia had spoken to the second respondent on three or four separate occasions attempting to impress upon the second respondent the importance of complying with the regulations. In the circumstances, it was reasonable for the applicant to not agree to the respondents' request for the application to be withdrawn.

89. It is correct that the applicant had raised a specific allegation in closing submissions only, that the second respondent had accepted paying guests contrary to the terms of the lease. However, I note that the application had attached supporting witness statements, one of which made reference to paying guests having stayed overnight. Therefore, the respondents should consider themselves fortunate that the applicant had failed to plead this specific point earlier. In any event, the fact that the tribunal concluded that

this allegation was not specifically pleaded did not prejudice the respondents as the tribunal agreed with the respondents that it would not be appropriate or fair to the respondents to determine whether the second respondent had accepted paying guests and whether that breached the terms of the lease. The respondents were not put to any additional expenditure. In the circumstances, it is difficult to see how that amounts to unreasonable behaviour?

90. I note that the applicant only conceded in its letter dated 8/5/19 that it did not oppose the respondents' application to prevent the applicant from recovering its costs under the lease either by way of service charge or administration charge, despite stating the contrary in its written legal submissions dated 20/3/19. However, I do not find that this amounts to evidence of unreasonable behaviour in bringing, defending or conducting the previous proceedings as the parties were not asked to make any submissions on this issue at the conclusion of the previous proceedings.

91. In any event, given the specific facts of this case, namely, the ongoing problem with the keeping of a dog without consent despite the previous assurances, the parties that have continued since the previous hearing, the first respondents director or any other officer not providing any evidence, the second respondent not attending the hearing to give any oral evidence or allowing the applicant to cross examine her, and the tribunal finding that the first respondent had allowed the second respondent to occupy the flat without any terms whatsoever and therefore not prohibiting the second respondent from doing whatever she wishes, the respondents can consider it fortunate that the applicant had made this concession as any reasonable tribunal may well have come to a different conclusion.

92. For the reasons given, I find the respondents have failed to discharge the burden of demonstrating that the applicant had behaved unreasonably in bringing or conducting those proceedings.

93. If I am wrong in concluding that the applicant had not behaved unreasonably, when considering the tribunals discretionary power at the second stage of the test identified in Willow Court, I would have concluded that the tribunal ought not to make an order for costs for the reasons set out at paragraph 91 above.

Name: Mr L Rahman **Date:** 19/6/19

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).