FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference **HMCTS Code**	**:**	**CAM/22 UG/HNA/2021/0034** **P: PAPER REMOTE**
Property	**:**	**24 Sittang Close, Colchester, Essex CO2 9RB**
Applicant	**:**	**Philip Sackey**
Respondent	**:**	**Colchester Borough Council**
Type of application	**:**	**Costs - rule 13(1)(a) and (b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member(s)	**:**	**Judge Wayte**
Date of decision	**:**	**7 February 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPER REMOTE. A face-to-face hearing was not held because it was not necessary and all issues could be determined in a remote hearing/on paper. Both parties made submissions in accordance with the directions and I have also had regard to the parties' bundles in the main action. The order made is as follows:

The tribunal does not make an order for costs under rule 13(1)(a) or (b) of the 2013 Rules.

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Background

1. The financial penalty which was the subject of the appeal was withdrawn by the council on 1 December 2021, prior to the hearing. That means that the evidence filed by both parties has not been tested. I have used the evidence filed by both parties to complete this section and will highlight any conflict between them.

2. The applicant stated that he had "looked after" the property at 24 Sittang Close, a two storey 4/5 bedroom house, on behalf of his cousin since 2006. The property was rented out to multiple tenants until in or about November 2017 when the applicant agreed to let the whole property to one of the occupants, David Graves, for a monthly rent of £1,200. The respondent's bundle contains the front page of a tenancy agreement between the applicant and Mr Graves dated 14 November 2017. The rent was collected by Leigh Taylor on behalf of the applicant, initially monthly but more sporadically during the pandemic due to the lockdowns.

3. Mr Graves provided a witness statement in the applicant's bundle which confirms that he initially used the property for himself and his children. His statement gave details of an inspection by the council in February 2018 as a result of complaints that the property was being used as an HMO. On that occasion the council were satisfied it was not and in any event as a two storey property, 24 Sittang Close would not have required a mandatory licence until the storey requirement was removed on 1 October 2018.

4. Mr Graves' statement continues that in October 2018 he allowed two homeless lads to stay. They did not pay rent but made a contribution towards the bills. In time he also allowed their girlfriends to stay, which took the occupation of the property up to 5 people from three households and would have therefore met the requirements for a mandatory licence under the Housing Act 2004.

5. On 29 September 2020 Mr Ward, an Environmental Health Officer employed by the respondent, started an investigation into the property as his records indicated that it was likely to have been used as an HMO since 2014. His witness statement records that David Graves was registered as the sole Council Tax payer. He visited the property on 30 October 2020 and was told by Mr Graves that 5 people lived there. Mr Graves confirmed he was the tenant but did not provide any contact details for the applicant or answer Mr Ward's question about whether his landlord knew about the number of occupants. Mr Graves subsequently provided the names of the other 4 occupants.

6. On 22 December 2020 Mr Ward rang Mr Graves to confirm the identity of Leigh Taylor. Mr Ward states that Mr Graves told him the other occupants paid rent but Mr Graves' statement confirms that "the lads chipped in with the bills". Both record that Mr Graves said two of the

occupants would be leaving in January 2021, although they were then replaced by another couple, meaning that the property was still occupied by 5 people.

7. That fact was confirmed by David Graves in a telephone call with Mr Ward on 3 February 2021 who replied that the council would be serving a Notice of Intent to issue a Civil Penalty on the owner for failure to apply for an HMO licence. Again, there was a conflict in their statements as to whether the other occupants paid rent or whether the landlord was aware of the number of occupants.

8. Mr Graves stated that he thought he would be fined and/or jeopardize his tenancy and he therefore sought advice from a lettings service. They wrote to the council on his behalf on 5 March 2021, effectively stating that Mr Graves thought he could have 4 other occupants as well as himself but would now reduce the total number to 4. Mr Ward replied on 18 March 2021 saying the council cannot take his representations into account as he was not the landlord.

9. On 7 April 2021 Mr Ward served a notice of intent on the property owner proposing a penalty of £20,000, having previously served a notice on his father by mistake. The applicant was contacted by the property owner and spoke to David Graves, when he found out about the council's previous action. In the meantime, Mr Ward had received a copy of the tenancy agreement which named the applicant as the landlord and he entered into correspondence with him.

10. On 2 June 2021 Mr Ward served a notice of intent on the applicant, with a proposed penalty of £30,000. On 29 June 2021 the applicant made representations, stating that he was unaware there were 5 people living at the property but confirming the tenancy to Mr Graves. He also confirmed that he paid half the rent to the property owner.

11. Mr Ward replied to those representations at length on 9 July 2021. In short, he confirmed that the council considered that he did know or ought to have known that the property was being used as an HMO and that as the person in receipt of the rent he was a person in control of the property and therefore liability for the penalty.

12. On 13 July 2021 the Final Notice was served on the applicant. It stated that an offence under section 72(1) of the Housing Act 2004 was committed on 3 February 2021. The amount of the penalty was £30,000, the maximum set by the 2004 Act.

13. On 11 August 2021, the appeal was received by the tribunal. Directions were given on 24 September 2021 and both parties served their bundle in accordance with those directions. The matter was listed for hearing on 10 January 2022.

14. On 1 December 2021 the council withdrew the Final Notice. The applicant replied on 2 December 2021 indicating that he wanted to

recover his reasonable costs and for the council to repay the penalty of £20,000 which had been paid by the property owner.

15. There was a short hearing on 10 January 2022 as the parties had been unable to agree terms. Directions were given for each party to make submissions in respect of the application for costs. The parties agreed that the determination would be based on those submissions and the evidence filed by both sides in respect of the appeal. At that hearing I made an order that the respondent repay the applicant's tribunal fees of £300. The council also indicated that they would be refunding the penalty paid by the property owner.

The Law

16. Under Rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal may make an order for costs only under section 29(4) of the Tribunal Courts and Enforcement Act 2007 (wasted costs) or if a person has acted unreasonably in bringing, defending or conducting proceedings (unreasonable costs).

17. The leading decision on Rule 13(1) unreasonable costs is *Willow Court Management Company 1985 Ltd v Alexander* [2016] UKUT 0290. In paragraph 43 the Upper Tribunal made it clear that such applications should be determined summarily and the decision need not be lengthy, with the underlying dispute taken as read. There are three steps: I must first decide if the applicant acted unreasonably. If so, whether an award of costs should be made and, finally, what amount.

18. In deciding whether a party's behaviour is unreasonable the Upper Tribunal in *Willow Court* cites with approval the judgment of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 2005. It does so at paragraph 24 of its decision in these terms:

""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?".

19. The applicant also claimed wasted costs under the 2007 Act. The definition of wasted costs in section 29(5) of that Act states that it means any costs incurred by a party:

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

20. The leading decision on wasted costs in the courts is also *Ridehalgh v Horsefield*. The Court of Appeal provided guidelines as to the meaning of improper, unreasonable and negligent conduct. In this case the applicant relied on negligent conduct. *Ridehalgh* stated that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

The applicant's case

21. At the hearing on 10 January 2022 and in his submissions, the applicant relied on the fact that the letter written on behalf of Mr Graves and the council's response had been deliberately disregarded by the council. He asserted that this correspondence made it clear that there was no case to answer, confirmed by the withdrawal of the Final Notice on receipt of his bundle which contained that correspondence.

22. He also submitted that as Mr Ward had not entered the property (due to covid), he had no grounds upon which to assess the appropriate fine and pointed to the discrepancy between the penalty levied on the property owner of £20,000 and his own penalty of £30,000.

23. He had previously argued that the council had failed to observe their own enforcement policy by failing to give Mr Graves clear advice as to how to ensure the property was not let as an HMO.

24. He had paid £300 to Landlords Defence for advice on his appeal and also sought 20 hours preparation at £50 per hour, copying costs and time for his personal courier of his bundles to the tribunal and the respondent, amounting to a total of £1,461.25.

The respondent's case

25. The respondent did not address the allegation of negligence in the applicant's submissions but denied unreasonable behaviour in respect of its initial defence of the appeal.

26. The respondent denied that the correspondence in relation to Mr Graves was material to its case against the applicant and in any event pointed out that this correspondence was prior to the proceedings and could therefore not comprise conduct during the course of the proceedings as required by Rule 13(1).

27. The respondent maintained it had evidence from Mr Graves that the property was being occupied as an HMO on 3 February 2021. It was also correct to conclude that the applicant met the statutory definition of a person in control of the property. The decision to withdraw the

penalty having considered the applicant's evidence was appropriate and could not be criticised in all the circumstances.

Tribunal decision and reasons

28. The allegation of wasted costs relied on the claim that Mr Ward had been negligent in issuing the penalty. The applicant did not spell out his case on that point but I have assumed that in effect he relies on the same argument for both that claim and the claim for unreasonable costs.

29. There does not seem to be any doubt that on 3 February 2021 the property was occupied by 5 persons and did not have an HMO licence. There is also no doubt that the applicant met the statutory definition for being in control of the property. The offence under section 72(1) of the 2004 Act had therefore been committed, subject to any defence of reasonable excuse. That defence was really about whether the applicant knew or ought to have known about the extent of the property's occupation. The applicant had previously admitted to the respondent that he had allowed Mr Graves to have friends stay in the property but denied its use as an HMO without a licence.

30. Although I initially thought there may be something in the council's failure to include the correspondence with Mr Graves in their evidence, I doubt it is really the "smoking gun" contended by the applicant. Mr Ward's statement set out his prior interaction with the tenant and that evidence was largely agreed, except for the differences set out above. Perhaps frustratingly, we will never know the basis on which the council decided to withdraw their notice but it was more likely to be in the light of the witness statement from Mr Graves than the missing correspondence. It is well established that the fact a party has succeeded in their case is insufficient on its own to establish a case for unreasonable or wasted costs.

31. In the circumstances and bearing in mind that the tribunal is looking for a failure to act with the competence reasonably to be expected of an Environmental Health Officer, I cannot agree that Mr Ward was negligent in the *Ridehalgh* sense to trigger a liability for wasted costs. In particular, he had sufficient evidence to issue a Final Notice against the applicant and his decision not to inspect did not really affect that decision. The penalty itself would appear to be on the high side for a licensing offence but again that is not negligence in itself.

32. I also do not consider that the failure to include the correspondence with Mr Graves in the respondent's bundle was unreasonable conduct in the *Willow Court* sense, although it was arguably in breach of the directions. As stated by the respondent, unreasonable costs can only relate to conduct in the proceedings and not beforehand, meaning that the decision to issue the penalty is outside the scope of unreasonable costs. In the circumstances, the applicant has failed to meet the first test and there is no need to go on to consider steps two and three.

33. I appreciate that the applicant must be frustrated that he has had to incur costs but I have already ordered the respondent to repay his tribunal fees and his other costs were relatively low, given his decision to represent himself.

Judge Ruth Wayte **7 February 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).