FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/26UG/LIS/2019/0017**
Property	**:**	**4 The Clock Tower, Goldring Way, Napsbury Park, St Albans AL2 1GF**
Applicant	**:**	**David Decio**
Respondent	**:**	**1.Hurford Salvi Carr Property Management Ltd** **2.Crest Nicholson Ltd (Eastern Division)**
Type of application	**:**	**Rule 13 costs**
Tribunal member	**:**	**Judge Wayte**
Date of decision	**:**	**20 December 2019**

DECISION

The tribunal determines that the sum of £771 is payable by the First Respondent in respect of the Applicant's costs pursuant to rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Background and application

1. This was a service charge dispute in relation to the correct percentage for the calculation of the applicant's service charges. In summary, the applicant's lease contained a provision allowing for the variation of percentages and he was notified in 2010 that his percentage would be 0.97%, allegedly based on the floor area of his apartment, a one bedroom flat.

2. In 2018, he discovered that a fellow leaseholder with a three bedroom flat was paying 1.07%. He carried out his own calculation using the correct floor area for his apartment, which produced a percentage of 0.59%. He raised the issue with the First Respondent (HSCPM) but they failed to engage with him and therefore he issued his application on 11 July 2019.

3. The directions issued on 19 August 2019 required HSCPM to provide their justification for charging 0.97% by 10 September 2019. HSCPM failed to comply with that order and, following a final order, eventually wrote to the applicant and the tribunal on 27 September 2019 indicating that the correct percentage for the property was in fact 0.9025%.

4. In the circumstances the matter proceeded to a paper determination, with both parties submitting bundles in accordance with the directions. HSCPM's bundle was received on 28 October 2019 and was accompanied by a letter which admitted that 0.59% was indeed the correct percentage, although there was a difference between the parties as to the amount of the overpayment due to be refunded.

5. The tribunal's decision dated 15 November 2019 determined that £4,910.91 (the figure finally stated by HSCPM) was due by way of a refund in respect of the service charges demanded from 1 June 2012 to 1 July 2019 inclusive. The decision was critical of HSCPM's conduct, stating at paragraph 14 that the "*tribunal considers that HSCPM have fallen well below the standard of a reasonably competent management company. They were put on notice as early as 2014 that there were errors in the floor area attributed to a number of properties, including number 4 the Clock Tower. Checking that the correct floor area has been used for the calculation of the service charge was a relatively simple matter but they failed to do so. They compounded this omission by failing to respond to the Applicant's queries since 2018 and have only admitted at the last possible moment in the proceedings that they had overcharged him by almost £5,000*."

6. The applicant had applied for the refund of his application fee of £100 which was ordered to be paid within 28 days, in making that order the tribunal stated "*Given the failure of the Respondent to engage with the issue earlier in the proceedings, despite being informed by the*

Applicant of his serious ill-health, the tribunal would also have considered making an order for costs under Rule 13(1)(b). If he so wishes, the Applicant can make an application for any costs he has incurred within 28 days of the date this decision is sent out."

7. By letter dated 29 November 2019 the applicant's representative, his mother, made an application for costs to be paid by HSCPM under Rule 13. This was sent to HSCPM for comment and they replied to the tribunal on 6 December 2019. Neither party requested a hearing. In the circumstances, no further directions have been issued and I have determined this application on the basis of the written representations.

Determination

8. The leading decision on Rule 13 costs is *Willow Court Management Company 1985 Ltd v Alexander* [2016] UKUT 0290. In paragraph 43 the Upper Tribunal made it clear that such applications should be determined summarily and the decision need not be lengthy, with the underlying dispute taken as read. There are three steps: I must first decide if HSCPM acted unreasonably. If so, whether an award of costs should be made and, finally, what amount.

9. In deciding whether a party's behaviour is unreasonable the Upper Tribunal in *Willow Court* cites with approval the judgment of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 2005. It does so at paragraph 24 of its decision in these terms:

""Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?".

10. The applicant's mother clarified that it was her illness which was terminal but that she represented her son due to his own difficulties with numbers and the fact that a professional representative would have led to prohibitive cost. The unreasonable conduct was described as the failure of HSCPM, "*the so called professionals*" to "*not even begin to comprehend the enormity of their own errors*" having "*fobbed him off with excuse after excuse*". She applied for £1,230, being time spent dealing with the dispute over the 15 months before the application and throughout, charged at £20 per hour plus postage, stationery and other minor disbursements.

11. In response, HSCPM stated that some of Ms Decios previous accusations "*have been extremely wild and misguided*". Of greater

relevance was the statement that "*I do not believe it would be fair for HSCPM to pay [*the costs*] as I point out above that the error was made by the previous manager ("Countrywide*").

12. Given the background to the case, including the fact that HSCPM were informed back in 2014 that there were errors in the floor area attributed to a number of properties, including number 4 the Clock Tower, I do consider that there is a liability on the part of HSCPM under Rule 13. In particular, their failure to check whether the correct percentage was being charged in respect of the applicant's flat fell well below the conduct of a reasonable managing agent. It is notable that they persist in blaming their predecessors to date. That said, the rule only applies to unreasonable conduct in defending or conducting the proceedings, as opposed to conduct beforehand. In the circumstances the unreasonable conduct is the failure of HSCPM to accept their error at an earlier stage in the proceedings, which directly led to the applicant being put to the additional expense of preparing for the final determination. Had the letter accepting that 0.59% was the correct percentage been sent at the outset, it is likely that the overpayment may have been agreed or at very least the applicant would have needed to be put to far less expense in preparing his case.

13. For these reasons I further determine that it is right to reflect this in an award of costs. In determining the amount of costs, I have considered what might have been incurred had HSCPM acted reasonably. HSCPM have already refunded the application fee. As stated above, costs incurred before the proceedings were issued fall outside Rule 13. The applicant's schedule does not break the costs down by date but the headings indicate the stage in proceedings when the costs were incurred and it appears to be in chronological order. In the circumstances I consider that the respondent should pay the applicant's costs for the bundles, legal advice and tribunal communications. This amounts to some 27 hours and expenses of £285.

14. The applicant has sought an hourly rate of £20. Although Ms Decio is acting as her son's representative she has not claimed to be legally qualified and, in the circumstances, I have applied the hourly rate for litigants in person of £18 set out in paragraph 17 to Practice Direction 13 on costs contained in the White Book 2019. Her time is therefore payable by HSCPM in the sum of £486.

15. In the circumstances and for each of the above reasons I make an award of costs in favour of the applicant against HSCPM of £771, to be paid within 28 days.

Name: Judge Wayte

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).