



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **LON/00BC/HMF/2020/0047**

HMCTS code : **P:PAPER**

Property : **Flat 2, 66 Aldborough Road South,
Ilford, Essex, IG3 8EX**

Applicants : **Gledere Kulikauskiene
Marius Kulikauskiene**

Representative : **Justice for Tenants**

Respondent : **Kimat Singh**

Representative : **Shoosmiths solicitors**

Type of application : **Application for costs under Rule 13 of
the Tribunal Procedure (First-tier
Tribunal)(Property Chamber) Rules
2013, following a decision in respect of a
Rent Repayment Order under the
Housing and Planning Act 2016.**

Tribunal members : **Judge Pittaway
Mr S Wheeler MCIEH
Mr J Francis QPM**

Date of decision : **7 April 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers. The form of remote hearing was P:PAPERREMOTE, A face-to-face hearing was not held because the tribunal considered that the application might be determined by summary assessment, pursuant to rule 13(7)(a), without a hearing, on the basis of the written submissions from the parties unless any party requested a hearing and neither party did.

In reaching its decision the tribunal had before it the respondent's application for costs (20 pages) and the applicants' response (9 pages).

The decisions made and reasons are set out below.

Decision of the tribunal

The tribunal makes no order for costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Background

- (1) The Respondent seeks an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the '**Rules**'). Rule 13(1)(b) provides that 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 ("**Rule 13**").
- (2) The costs claim arises following a decision in respect of a Rent Repayment Order under the Housing and Planning Act 2016.
- (3) The application is made within the time limits prescribed by rule 13(5).
- (4) The total costs sought are set out in two statements of costs. One is for the period 4 May 2021 to 3 August 2021 for £4,405.20 and the second statement of costs is from 3 August 2021 and is for £5,341.20.
- (5) Rule 13(6) provides that the Tribunal may not make an order for costs against a person ("the paying person") without first giving that person an opportunity to make representations.
- (6) Accordingly, by directions dated 11 January 2022, the respondent was directed to provide a statement of case to the applicants with legal submissions and full details of the costs being sought. In particular, the respondent was asked to specify why it alleged that the applicants had acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule, dealing with the issues identified in the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT

(LC) (*‘Willow’*), with particular reference to the three stages that the tribunal will need to go through before making an order under Rule 13.

- (7) The directions provided for the applicants to provide a statement in response and for the respondent to provide a statement in reply.
- (8) The directions also stated that the tribunal considered that the application may be determined by summary assessment, pursuant to rule 13(7)(a), on the basis of written submissions from the parties.

The respondent’s case

1. In his statement of case the respondent submits that the applicants had acted unreasonably in bringing and conducting an application under section 95(1) of the 2016 Act. No offence was committed under this section as the Property never required a selective licence and the applicants or their representatives should have known this. When the applicants did amend their application it was more than 14 months after the period set out in the 2016 Act during which an application could be made.
2. Further, or alternatively the respondent submits that he had raised the issue of limitation in his response of 25 May 2021 so that from that date the applicants were on actual notice that there was a limitation issue.
3. The respondent states that once L B Redbridge had provided its evidence, which they did on 3 August 2021, the applicants were on notice that no selective licence was required but they did not amend their application until 7 September 2021.
4. The respondent incurred costs from 24 March 2020 in responding to the application made under section 95(1) which would not have been incurred had the applicants made proper enquiries of the local authority. From 3 August 2021 the applicants and their representatives should have been in no doubt that the application under section 95(1) would fail, and they should have discontinued their application.
5. The respondents further submit that the applicants refused to attempt to settle the case and their conduct did not seek to resolve the case.

The applicants’ case

6. The applicants submitted that their action in bringing the application under section 95(1) had to be considered in context. L B Redbridge had told them that there was no licence, selective or otherwise, held or applied in respect of the Property as of 10 February 2020. When the applicants made their application the nature and layout of the property led them to believe that the appropriate licence required for the property was a selective licence. It was only at the hearing on 5 July 2021 that it became clear that there was confusion as to the licence required for the Property with both parties having been given conflicting information by L

B Redbridge. The applicants submit that the respondents believed they had a valid licence which had been backdated but did not provide to the applicants all the evidence available to them despite the Directions having required the respondent to provide all correspondence relating to the application for a licence and any that had now been granted. The confusion was such that the tribunal was unable to make a determination on 5 July 2021 and resulted in the tribunal requiring L B Redbridge to provide further evidence which they did, by way of a witness statement, on 3 August 2021. It was only then that it became clear that the offence was one under section 72(1), by reason of the building not complying with building regulations. The applicants submit that this was not something that the applicants were in a position to know.

7. The applicants deny that they have acted unreasonably so that their conduct falls within Rule 13 of the Rules. They submit that they did not act unreasonably in bringing proceedings under section 95(1) in the first instance. A genuine mistake was made. Even the tribunal was unclear as to the status of the property in July 2021. Once the position was clarified the applicants amended their application.
8. The issue of limitation raised by the respondents in May 2021 was with regard to a different issue, whether the council could backdate the date of the licence.
9. The applicants submit that it was not that a new application was being made, only an amendment to the alleged offence, and that it was arguable that even after twelve months had elapsed from the date of the offence the tribunal might consider that it was able to amend the offence alleged, where the correct offence was similar to the original offence alleged. It was not vexatious of the applicants to put forward this argument.
10. The applicants therefore submit that they did not act unreasonably in making the application or conducting the proceedings
11. The applicants also drew attention to the length of time between the date of their application (25 March 2020) and the date of the directions (Received in February 2021). At no time during this period did the respondent notify the applicants that the wrong offence had been alleged. This contributed to the applicants' amendment having been out-of-time.
12. The applicants referred the tribunal to the three tests set out in *Willow* and submitted that the applicants' conduct in this case did not amount to unreasonable conduct, that the tribunal did not find it within its jurisdiction to make a RRO did not mean that the applicants had been unreasonable in pursuing their claim. *Willow* makes it clear that it is not enough that a party has an unsuccessful outcome to its case. The applicants submitted that the threshold for unreasonable conduct is a high one, reserved for the clearest of cases and has not been met here.

Reasons for the tribunal's decision

13. It is clear that there was confusion as to whether the Property needed a selective licence until L B Redbridge produced its witness statement in July 2021. There was also disagreement between the parties as to whether L B Redbridge could backdate the date upon which the respondent applied for the relevant licence for the Property. The limitation issue raised by the respondent in May 2021 related to the effect of L B Redbridge purportedly backdating the date of the application for the licence. It did not relate to the ability to amend the offence alleged in the application more than twelve months after the offence had been committed, which was an issue raised at the hearing in November 2021 by the tribunal.
14. Rule 13 provides,
- 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) (iii) a leasehold case; or
- (c) in a land registration case.
15. The tests to be considered by the tribunal when considering whether a costs order should be made under Rule 13 are set out in *Willow* at Paragraphs 27 and 28 which are set are below.

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: “the Tribunal may make an order in respect of costs only ... if a person has acted unreasonably....” We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28 At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the

threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

16. On the facts of this case the tribunal does not consider that the applicants' behaviour meets the test for unreasonableness required by the first stage of the test set out in *Willow*. On the evidence before it the tribunal considers that there was a reasonable explanation for the conduct complained of, set out in the applicants' case above. The applicants believed that they were bringing the application under the correct section of the Act but were mistaken, which only became clear when L B Redbridge clarified the licence position of the building of which the Property forms part with the witness statement of L B Redbridge. When the applicants then amended their application to reflect the correct offence they considered that it was arguable that this could be done more than 12 months after the offence was committed. The tribunal did not agree with them but this does not make their conduct unreasonable, just mistaken.
17. As stated in *Willow* at paragraph 62,

'Although in some cases, the fact that a party has been unsuccessful before the Tribunal in a substantive hearing might reinforce a view that there has been unreasonable behaviour, that failure cannot be determinative on its own. The residential property division of the First-tier Tribunal is a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs....'
18. The tribunal therefore makes no order for costs, either before or after 3 August 2021.

Name: Judge Pittaway

Date: 7 April 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

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

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).