FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FK/HNA/2018/0005**
Property	**:**	**35 Cowley Street, Derby DE1 3SL**
Applicant	**:**	**Mr Manir Khan**
Representative	**:**	**The Smith Partnership, Solicitors**
Respondent	**:**	**Derby City Council**
Representative	**:**	**Ms F Harper, Solicitor**
Type of application	**:**	**Application for costs following a tribunal decision dated 21 January 2020 in respect of a financial penalty under section 249(a) of the Housing Act 2004**
Tribunal member	**:**	**Judge C Goodall** **Mr V Ward** **Mr R Chumley-Roberts MCIEH, JP**
Date and place of hearing	**:**	**Paper determination**
Date of decision	**:**	**7 April 2020**

DECISION ON COSTS

Background

1. In the substantive proceedings in this case, Derby City Council ("the Respondent") served an Improvement Notice under sections 11 and 12 of the Housing Act 2004 ("the Act") on Mr Manir Khan ("the Applicant"). The Respondent alleged that the Applicant had failed to comply with the Improvement Notice, and so had committed an offence under section 30 of the Act. It therefore imposed a financial penalty of £20,500 upon the Applicant. The Applicant appealed to this tribunal, his case being that he had not committed the offence, and if he failed in that defence, that the penalty imposed was excessive.

2. The tribunal found that the Applicant had committed an offence under section 30 of the Act. But we also varied the financial penalty by reducing it to £6,000, broadly because:

    a. Part of the Improvement Notice was defective;

    b. We considered that the risk of harm was not as great as the Respondent thought; and,

    c. We considered that mitigating factors were more weighty than seemed to be reflected in the Respondent's decision.

3. Because we did vary the Notice, the Applicant has now applied for an order that the Respondent pay some of its costs incurred in the substantive decision, which we are told amount in total to £20,636.60.

4. The tribunal directed that the costs issue be determined by written representations unless either party requested a hearing. Neither has done so. The tribunal has therefore considered the written representations contained in the Applicant's costs application received on 14 February 2020 and the Respondent's response dated 19 February 2020. This is our determination on the costs application.

The law on costs under Rule 13

5. The First-tier Tribunal is not a jurisdiction, unlike the courts, where the unsuccessful party is normally ordered to pay the costs of the successful party. An order for costs is exceptional and can only come about through the application of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant parts of that rule are:

    "Orders for costs, reimbursement of fees and interest on costs

    13.—(1) The Tribunal may make an order in respect of costs only—

    (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

6. In *Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC),* ("Willow Court") the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13.

7. Firstly, the Tribunal should adopt a three-stage process:

1. Consider whether the person against whom an order is sought has behaved unreasonably:

2. If so, should the Tribunal exercise its discretion to award costs;

3. If so, how much should be paid.

8. Secondly, in considering what "unreasonable" conduct comprises, the Upper Tribunal approved the following passage (from *Ridehalgh v Horsefield [1994] Ch 2015*) as encompassing "unreasonable" conduct:

"… 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 the practitioner's judgement, but it is not unreasonable."

9. The Upper Tribunal commented on the application of this passage (which they approved) in paragraphs 23 and 24 of Willow Court, as follows:

"23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in Ridehalgh on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider

interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, 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. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. 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. …"

10. In paragraph 95 of Willow Court, when discussing one specific case in the appeal, the court made some comments which appear to be of general significance concerning how Tribunals should deal with determinations of unreasonable conduct under the first stage of the three stage process, by saying:

"95 … Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis. We qualify that statement in two respects. We do not intend to draw this limitation too strictly (it may, for example, sometimes be relevant to consider a party's motive in bringing proceedings, and not just their conduct after the commencement of the proceedings) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct. Secondly, once unreasonable conduct has been established, and the threshold condition for making an order has been satisfied, we consider that it will be relevant in an appropriate case to consider the wider conduct of the respondent, including a course of conduct prior to the proceedings, when the tribunal considers how to exercise the discretion vested in it. In this case, however, the FTT inadvertently but impermissibly elided the different stages of the analysis."

The Applicant's case

11. The Applicant only asks for a "contribution" towards his costs which he says should be between 25% and 40% of his costs.

12. The Applicant's primary criticism of the conduct of the Respondent focuses on criticising the Respondent's policy on financial penalties in that:

a. The penalties it suggested were disproportionate;

b. The way it took account of mitigating and aggravating factors was "unacceptable, unfit for purpose and wrongly applied in this case" (see paragraph 82 of the decision);

c. The Respondent's policy was not strictly followed in this case as its implementation document departed from the policy (see paragraph 68 of the decision);

d. By reason of the three points above, the Respondent's conduct was unreasonable in that a reasonable authority would not have fallen into the errors identified.

13. The Applicant's second point was in relation to Schedule 2 of the Improvement Notice which the Tribunal found to be defective (see paragraph 74 of the decision). He says that failure to insert a date into that schedule was unreasonable conduct in the course of the proceedings.

The Respondent's case

14. The Respondent disputes that it should contribute to the Applicant's costs. Its main argument is that the conduct relied upon for an application for costs under Rule 13 must be conduct in bringing, defending or conducting proceedings. None of the conduct alleged to be unreasonable fell within that category.

15. Secondly, the Respondent pointed out that the Applicant's primary case in the proceedings was that the financial penalty order should be revoked as no offence had been committed. The Tribunal had rejected that argument.

16. Thirdly, the Respondent argues its conduct was not unreasonable in any event, pointing out that "unreasonable" means conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case.

Discussion and decision

17. The question for the Tribunal is whether, as stage 1 of our consideration, the conduct complained of by the Applicant falls within the category of unreasonable conduct in the bringing, defending, or conducting of proceedings. In considering the standard by which unreasonable conduct is measured, failing to achieve a successful result, or the seeking of wholly unrealistic or unachievable outcomes are not to be regarded as conduct that is unreasonable.

18. Looking at the conduct complained of by the Applicant, we take the view that none of it was strictly conduct in the proceedings. All the allegations

centred around the actions of the Respondent before this case started, so cannot be the foundation of a claim for costs.

19. Even if we are wrong on this point, because it is appropriate to consider the actions of the local authority in setting its policy on financial penalties and its actions in fixing the penalty prior to commencement of any proceedings, we still do not think the actions of the Respondent come anywhere close to falling within the definition of unreasonable behaviour. It is correct that the Tribunal disagreed with the Respondent on the amount of the financial penalty, but that is not the trigger for a costs order. All the Respondent was doing was defending the actions of its officers and elected members, which it seems to the Tribunal is an entirely reasonable approach. There is no suggestion that the Respondent, or any of its members or officers, have acted capriciously, or maliciously. Their conduct in defending the decisions taken by their officers and members seems to the Tribunal to have been entirely reasonable.

20. So far as the error in Schedule 2 of the Improvement Notice is concerned, this point was raised by the Tribunal, not by the Applicant. It cannot be unreasonable for the Respondent to have acted in a way that was not even criticised by the Applicant's own advisers.

21. We therefore determine that the Respondent did not act unreasonably in bringing, defending or conducting these proceedings. That means that the Applicant fails to establish that we should progress beyond stage 1 of our enquiry and means that we dismiss the Applicant's application for costs.

Appeal

22. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)