FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	CHI/45UC/HIN/2022/0019
Property	**:**	Co-Operative Food Store, The Parade, Pagham, PO21 4TW
Applicant	**:**	The Scottish American Investment Company PLC
Representative	**:**	Mr W Beetson of Counsel instructed by Shepherd & Wedderburn LLP
Respondent	**:**	Arun District Council
Representative	:	Mr D Shing – Locum Solicitor
Type of application	**:**	Appeal against an Improvement Notice and charge for enforcement action Application for costs by Applicant – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
Tribunal member(s)	**:**	Mrs J Coupe FRICS Judge H Lederman Mr D Ashby FRICS
Date Hearing and venue	**:**	21 February 2023 Hybrid hearing held at Havant Justice Centre, Elmleigh Road, Havant, PO9 2AL
Date of decision	**:**	25 May 2023

DECISION

Summary of the Decision

The Tribunal dismisses the Applicant's appeal against an Improvement Notice and Charge Notice each dated 20 July 2022.

The Tribunal refuses the Applicant's application for costs under Rule 13.

The reasons for the Tribunal's decision are set out below.

REASONS

Application

1. By way of an application received by the Tribunal on 9 August 2022, the Applicant sought to appeal an Improvement Notice issued by the Respondent, Arun District Council, on 20 July 2022 requiring work to be carried out to the property. The Applicant further sought to appeal a charge for enforcement action of £406.25. Both will be referred to as "the Notice".

2. On 29 September 2022, the Tribunal issued directions setting out a timetable for the progress of the case leading to the submission of the hearing bundle by 25 November 2022 and setting down a hearing for 8 December 2022.

3. On 2 November 2022, the Applicant submitted a case management application to the Tribunal requesting a stay of proceedings for six months whilst the outcome of an application to the Valuation Office Agency ("VOA") for removal of the property from the residential council tax list was decided. The Tribunal refused the application.

4. The parties sought a review of the Tribunal's refusal to stay proceedings and, in support, provided additional information and documentation. Judge Dobson reviewed the Tribunal's decision and, on 14 November 2022, issued further directions confirming the refusal to stay proceedings.

5. On 2 December 2022, the Respondent applied to the Tribunal for an adjournment of the hearing scheduled for 8 December 2022 on the ground that the Respondent's witness was unable to attend due to immediate compassionate leave. The adjournment was granted and the hearing relisted for 21 February 2023. On 5 December 2022 the VOA informed Hill Dickinson LLP solicitors for the lessee of the property (the Cooperative Group Food Limited ("the Co-op")) that the former flat on the first floor of the property had been removed from the Council tax list with effect from 21 November 2017.

6. At the hearing on 21 February 2023 the Applicant argued for an award of costs against the Respondent under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules").

Background

7. The property, a former hotel, had been registered for council tax since 1993.

8. On 20 July 2022, the Respondent served an Improvement Notice on the Applicant in relation to the property ("the Notice").

9. On 9 August 2022, the Applicant applied to the Tribunal to appeal the Notice under Schedule 1, paragraph 10(1) Housing Act 2004 ("the Act"), stating that the Applicant considered the Notice incorrectly served on the basis that the property contained no residential accommodation.

10. On 19 October 2022, the Respondent notified the Applicant of its intention to revoke the Notice once the premises were removed from residential listing by the VOA.

11. On 5 December 2022, the Respondent was notified by the VOA that the premises would be removed from the council tax register with effect from 21 November 2017.

12. On 7 December 2022, the Respondent issued a letter to the Applicant advising of its intention to revoke the Notice and attaching a Revocation Notice.

13. On 8 December 2022, the Respondent telephoned the Applicant reiterating its decision to revoke the Notice.

14. On 8 December 2022, the Notice was revoked.

15. A hearing bundle extending to 251 electronic pages was submitted by the Applicant. References in this determination to page numbers in the bundle are indicated as [ ].

16. These reasons address in summary form the key issues raised by each application. They do not recite each and every point raised or debated. The Tribunal concentrates on those issues which, in its view, go to the heart of the application.

17. Where the Tribunal finds a particular matter as a fact, it does so on the basis that it is confident that on the available evidence that fact is established or proven on the balance of probabilities.

The Hearing

18. The hearing was held at Havant Justice Centre, with the Chairman sitting in Court One. Judge Lederman and Mr Ashby of the Tribunal joined the hearing remotely.

19. The parties attended remotely. The Applicant was represented by Mr Beetson of Counsel. Also, in attendance was Ms. L McLeod, instructing solicitor and, observing proceedings, Ms. S Martin of Olim Property Limited. The Respondent was represented by Mr Shing, in-house solicitor

for Arun District Council.

20. Prior to the start of the hearing and on the instructions of the Tribunal, the Tribunal case officer forwarded to each party a copy of a decision of the Court of Appeal in the matter of *Distinctive Care Ltd v The Commissioners for Her Majesty's Revenue and Customs* (2019) Costs LR 999 *("Distinctive Care").*

The Improvement Notice

21. It is common ground between the parties that the Improvement Notice was revoked on 8 December 2022. Following revocation of the Notice the Applicant invited the Tribunal to quash the Notice and to allow the appeal. The Respondent argued that following revocation of the Notice there was no longer a valid Notice before the Tribunal requiring determination.

Rule 13 Costs Application

22. The Applicant sought an order that the Respondent pay the costs of these proceedings under Rule 13(1)(b)(ii) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in the amount of £24,280.95, on the basis that the Respondent acted unreasonably in defending the proceedings.

23. Under Rule 13(1)(b), where a Tribunal finds that a person has acted "unreasonably in bringing, defending or conducting proceedings" the Tribunal may make an order in respect of costs.

24. The three stage test that the Tribunal applies in determining whether a costs order is warranted is that set out by the Upper Tribunal in *Willow Court Management Co (1985) Ltd v Alexander* (2016) UKUT 290 (LC) ("Willow Court").

The Applicant

25. The Applicant stated that Section 11 of the Housing Act 2004 only applies to residential premises. Residential premises being defined under Section 1(4) of the Act as a dwelling, an HMO, unoccupied HMO accommodation or any common parts of a building containing one or more flats.

26. The Applicant argued that the property upon which the Respondent served the Notice was solely commercial and, accordingly, that the Respondent had incorrectly interpreted the Act when serving the Notice.

27. Upon receipt of the Notice, the Applicant informed the Respondent that the property was occupied solely in a commercial capacity. Having received no response, the Applicant was obliged to apply to the Tribunal for determination.

28. The Applicant referred to the Respondent's witness statement of Ms. Stevens, in which Ms. Stevens described the property as a former hotel with the ground floor in commercial occupation as a convenience store since 2014. [154]

29. Furthermore, the Applicant argued that the Respondent acknowledged that the Co-Op occupied the property under a lease prohibiting residential use. It was said that were the Respondent to enforce the Notice, the Applicant would have found themselves in a position whereby complying with the Notice would have interfered with the tenant's lease.

30. The Applicant argued that the Respondent's assertion that section 11 of the Act applies to the property on the basis that it is listed with the VOA for council tax is incorrect. The Applicant argued that the listing for council tax was an obvious error and one which was subject to an ongoing appeal with the VOA. Furthermore, the Act contains no reference to the VOA nor any reference to a property's council tax status as being relevant to the question of whether Sections 11 and 12 of the Act apply to a property.

31. Accordingly, the Applicant considered there to be no reasonable basis upon which the Respondent should have issued the Notice in the first instance. Furthermore, it was said, that having erroneously issued the Notice it was incumbent on the Respondent to revoke the Notice immediately on notification of their alleged error. Instead, the Applicant argued that the Respondent chose to defend the issuing of the Notice and refused to revoke it until the VOA removed the property from residential listing, a condition for which the Applicant asserts there is no justification within the Act.

32. On the basis of such grounds the Applicant argued that the Respondent had acted unreasonably in defending proceedings and that an award of costs was thereby justified.

33. The Applicant sought recovery of costs in the sum of £24,280.95.

34. Mr Beetson sought to explain the quantum of the claim by arguing that the Applicant was entitled to instruct legal advisors of its choosing, not necessarily the cheapest or most local and that the appointment of both a solicitor and Counsel was not considered unreasonable in the circumstances. However, Mr Beetson confirmed that the Applicant was registered for VAT so the sums claimed for VAT could not be charged.

35. In response to a question concerning the approximate cost of the works required by the Notice Mr Beetson provided an estimate of £50,000. Mr Beetson was further asked whether, irrespective of the correctness or otherwise of serving the Notice, his client considered it proportionate to spend nearly half such sum incurring legal costs? Mr Beetson considered the outlay reasonable in the circumstances.

36. Turning next to the three stage test set out in Willow Court.

    i. <u>Has a party acted unreasonably?</u>
    The Applicant considered it *"quite extraordinary"* for the Respondent to serve a statutory Notice which applies solely to residential property upon commercial property and to then proceed to defend such position for four months.

    Within days of service the Respondent was notified of their *"error"*. However, due to the Respondent's unwillingness to engage, the

Applicant was obliged to apply to the Tribunal which, in turn, gave rise to these proceedings.

Further, the Notice required the Applicant to undertake extensive works to the premises to render them suitable for residential occupation in circumstances where such occupation would have breached the tenant's lease.

In summary, the Applicant argued that the service and subsequent defence of the Notice was *"not only unreasonable but mystifying and for which there is no reasonable explanation."*

ii. Should an Order for costs be made?
As a local authority, with in-house solicitors, the Applicant argued that the Respondent should be expected to understand and correctly apply the legislation. Instead, the Respondent chose to robustly defend the application and, furthermore, to seek an adjournment of the hearing set down for 8 December 2022.

The Applicant argued that it is not open to the Respondent to put the Applicant to the cost of preparing for an unnecessary and unopposed appeal and to then refuse to compensate the Applicant for the expense to which it was unjustly put.

iii. What Order should be made?
The Applicant argued that it ought to be awarded its costs of *"dealing with the Notice and the attendant, necessary application."* The Applicant has neither prolonged nor invited these proceedings and had no realistic alternative than to bring the application to revoke the Notice.

The Respondent

37. The Respondent confirmed that the Notice dated 20 July 2022 was served on the Applicant in their capacity as freeholder of the property and thereby the person deemed as having control of the property. The Notice was due to take effect on 10 August 2022, that being 21 days from service.

38. The Notice was served following an inspection of the property by the Respondent on 17 May 2022, whereupon Category 1 and 2 Hazards were identified on the upper floors which, the Respondent considered, contained residential premises.

39. The background to the inspection in May 2022 was an earlier visit to the premises on 25 April 2021 when Ms. Stevens met with the store manager operating the convenience store on the ground floor of the premises. This would have been a manager employed by the Co-op. The unchallenged evidence of Ms. Stevens in paragraph 9 of her witness statement at [155] was that she asked the manager what the intention was for the area above the shop. She was informed that "Head Office were looking to refurb the area into self-contained flats and surveyors had been out to site". She left a card and asked for estate management to contact her but no response was received.

40. The sequence of events is explained further below.

41. On 5 December 2022, the VOA removed the upper floors of the property from the residential Council Tax register and reclassified the area as commercial premises liable for business rates.

42. On 7 December 2022, the Respondent revoked the Notice and on 8 December 2022, a formal Notice of revocation was served on the Applicant with immediate effect.

43. The Respondent argued that the Applicant was aware of the Respondent's intention to revoke the Notice if the Applicant's application to the VOA for removal of part of the property from the residential Council Tax register was successful, such intention having been communicated to the Applicant on the 19 October 2022 and throughout the appeal. The Respondent argued that they acted with transparency throughout the process.

44. The Respondent issued the Notice in accordance with statute, (including its duties under sections 3, 4 and 5 of the Act), government guidance and its own policy of bringing empty residential properties back into use.

45. The Respondent referred to the residential council tax listing of the property as at the date of Notice and that the planning permission for the upper floors remained as residential. Further, the Respondent stated that the upper floors in the property had previously been used as living accommodation and remained listed as such until December 2022. Despite being utilised as storage rooms, the upper floor accommodation remained capable of residential occupation.

46. The Respondent relied upon the witness statement of Ms. Stevens who, at paragraph 3 of her statement describes the property as a former hotel converted into a convenience store on the ground floor with derelict living accommodation on the first and second floors, closed off since 2014.

47. Ms. Stevens witness statement continues that the Respondent wrote to the tenant (the Co-Op) on 4 December 2017 and again on 1 February 2018 in regard to the upper floors and that no response was received to either letter.

48. On 12 April 2018, the Respondent issued a final letter and notice under Section 16 Local Government (Miscellaneous Provisions) Act 1976 to the Co-Op, advising that if no response was received within fourteen days an inspection would follow.

49. On 15 May 2019, the Respondent wrote to the Co-Op advising them that they were paying a fifty percent surcharge on the accommodation as the upper floors had been empty for in excess of two years. No response was received.

50. On 25 April 2021, Ms. Stevens inspected the upper floors in the presence of the store manager in the circumstances described above.

51. Having telephoned the Co-Op's head office on 9 June 2021, Ms. Stevens emailed Mr M Cadwallader, area manager for the Co-op for West Sussex in regard to the upper floors. That email is at [176]. She requested progress or

updates, explicitly referred to the upper parts of the property as residential premises and the Respondent's powers of entry and access under section 239 of the Act.

52. On 9 May 2022, Ms. Stevens emailed the area manager as no response had been received to her previous communication. An inspection and access were subsequently agreed for 17 May 2022 whereupon Category 1 and 2 hazards were identified requiring remedial action.

53. On 26 May 2022 Ms. Stevens emailed Mr Cadwallader the area manager for the Co-op informing him that she had been told by the store manager that "surveyors had been out as Head Office were looking to refurbish the property into self-contained flats": see [217]. Mr Cadwallader replied saying that he had yet to establish who the surveyor was. He said this was not open to "us" because of the terms of the Lease [216-217].

54. The Respondent's position was that it acted in the belief reasonably held that under the Act it had a duty to act upon Category 1 hazards and discretionary powers for Category 2 hazards under sections 5 and 7 of the Act.

55. An Improvement Notice, the subject of this application, was subsequently issued on 20 July 2022 a copy of which is found at page [28-46]. The accompanying letter to that Notice at [28-29] was signed by Ms. Stevens. In that letter she indicated that at the time of her visit on 17 May 2022 the future habitable use of the property was unclear and that the refurbishments referred to were on the basis that the property would be used as an HMO.

56. The Co-op's area manager Mr Cadwallader emailed the Respondent on 8 June 2022 at [216-217] that the Co-Op's lease with the Applicant prohibited residential use.

57. Ms. Stevens reiterated that the Respondent was statutorily obliged to pursue the Category 1 hazards and to issue the Notice, irrespective that the Respondent argued that the upper floors were incorrectly classified as residential occupation. Ms. Steven's repeated the Respondent's position that once a property is removed from the council tax register and is no longer recognised as residential, the involvement of the Local Authority ceases.

58. Further communication with the Applicant's solicitor discussing the status of the upper floors followed.

59. Acting on the information available to them at the time and having regard to their statutory duty, the Respondent maintained that service of the Notice upon the Applicant was a valid decision. Further, that following conversations with the Applicant, they were prepared to revoke the Notice immediately on the Applicant successfully applying to the VOA for the property to be removed from the residential Council Tax register. The Respondent argued that they acted properly and reasonably throughout and that the Applicant has failed to establish any "unreasonable" behavior on their part in their defence of these proceedings.

60. Finally, the Respondent stated that they had supported both of the Applicant's applications to the Tribunal requesting a stay in proceedings.

Discussion and Decision

61. The Tribunal's powers under paragraph 15(3) of Schedule 1 of the Housing Act 2004 are to uphold, quash or vary an order.

62. It is common ground between the parties that the Notice was revoked on 8 December 2022. The Tribunal concurs with the Respondent that, following the Respondents' revocation of the Notice on 8 December 2022 and in accordance with the Upper Tribunal's decision in *John Daniel Simon v Denbigshire County Council* [2010] UKUT 488 (LC) to which the Respondent referred, there was no longer a valid Notice before the Tribunal upon which jurisdiction could be exercised.

63. The appeal against the Improvement Notice is hereby dismissed.

The Rule 13 Application

64. It is a requirement of Rule 13(1)(b) that the party against whom an order may be made must act unreasonably in defending the proceedings. The Tribunal must consider whether or not the behaviour complained of can be described as unreasonable.

65. As identified by the Applicant, the approach that the Tribunal should adopt when considering an application under Rule 13(1)(b) was set out by the Upper Tribunal in *Willow Court*.

66. At paragraph 24 of its decision in *Willow Court* the Upper Tribunal stated:

> *"An assessment of whether behaviour is unreasonable requires a value judgement 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?".*

67. The Tribunal is of the opinion that the threshold for an unreasonable costs award is a high one. The Tribunal finds, on the balance of probabilities and for reasons that follow, that the threshold of unreasonable behavior in this instance has not been met.

68. The Tribunal finds that the Respondent acted in good faith throughout. Irrespective of the merit or otherwise of the Notice, the Respondent formed an opinion from the information available, including that provided by the tenant's area manager during an inspection, and, having done so, was statutorily obliged to act on such findings. In defending the appeal, the Respondent sought and acted upon legal advice; the Respondent advised the Applicant at the earliest opportunity that the Notice would be revoked if the

Applicant successfully appealed the residential listing of the property with the VOA; the Respondent supported and actively contributed to the Applicant's two applications for a stay in Tribunal proceedings; the Respondent considered that they were acting in pursuance of their statutory duty and in accordance with their wider internal policy to bring empty residential properties back into use; and the Respondent's actions followed a logical and reasonable sequence of communication.

69. In deciding whether the behaviour complained of meets the three stage test of *Willow Court*, the Tribunal only has regard to that behaviour complained of in defending the proceedings. The Applicant's submissions in its (second) skeleton argument of 19 February 2023 seeking an order for costs are tantamount to arguing that the Respondents' decision to issue the Notice in the first place was misconceived in law and/or based upon a misunderstanding of the Lease or the role of the tenant. These submissions in substance repeated the Applicant's submissions made before the Notice was revoked when the appeal was live: see paragraphs 27-39 of the Applicant's skeleton argument of 5 December 2022. The substance of the criticism of the Respondent in defending the appeal is that it maintained its position before issue of proceedings. The Tribunal cannot regard that conduct (i.e. maintaining its decision to issue the Notice based upon the same information as previously available) as unreasonable conduct as it in effect amounts to criticism of conduct prior to the appeal.

70. The Tribunal finds that the Respondent's conduct of the appeal could not be regarded as vexatious or as designed to harass the Applicant rather than advance the resolution of the issues raised by the Notice. The Respondent clearly set out to the Applicant what action was required in order for the Notice to be revoked, such action being to rectify an alleged incorrect residential listing with the Local Authority which the Applicant had failed to identify or address earlier. The Respondent's support offered to the Applicant in their case management applications to the Tribunal also demonstrated a willingness to co-operate and assist the Applicant in these proceedings.

71. As the first stage of the tests laid out in *Willow Court* has not been met the Tribunal need not consider the following two stages. Had the Applicant persuaded the Tribunal that the Respondent's conduct in resisting the appeal was unreasonable, it would not have been minded to make an order for costs against the Respondent in the exercise of its discretion. In so finding the Tribunal takes into account the following factors.

    a. The Respondent's officers were fulfilling what they genuinely perceived to be the Respondent's statutory duties as a public authority in an area where the Respondent's published policy was to make use of empty residential accommodation against a background of shortage of such accommodation: see for example the strategy at [231-242].

    b. The Respondent engaged proactively with the Co-op and with the Applicant both before and after the issue of the appeal. The Respondent was transparent in its dealings with both.

    c. No attempt was made to pursue or investigate alternative dispute resolution.

d. The Applicant took a commercial decision to incur a level of legal costs sought which the Tribunal finds to be to be both excessive and disproportionate to the dispute illustrated by its statement of costs dated 10 February 2023. The Applicant has not drawn attention to any attempt to inform or notify the Respondent that such a level of costs would be incurred in this appeal.

72. Separately Mr Beetson failed to persuade the Tribunal that it was appropriate or proportionate for the Applicant to engage the services of legal advisors at the level claimed or that the work could not have been undertaken by specialist leasehold or housing solicitors at a lower grade and whose costs would, in all likelihood, have been considerably less than those incurred. The Applicant is entitled to engage a single firm of solicitors on its nationwide portfolio of properties and to appoint legal advisors of its choosing. However, that decision bears no relationship to the complexity or nature of the issues in this appeal. Nor does that decision come close to showing why in the exercise of the Tribunal's discretion the hourly rate of £595.00 per hour plus VAT should be visited upon a public authority exercising its statutory duties in good faith. Furthermore, the sums claimed by the Applicant significantly exceed those contained within the published Solicitors' Guideline Hourly Rates, to which the Tribunal takes account.

73. Looked at individually item by item or as a whole the Tribunal finds that the sums claimed in the Statement of Costs are excessive and disproportionate to the level and nature of the issues in the appeal and the time spent. Had the Tribunal been persuaded to make an order for cost it would have been nominal.

74. The Tribunal does not find that the Respondent's conduct was unreasonable in defending this appeal and, accordingly, the Applicant's costs application is hereby refused.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.