FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AP/HMB/2023/0002**
Property	**:**	**116 Edgecot Grove, London N15 5HH**
Applicant	**:**	**Lloyd Lee**
Representative	**:**	**Ms R Spencer of Safer Renting**
Respondent	**:**	**David Buwule**
Representative	**:**	**Not represented**
Type of Application	**:**	**Rule 13 cost application following an application for a rent repayment order**
Tribunal Member	**:**	**Judge P Korn**
Date of decision	**:**	**24 January 2024**

RULE 13 COSTS DECISION

Paper determination

This has been a determination on the papers alone. An oral hearing was not held because neither party requested an oral hearing and the tribunal considered that it was appropriate and proportionate to determine the issues on the papers alone.

Decision of the tribunal

The tribunal refuses the Respondent's 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 by the Applicant for a rent repayment order ("**the RRO Application**") under section 41 of the Housing and Planning Act 2016.

2. The basis for the RRO Application was the Applicant's claim that the Respondent had committed the criminal offences of harassment of the Applicant at, and illegal eviction of the Applicant from, the Property.

3. The RRO Application was dated 26 January 2023. It was withdrawn on 24 October 2023 with the hearing due to take place the following day. The Respondent now seeks to recover his costs in opposing the Main Application pursuant to paragraph 13(1)(b) of the Tribunal Rules.

Respondent's written submissions

4. The Respondent states that in May 2014 the Applicant agreed to sign a tenancy agreement for the Property for a fixed term of six months. There was a provision in the tenancy agreement which provided that once the fixed term had ended the tenancy would become periodic if the Applicant did not seek a new fixed term tenancy agreement.

5. The fixed term duly ended, and the tenancy agreement then continued on a periodic basis until August 2020 when the Applicant requested a renewal. The tenancy agreement was renewed on the same terms as the original fixed term tenancy agreement and again became a periodic tenancy after the initial fixed term had expired. The Applicant was given notice verbally on 1 August 2022 and in writing by text message on 11 August 2022 to vacate the property by 30 September 2022. The Applicant was aware that his tenancy did not entitle him to any protection but required him to vacate the Property as per the notice to vacate. He therefore acted unreasonably in bringing his application for a rent repayment order.

6. Around 26 October 2022, after vacating the Property on 30 September 2022, the Applicant made an application for an injunction at Edmonton County Court seeking to reinstate his tenancy and claiming that he had been wrongly evicted and harassed. That application for an injunction was dismissed by the Court on the grounds that the Applicant had vacated the Property and that a new owner had taken possession of the

Property. There was no evidence that the Applicant had been harassed and no evidence that he was entitled to an assured shorthold tenancy.

7. The statement of case and evidence contained in the RRO Application were identical to those contained in the application for an injunction, and therefore in the Respondent's submission the Applicant acted unreasonably in bringing an application in respect of the same matters as had already been addressed by the Court.

8. In addition, the RRO Application was listed on 23 June 2023 to be heard on 25 October 2023 but the Applicant did not withdraw the RRO Application until the afternoon before it was due to be heard. The Respondent contends that the Applicant knew that the RRO Application had no basis and that it was a malicious application with the sole intention of bettering his position for local authority housing assistance and getting a payout from the Respondent. The Applicant later realised that the Respondent was able and determined to defend himself and therefore he abandoned the RRO Application at the very last minute. In the Respondent's submission, such behaviour is not consistent with being a reasonable person who genuinely believed in his case. The Applicant's conduct resulted in the Respondent incurring costs that he did not need to incur, and therefore he seeks to recover them from the Applicant.

9. Furthermore, states the Respondent, the Applicant's reasons for withdrawing the RRO Application lacked any specificity, and the Applicant ought to have given an explanation, including as to why he was withdrawing at such a late stage. The Respondent also comments that the Applicant did not pay the hearing fee by the required date.

10. The Respondent notes that the Applicant sent an email on 26 October 2023 after he had withdrawn the RRO Application in which he attempted to explain his reasons for withdrawing. The Applicant claimed that the Respondent's bundle served on John-Luke Bolton of Safer Renting was not recorded on Safer Renting's case management system before Mr Bolton left that organisation, that the Respondent was notified of Mr Bolton leaving the organisation in an email on 2 June 2023 and that the error on the Applicant's part was identified after access to the archived emails of Mr Bolton which revealed that the Respondent had served documents incorrectly or to the wrong person. However, the Respondent's position is that he served his bundle on the Applicant himself, not on Mr Bolton. Furthermore, on 22 June 2023 Mr Bolton filed and served the Applicant's listing questionnaire at which time he gave notice that he was to leave Safer Renting on 30 June 2023.

Applicant's written submissions

11. On 24 March 2023, the tribunal issued directions for the progress of the RRO Application. Amongst other things, this included a requirement for the Respondent to serve his bundle by 9 June 2023, and on that date (9 June) the Respondent sent an email with a bundle attached which was copied to Mr Bolton of Safer Renting. In that same email the Respondent requested permission to serve additional documents relating to the RRO Application by 30 July 2023. In an email dated 22 June 2023, Mr Bolton notified the Respondent and the tribunal that all future correspondence in respect of the RRO Application should be addressed to Roz Spencer, also of Safer Renting.

12. On 30 June 2023 Mr Bolton left the employment of Safer Renting. The Respondent did not address any correspondence relating to the RRO Application to Roz Spencer until after she had sent an email to the tribunal on 24 October 2023 requesting that the RRO Application be withdrawn.

13. The Applicant's grounds for making the RRO Application were based on the evidence provided that he had an assured shorthold tenancy and was not a lodger. The Applicant maintains this to have been true.

14. As regards the Respondent's assertion that the Applicant's application for an injunction against the Respondent (and persons unknown) was dismissed by the Court on the basis that the Applicant had vacated the Property and a new owner had taken possession of the Property, this was true by the time the application for an injunction was heard on 7 November 2022 but it was not an established fact at the time the application for the injunction was filed on 24 October 2022. Also, the assertion that the statements of the case and evidence in respect of the application for an injunction were identical to that for the RRO Application ignores the fact that the legal basis for the injunction was not the same as that for the rent repayment order. Furthermore, the reasons for the injunction order being dismissed related to changing circumstances over time rather than whether certain facts had been established at an earlier point in time.

15. The Applicant admits that the request to withdraw the claim gave no specific reasons, but this was because the Applicant did not believe detailed reasons were required. The Applicant and Safer Renting also believed, in error, that the Respondent had not filed a bundle for defence against the application, for reasons that the Applicant accepts were Safer Renting's own but which amounted to an innocent mistake.

16. The specific reasons for the withdrawal are as follows. The RRO claim was prepared by a senior advocate at Safer Renting and filed as a bundle with the tribunal and the Respondent. That senior advocate (Mr Bolton) left the employment of Safer Renting on 30 June 2023, giving

notice of this fact to the tribunal and the Respondent on 22 June 2023 (not 2 June 2023 as previously incorrectly stated) before a date was set for the hearing. The Respondent's bundle served on Mr Bolton on 9 June 2023 was overlooked by him and not forwarded to the replacement advocate. This organisational oversight by Safer Renting was compounded by the Respondent's failure to serve further documents (as directed) on the replacement advocate, further adding to the impression that the claim was not being contested by the Respondent.

17. The Applicant does not seek to argue that the abovementioned errors or omissions themselves had any impact on Safer Renting's opinion on the merits of the claim. Rather, this background serves as an explanation for the late timing of the request to withdraw the claim and the failure to serve that request concurrently on the Respondent. The Applicant submits that it is reasonable and responsible for litigants to keep the merits of their case under ongoing review, and in this case the Applicant and his representatives did just this and concluded that the application should not proceed to a hearing.

18. The original advocate for the Applicant (Mr Bolton) was of the opinion that as the Respondent had incorrectly asserted that he did not require a court order to exclude the Applicant from the Property and had admitted to seeking to exclude him, it was safe to conclude that he was responsible for evicting the Applicant. As a result of the subsequent review by the new advocate (Ms Spencer) the Applicant accepted advice that, on a technicality, his bundle did not constitute sufficient evidence that the Respondent himself carried out the eviction and that therefore the tribunal might only hold the Respondent complicit in the eviction rather than responsible for it. The Applicant withdrew the RRO Application despite being under the, admittedly mistaken, belief that the Respondent was not contesting it. Accordingly, the Respondent's characterisation of this course of conduct is misguided.

Follow-up by Respondent

19. The Respondent counters that the defence bundle was served correctly on 9 June 2023 and that after that date there was no further need or requirement on the Respondent to serve any documents on the Applicant.

20. In the Respondent's submission the RRO Application was vexatious. It caused the Respondent unnecessary worry and it also amounted to harassment. False statements were made about the Respondent, labelling him a rogue landlord who did not follow eviction rules and cut off utility supplies to the Property. The Applicant produced no tangible evidence for his damaging statements. The Applicant did not intend to advance the resolution of the case; instead, his interest was in character assassination and extortion. Crucial evidence to support allegations of

the cutting off of utilities at the Property was absent, and the RRO Application was exaggerated and consisted of mere assertions. The Applicant also does not dispute that the Respondent incurred costs or suffered loss as a result of his conduct.

21. The evidence provided by the Applicant to prove that his tenancy agreement was an assured shorthold tenancy was incomplete, and the Respondent believes that this was intentional to avoid proper scrutiny. The Respondent also contends that if the Applicant was badly advised to withdraw his application by Safer Renting then he can bring a separate claim against them to recover his losses.

The tribunal's analysis

22. The relevant parts of Rule 13(1)(b) of the Tribunal Rules ("**Rule 13(1)(b)**") read 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 …"*.

23. As noted by the parties, the leading case on this issue is the decision of the Upper Tribunal in *Willow Court Management Ltd v Mrs Ratna 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?

24. The first part of the test, namely whether the person acted unreasonably, is a gateway to the second and third parts. 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*, albeit adding some commentary of its own, and stated (in paragraph 24) 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. 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" [in Ridehalgh]: is there a reasonable explanation for the conduct complained of?"*.

25. The Upper Tribunal in *Willow Court* (in paragraph 23) also expressly rejected the submission that *"unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous"*. Therefore, in order for conduct or behaviour to qualify as "unreasonable" under the *Willow Court* test it needs to be vexatious and/or abusive and/or

frivolous and/or designed to harass the other side and/or needs to be such that there is no reasonable explanation for it.

26. In the present case, the bases for the Respondent's cost application seem in part to be the mere fact of the Applicant having made the RRO Application at all and in part his decision (whether due to poor advice or otherwise) to withdraw the RRO Application the day before the hearing.

27. First of all it needs to be pointed out that the tribunal was not called upon to make any factual findings in respect of the RRO Application because the application was withdrawn prior to the hearing. It is also important to note that the tribunal was also given no opportunity to test the evidence by way of cross-examination or otherwise. This makes it harder for the Respondent to demonstrate unreasonableness because although there is a hearing bundle ultimately the tribunal still only has before it a series of untested assertions and counter-assertions.

28. Guidance given by the Upper Tribunal in *Marigold v Wells [2023] UKUT 33 (LC)* on the defence of reasonable excuse in the context of a rent repayment application confirms that it is a fundamental requirement for a tribunal to base any decision regarding such a defence on findings of fact. The judgment makes plain that it would be inappropriate for the tribunal to express any view on the application of the defence in circumstances where it has heard no evidence and reached no final conclusions. Whilst the present application is a costs application and not the RRO Application itself, in my view the same rationale applies with equal force here. No hearing has taken place, key factual points are contested, and the tribunal has had no opportunity to cross-examine witnesses and then to reach reasoned conclusions on the basis of properly tested evidence. A tribunal should be cautious in such circumstances, and arguably more cautious still in circumstances where the risk of a cost award might deter tenants who have been unlawfully evicted – but are not sure whether they can prove it – from seeking legal redress.

29. The evidence before me does indicate that neither the Applicant nor Safer Renting dealt with the conduct of the RRO Application in an exemplary manner. Safer Renting appears not have noticed that the Respondent served a response to the RRO Application in June 2023 and, whilst this is partially explained by a change in personnel at Safer Renting, Mr Bolton had not yet left Safer Renting when the response was served. In addition, in the context of an allegation of unreasonable conduct it is not in my view a defence for a party to say that the unreasonable conduct was that of the relevant party's professional adviser or agent.

30. As regards the decision not to withdraw the RRO Application until the day before the scheduled hearing, it is far from ideal that the Applicant

left it so late to withdraw, and no good explanation has been given as to why indeed it was withdrawn so late. Safer Renting state in their written submissions that their own organisational oversight was 'compounded' by the Respondent's failure to serve further documents on the replacement advocate, but there was no requirement on the Respondent to serve further documents and his failure to do so could not have confused Safer Renting or the Applicant since Safer Renting deny having seen the letter of 9 June 2023 which mentioned the possibility of the Respondent wishing to serve more documents.

31. The Applicant's position on late withdrawal seems to be that neither the Applicant nor Safer Renting were aware that the Respondent had served a defence, due to that defence not having been seen by and/or passed on to his successor by Mr Bolton in the time left prior to his leaving the employment of Safer Renting. As a result, the new advocate – Ms Spencer – states that she genuinely believed the RRO Application to be undefended but nevertheless on a review of the case advised the Applicant to withdraw on a technicality.

32. On the basis of the limited evidence before me, I am unable to conclude that the Applicant did receive a copy of the Respondent's bundle in June 2023. This is a contested point and there has been no opportunity to test the evidence in detail or to cross-examine the parties. For the same reason, I am unable to conclude that Ms Spencer is being untruthful when she states that the Applicant (and also Ms Spencer herself, by implication) was unaware that the RRO Application was contested, and indeed it would require weighty evidence to enable me to conclude that a legal adviser has given untruthful evidence. In that context, the lateness of the withdrawal – whilst puzzling – could in my view reasonably have been regarded by the Applicant as not being materially prejudicial to an apparently unresponsive Respondent. It also explains why no specific reasons for the withdrawal were given.

33. As regards the decision to make the RRO Application, the Respondent's assertion that this was itself unreasonable conduct rests largely on the outcome of the separate Court application for an injunction. However, the Respondent has not produced a copy of the Court's decision on the application for an injunction and there has been no detailed argument on the relationship between the two cases and no opportunity for the tribunal to test the veracity of the Respondent's suggestion that it was – or should have been – obvious to the Applicant that the RRO Application was bound to fail.

34. The Respondent also asserts that the RRO Application was a malicious application with the sole intention of bettering the Applicant's position for local authority housing assistance and getting a payout from the Respondent, but this is mere speculation unsupported by evidence.

35. I do not accept, on the evidence before me, that the Applicant's conduct was vexatious, abusive, designed to harass the other side or frivolous. The Respondent has asserted, for example, that the behaviour was vexatious, but he has not demonstrated this to be the case and has in this regard relied on assertions rather than hard evidence. And it should be emphasised that it is not vexatious or otherwise unreasonable conduct (under the *Willow Court* test) merely to make an application that has weaknesses.

36. As to whether there is a reasonable explanation for the Applicant's conduct, I accept that the position is not totally clear-cut. It is possible that the Applicant knew before making the RRO Application that the application was likely to fail. Also, the failure on Safer Renting's part to see and then deal with the Respondent's defence was poor, and it is surprising that it took until the day before the scheduled hearing for the conclusion to be reached that the RRO Application should be withdrawn. However, to treat this as unreasonable conduct for the purposes of Rule 13(1)(b) would in my view be too harsh. It remains the case that the parties' competing narratives have not been properly tested, there are policy reasons for not being overzealous in imposing cost penalties for late withdrawal, especially in the context of alleged unlawful eviction, and in addition the – not fully tested – evidence indicates that the Applicant and Safer Renting genuinely believed that the Respondent had not engaged with the proceedings.

37. I therefore do not accept that the Respondent has demonstrated that the Applicant 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 Respondent's cost application under Rule 13(1)(b) is refused.

38. As an aside, it is conceivable that if this application had been dealt with at an oral hearing the Applicant would have met the evidential test necessary under *Willow Court* to demonstrate unreasonable conduct on the part of the Respondent. However, (a) the Applicant might well still have been unsuccessful even after a full oral hearing, (b) a hearing would have involved more costs being incurred and would have involved the parties and any other witnesses or legal advisers having to attend such a hearing, (c) a hearing would have involved greater use of the tribunal's resources and (d) potentially both Mr Bolton and Ms Spencer would have needed to be summoned to attend such a hearing to be cross-examined. In the circumstances it seems doubtful that to require an oral hearing would have complied with the overriding objective of the Tribunal Rules, including the requirement to deal with cases proportionately.

Name: Judge P. Korn **Date:** 24 January 2024

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.