FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BB/HMF/2019/0022**
Property	**:**	**12 Marmara Apartments, 13 Western Gateway, London E16 1AJ**
Applicants	**:**	**Samuel Brown** **Jessica Williams**
Representative	**:**	**Legal Road**
Respondents	**:**	**Mohamed Khalil** **Nataly Atalla**
Representative	**:**	**DMH Stallard**
Type of Application	**:**	**Rent Repayment Order**
Tribunal	**:**	**Judge Nicol**
Date of Decision	**:**	**28th January 2020**

DECISION ON COSTS

The Tribunal rejects the Applicants' application under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and makes no further order as to costs.

Reasons

1. On 1st October 2019 the Tribunal determined that the Respondents would have to pay a Rent Repayment Order in the sum of £3,459.04 and the Applicants' application and hearing fees of £300. By letter dated 14th November 2019 (but received by the Tribunal on 18th December 2019), the Applicants have applied for an order that the Respondents also pay their costs of the proceedings of £2,885.35 under

rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

2. On 20th December 2019 the Tribunal issued directions for the determination of the Applicants' costs application. The Respondents were required to submit their statement of case in response by 17th January 2020 but it was not sent to the Tribunal until 20th January 2020.

3. The covering letter from the Respondents' solicitors apologises for submitting it late and asserts that no prejudice has been caused. However, they provided no explanation for failing to comply with the clear direction of the Tribunal. But for the accidental omission of the Tribunal's standard warning at the end of directions as to the consequences of non-compliance, the Tribunal would have been minded not to take the Respondents' statement of case into account.

4. In the event, the Tribunal has proceeded to consider the application on all the papers before it.

The relevant law

5. The relevant parts of rule 13 state:

> (1) The Tribunal may make an order in respect of costs only—
> (a) ...
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
> (ii) a residential property case; ...

6. The Upper Tribunal considered rule 13(1)(b) in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 0290 (LC). They quoted with approval the following definition from *Ridehalgh v Horsefield* [1994] Ch 205 given by Sir Thomas Bingham MR at 232E-G:

> "Unreasonable" ... 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 judgment, but it is not unreasonable.

7. The Upper Tribunal in *Willow Court* went on to say:

> 24. ... An assessment of whether behaviour is unreasonable

> requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?
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> 26. We … consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. …

The Tribunal's reasoning

8. The Applicants pointed to the following paragraphs of the Tribunal's decision which was critical of the Respondents:

- 16: When pressed by the Tribunal, he grudgingly accepted that it was his responsibility as landlord to ensure that his agents behaved properly. He had the power to supervise his agents more closely and chose not to exercise that power. It may be understandable that a landlord chooses to repose trust in their agents but this approach inevitably runs a risk that liability will arise if the agents do not do their job properly. In that case, a landlord may have a remedy against the agents but cannot use their deliberate ignorance as a shield against their own liability.
- 17: The Respondents pointed to the written tenancy agreement itself. Their name does not appear. Indeed, no landlord is mentioned at all, in possible breach of section 48 of the Landlord and Tenant Act 1987.
- 19: Neither Mr Brewin nor the Respondents appeared to appreciate how deeply unpleasant and contrary to the purposes of the Housing Act 2004 this submission was.
- 24: The Tribunal has no hesitation in rejecting this assertion. At every step, the Respondents chose to keep themselves ignorant of what was happening at their own property rather than to take simple, reasonable steps which would have allowed them to keep on top of the situation.

- 26: … the Tribunal is satisfied beyond any reasonable doubt that the Respondents committed the offence under section 72 of the Housing Act 2004 of controlling or managing an unlicensed HMO for at least the period from 17th November 2018 until 16th February 2019.
- 28: The Tribunal has a discretion not to make a rent repayment order but sees no reason why it should exercise that discretion. The Respondents' ignorance is no defence.
- 31: The Tribunal rejects this submission … There is no suggestion that the Applicants' conduct included anything relevant for these purposes.

9. The definition of "unreasonable" for the purposes of an award of costs under rule 13 sets a very high bar for the Applicants to get over. They have failed to do so. Many of the above quotes simply support the Respondents' liability to a RRO – if they carried the same weight when considering costs under rule 13, RROs would almost always be accompanied by an award of costs. This is not what rule 13 is for.

10. It is understandable why the Applicants are highly dissatisfied with the Respondents' behaviour but such behaviour is part of the reason for the RRO in the first place. The Tribunal is satisfied that the matters raised are not sufficient to regard the Respondents as having acted unreasonably in defending these proceedings within the meaning of rule 13. It is not possible to go so far as to describe their behaviour as vexatious or designed to harass the Applicants rather than advance the resolution of the case. The Respondents are guilty of negligence more than malice.

Name: NK Nicol **Date:** 28th January 2020