FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2021/0182**
Property	**:**	**65 Clearbrook Way, London E1 0SD**
Applicants	**:**	**Ms Abigail Blain, Ms Florence Gardner-Hillman and Ms Sacha Vietoris**
Representative	**:**	**Represent Law Limited**
Respondent	**:**	**Ms Kerry Prevost-Cooper**
Type of Application	**:**	**Supplemental cost application following an application for a Rent Repayment Order**
Tribunal Members	**:**	**Judge P Korn** **Mr A Fonka MSc. MCIEH CenvH**
Date of Decision	**:**	**11 April 2022**

SUPPLEMENTAL DECISION ON COSTS

Decision of the tribunal

The tribunal refuses the Applicants' cost application under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**").

The background

1. This application is supplemental to an application (the "**Main Application**") made by the Applicants for a rent repayment order. The Main Application was successful, albeit that the order was for only 50% of the amount sought.

2. The Applicants have now made a cost application pursuant to paragraph 13(1)(b) ("**Rule 13(1)(b)**") of the Tribunal Rules.

Applicants' written submissions

3. The Applicants submit that the Respondent acted unreasonably in defending the original proceedings. This submission is based on the Respondent's alleged refusal to engage in without prejudice discussions until 24 January 2022. The Applicants state that the Respondent had submitted a request for mediation on 27 September 2021 and then on 16 November 2021 the Applicants asked her whether she was willing to settle the matter to avoid further costs. No response was received from the Respondent until 24 January 2022 when she made an offer of settlement of £2,500, payable in instalments of £500 per month. This was rejected by the Applicants, and in response the Respondent stated that she was not willing to make an increased offer. In the end, the tribunal ordered that the Respondent pay the Applicants the sum of £11,386.69.

4. The Applicants argue that the hearing and costs could have been avoided had the Respondent acted reasonably. They suggest that the Respondent's statement that she was willing to engage in mediation was not made in good faith and resulted in unnecessary costs being incurred plus a day of the tribunal's time in circumstances where a significant backlog of work had built up during the Covid-19 pandemic.

Respondent's position

5. The Respondent opposes the Applicants' cost application. Whilst she acknowledges that the tribunal found in favour of the Applicants, the sum awarded was significantly lower than that which was claimed, namely a 50% reduction. She submits that the tribunal is usually a cost neutral jurisdiction and that a costs order may only be granted pursuant to Rule 13(1)(b) where an applicant can satisfy the tribunal that the respondent "has acted unreasonably in bringing, defending or

conducting the proceedings". She notes that the tribunal itself has said in its decision on the Main Application that the bar for such cost orders is relatively high.

6. The Respondent submits that cost orders in the First-tier Tribunal ("**FTT**") are rare and notes the recent decision of *Leibel v Baird CHI/29UC/HMF/2020/0035* (4 May 2021) where costs were ordered against the landlord in a claim for a rent repayment order. The FTT in that case found that the landlord *"did deliberately obfuscate matters and in signing the statement of truth on his defence dated 19th February 2021 he deliberately misled the Tribunal"*. The FTT found that the landlord's conduct in the tribunal had been deliberate, and that the landlord had *"treated the Tribunal with contempt"*. In her submission this shows the extremely high threshold and circumstances which justify such an order.

7. The Applicants in this case have invited the tribunal to make a Rule 13(1)(b) order on the basis that the Respondent has unreasonably refused to enter into settlements or made no genuine attempt to settle, but the Respondent vehemently disputes this point. First of all, having requested mediation the Respondent then re-sent her request and assumed that it had been received as she received no response from the Applicants on the subject of mediation. Therefore, the Respondent contends that the Applicants themselves did not follow through on the suggestion to mediate.

8. In addition, as noted by the Applicants, the Respondent put forward an offer of £2,500.00 on 24 January 2022. The Applicants then made a counter-offer stating they would only accept the full amount claimed together with costs of £2,800.00, which the Respondent rejected. On that basis the Respondent submits that the Applicants at no point made any genuine attempt to settle, as an offer to settle in the full amount cannot be deemed an offer at all. In any event, not accepting such offer cannot be said to have been unreasonable when the Applicants only recovered 50% of the amount sought.

The tribunal's analysis

9. Rule 13(1)(b) of the Tribunal Rules ("**Rule 13(1)(b)**") states as follows: *"The Tribunal may make an order in respect of costs … if a person has acted unreasonably in bringing, defending or conducting proceedings in … a residential property case, or … a leasehold case"*.

10. The parties' respective written submissions contain no analysis as to the proper test to apply when considering a Rule 13(1)(b) cost application. The leading case on this point is the decision of the Upper Tribunal in *Willow Court Management Ltd v Alexander [2016] UKUT 290 (LC)*. In *Willow Court*, the Upper Tribunal prescribed a sequential three-stage approach which in essence is as follows: (a) applying an

objective standard, has the person acted unreasonably? (b) if so, should an order for costs be made? and (c) if so, what should the terms of the order be?

11. The first part of the test, namely whether the person acted unreasonably, is a gateway to the second part. As to what is meant by acting "unreasonably", the Upper Tribunal in *Willow Court* followed the approach set out in *Ridehalgh v Horsfield [1994] EWCA Civ 40, [1994] Ch 205* and stated that *"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"*.

12. In *Ridehalgh*, Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. One principle which emerges from both *Ridehalgh* and *Willow Court* is that costs are not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings. Sir Thomas Bingham also said that conduct could not be described as unreasonable simply because it led to an unsuccessful result. The Upper Tribunal in *Willow Court* added that tribunals should also not be over-zealous in detecting unreasonable conduct after the event.

13. In the present case, the Applicants submit that the Respondent's refusal to engage, or delay in engaging, in without prejudice discussions itself amounted to 'acting unreasonably' for the purposes of Rule 13(1)(b). We do not accept this. Whilst *Willow Court* did not concern this particular situation and therefore did not address this question directly, there is in our view nothing in that decision or in the reasoning contained therein to indicate that the sort of non-engagement in without prejudice discussions referred to by the Applicants would amount to 'acting unreasonably' for the purposes of Rule 13(1)(b). *Willow Court* establishes a reasonably high bar for Rule 13(1)(b) cost applications, and in our view even on the Applicants' own case they have failed to demonstrate that the Respondent acted unreasonably for the purposes of Rule 13(1)(b).

14. In any event, the Respondent challenges the Applicants' narrative and there is much force in the Respondent's challenge. Having considered the parties' respective submissions, on the balance of probabilities we accept that the Respondent offered mediation and that the Applicants' own offer of settlement was not a genuine attempt to mediate as they sought to insist on the Respondent paying the full amount claimed. Furthermore, the Applicants' solicitors stated in an email which has been included by the Respondent at the beginning of Exhibit 4 to her submissions that *"the breach is proven and you are liable for £23,100"*, which clearly constituted an attempt to pressurise the Respondent into

paying the full amount but which the Applicants' solicitors should have realised was at best a misleading statement as to what the tribunal would or might decide. That same email went on strongly to imply that the Respondent would necessarily be liable to pay the Applicants' legal costs, which again at best constituted a misleading implication as to what the tribunal would or might decide.

15. We therefore do not accept that the Applicants have demonstrated that the Respondent has acted unreasonably for the purposes of Rule 13(1)(b). As the application has failed to pass the first stage of the test set out in *Willow Court*, it follows that it is unnecessary to go on to consider stages two and three. Accordingly, the Applicants' cost application under Rule 13(1)(b) is refused.

Name: Judge P. Korn **Date:** 11 April 2022

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.