

**Housing and Property Chamber**  
First-tier Tribunal for Scotland

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**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 40 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 (“the 2017 Rules”)**

**Chamber Ref: FTS/HPC/PR/18/0155**

**Re: Property at 7 Deanfield Crescent, Bo'ness, EH51 0EU (“the Property”)**

**Parties:**

**Mr Stephen Fisher and Ms Denise Taylor, 24 Midfeild Terrace, Steelend, Dunfermline, KY12 9NA  
 (“the Applicants”)**

**Mr Robert Scotland, 70a Stewart Avenue, Bo'ness, EH51 9NW  
 (“the Respondent”)**

**McEwan Fraser Legal, Solicitors and Estate Agents, Claremont House, 130 East Claremont Street, Edinburgh, EH7 4LB  
 (“the Respondent’s Representative”)**

**Tribunal Member:**

**Susanne L. M. Tanner Q.C. (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”):**

**(1) awards expenses as taxed by the Auditor of the Court of Session against the Applicants, on the basis that the Applicants through unreasonable behaviour in the conduct of the case have put the Respondent to unnecessary or unreasonable expense, in terms of Rule 40 of the 2017 Rules; and**

**(2) the amount of the expenses awarded under Rule 40 are those required to cover the unnecessary or unreasonable expense incurred by**

the Respondent, namely: (1) the expenses of instruction of the Respondent's Representative in respect of preparation for and attendance at the second Case Management Discussion on 24 October 2018 at a fixed fee of £200; the expenses of instruction of the Respondent's Representative in respect of preparation for and attendance at the third Case Management Discussion on 28 November 2018 at a fixed fee of £120; and the expenses of instruction of the Respondent's Representative in respect of obtempering the Directions of the tribunal of 28 November 2018 to prepare written submissions and supporting material in relation to the application for expenses (fee to be intimated).

## 1. Procedural background

1.1. On 28 November 2018, the Tribunal (1) dismissed the Applicants' Application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations") and Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules") because the Applicants failed to cooperate with the tribunal to such an extent that the tribunal could not deal with the proceedings justly and fairly in terms of Rule 27(2)(b) of the 2017 Rules; and (2) reserved the questions of expenses to be determined at a future date and ordered parties by way of a Direction to submit any written representations relative to the Respondent's application for expenses by close of business on 7 December 2018. The tribunal's written decision of 28 November 2018 is referred to for its full terms.

1.2. The tribunal's decision of 28 November 2018 was sent to the Applicants by recorded delivery post.

1.3. On 29 November 2018 the tribunal issued Directions as follows:

1.3.1. the Respondent or his Representative were required to provide to the tribunal no later than close of business on 7 December 2018, any written representations the Respondent wished to make in relation to the Respondent's application for expenses against the Applicants in terms of Rule 40 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules which provides as follows:

*40(1) The First-tier Tribunal may award expenses as taxed by the Auditor of Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.*

*(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made.*

1.3.2. The Applicants were required to provide to the First-tier Tribunal for Scotland no later than close of business on 7 December 2018, any written representations the Applicants wished to make in relation to the Respondent's application for expenses against the Applicants in terms of the said Rule 40.

1.3.3. Both parties were advised that the said documentation should be lodged with the tribunal no later than close of business on 7 December 2018. The parties were notified that after that time the tribunal would take a decision in relation to the question of whether to make an award of expenses, after considering any representations submitted; and the tribunal may decide the issue on the basis of written representations alone or may fix an oral hearing on expenses, the date, time and place of which will be notified by the tribunal to parties.

1.4. On 7 December 2018, the Respondent's Representative submitted:

1.4.1. Written Representations in support of the application for expenses in terms of Rule 40;

1.4.2. His client ledger in respect of work in relation to the Respondent's case;

1.4.3. Two English authorities: (1) *Ridehalgh v Horsefield and Another* [1994] 3 WLR 462; (2) *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 LC.

1.5. On 7 December 2018, one of the Applicants, Stephen Fisher, sent an email to the tribunal's administration in the following terms *[sic]*:

*"Firstly, I apologise in delay for the reply, but the decision letter only arrived (signed for) today 7 December. I apologise for not attending the tribunal, but as stated when I contacted the court, that due to work commitments, and having no holiday to take, I was unable to attend. Also as we were unable to afford a solicitor, lawyer, we asked the court for advice on the fact that, we where continuously asked for evidence of statements of payment to Robert Scotland, which we went, and proof of payments he received and confirmed by mobile phone text message. I honestly do not know or understand what else the court required. I extremely sorry for not*

*attending and it's not my intention to waste anyones time and effort. Due to what I stated earlier about evidence, I know what to do about an appeal against the decision at all? As I was initially told when I first started this, that what we had would be more than sufficient. I feel that due to our financial burden, we were unable to afford lawyer, solicitor... I feel that Robert Scotland has mistreated us, but this is as far as I can go with. I once again apologise for delay in this reply. Regards, Stephen Fisher."*

- 1.6. The Applicants did not submit any written representations which related specifically to the Respondent's application for expenses in terms of Rule 40 or the Respondent's Representative's written submissions and supporting material.

### **1.7. Applicable Law**

- 1.7.1. Rule 40 of the 2017 Rules provides:

*"40.— Expenses*

*(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.*

*(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made."*

- 1.7.2. There are no reported Scottish authorities in relation to applications for expenses in terms of Rule 40 in the Housing and Property Chamber of the tribunal.

### **1.8. Respondent's Written Representations**

- 1.8.1. The basis of the Respondent's application for expenses is made on the basis that the Applicants have through unreasonable behaviour in the conduct of the case put the Respondent to unnecessary or unreasonable expense
- 1.8.2. In summary, the factual basis for the Application is that the Applicants failed to attend all three Case Management Discussions (CMD) on 21 May 2018, 24 October 2018 and 28 November 2018, despite having received notice of the same and failed to obtemper Directions of the tribunal to

produce specified evidence in relation to the Application and to appear at the third CMD or risk dismissal of the Application.

1.8.2.1. In relation to the first CMD on 21 May 2018, the Applicant failed to attend. His wife sent a short email on the morning of the CMD to state that he was too ill to attend. He was subsequently asked by the tribunal to provide a medical certificate which he failed to do.

1.8.2.2. The Respondent accepts that he would have been required to attend the CMD on 21 May 2018 and does not suggest that his attendance at the CMD or the instruction of legal advice and representation in relation to the same was incurred as a result of unreasonable behaviour on the part of the Applicants in the conduct of the case.

1.8.2.3. In relation to the second CMD on 24 October 2018, the Applicant made no contact with the tribunal and did not attend the CMD. At the second CMD the tribunal ordered that the Applicant attend the further CMD which was fixed and lodge evidence to deal with the issue in dispute.

1.8.2.4. In relation to the third CMD on 28 November 2018, the Applicant made no contact with the tribunal and did not attend the CMD, contrary to the Direction of the tribunal.

1.8.2.5. Additionally, it was stated that the Applicant had failed to obtemper Directions of the Tribunal to produce specified evidence in relation to the Application.

1.8.3. The Respondent's Representative submitted that the Respondent had acted reasonably in instructing a legal representative to appear on his behalf at the hearings, in anticipation that the Applicants, who had made the Application, would attend CMDs which were notified to them.

1.8.4. The Respondent's Representative submitted that an Applicant acting reasonably and responsibly would have attended all hearings set by the tribunal and would have advised all concerned if they were unable to attend. Additionally, an Applicant acting reasonably and responsibly would have obtempered Directions of the tribunal. Had the Applicants acted reasonably and properly, the Respondent would not have incurred such expenses.

1.8.5. In the circumstances, the Respondent seeks an award of expenses in terms of Rule 40 in relation to the unnecessary and unreasonable

expenses incurred. The Respondent instructed his legal representatives who agreed a fixed fee basis for preparing for and attending the CMD on 24 October and 28 November 2018 (£200 and £120, respectively). Reference was made to the client ledger, attached to the written submissions.

1.8.6. The Respondent's Representative relied on the *Ridelhaugh* and *Willow Court* authorities, referred to above, as being of assistance to the tribunal in how to approach such an application for expenses, in the absence of Scottish authorities directly in point. Reference was made to the three-part test laid down in *Ridelhaugh*. First, whether the legal representative acted improperly, unreasonably or negligently. Secondly, whether the conduct caused a party to incur unnecessary costs. Thirdly, whether it was just in all the circumstances to award compensation. Reference was also made to the test being applied in the *Willow Court* case and the fact that the court held (at H6) that the test for unreasonable conduct required the court to consider whether a reasonable person in the position of the party would have conducted themselves in the manner complained of.

1.9. As noted above, the Applicants have not lodged any written representations or supporting material in relation to the Respondent's application for expenses against the Applicants in terms of Rule 40, with the exception of the email of 7 December 2018, which did not specifically refer to the Respondent's application for expenses but has been treated for present purposes as the Applicant's only written representations submitted following the CMD and Decision of 28 November 2018 and Directions of 28 November 2018.

#### **1.10. Discussion**

1.10.1. The tribunal is satisfied that the matter of expenses can be dealt with on the basis of the oral representations of the Respondent's Representative at the third CMD on 28 November 2018 and the written representations submitted by parties on or before 7 December 2018, without the necessity of a further oral hearing, which would result in additional expenses.

1.10.2. The tribunal considered whether the Applicants have, through unreasonable behaviour in the conduct of a case, put the Respondent to unnecessary or unreasonable expense.

1.11. In so doing, the tribunal considered the procedural history of the case, including the three CMDs and the Directions issued by the tribunal.

- 1.11.1. The First Applicant made this Application to the tribunal on 19 January 2018.
- 1.11.2. On 8 February 2018 the First Applicant's Application was accepted for determination by the tribunal.
- 1.11.3. On 19 April 2018, following an earlier postponement request by the Respondent, the tribunal notified the parties a Case Management Discussion had been fixed for 21 May 2018 at 1400h in George House, 126 George Street, Edinburgh. The Respondent was invited to submit any written representations he wished by 14 May 2018.
- 1.11.4. On 25 April 2018 the Respondent submitted photographs of the Property. These were intimated to the First Applicant.
- 1.11.5. On 11 May 2018 the Respondent submitted written representations. These were intimated to the First Applicant.
- 1.11.6. Instruction of Respondent's Representative**
- 1.11.7. On 16 May 2018 the Respondent appointed the Respondent's Representative. The Respondent's Representative submitted written representations dated 14 May 2018. These were intimated to the Applicant.
- 1.11.8. First CMD - 21 May 2018; and representations from Respondent**
- 1.11.9. On the morning of the first CMD, on 21 May 2018, Ms Denise Taylor contacted the tribunal on behalf of the Applicant to advise that he was unable to attend the CMD due to illness.
- 1.11.10. The CMD took place on 21 May 2018 and reference is made to the Case Management Discussion Note of the same date which was prepared by the Legal Member and circulated to parties after the CMD. It records that the Applicant and Ms Denise Taylor contacted the tribunal on the morning of 21 May to advise that as the Applicant was ill, he was unable to attend. It also records that the Respondent contacted the tribunal on the morning of 21 May 2018 to advise that he was ill and unable to attend but he was represented by Miss Jordan from the Respondent's Representative. The tribunal adjourned the CMD to a date to be advised.
- 1.11.11. On 21 May 2018 the Respondent submitted written representations with regard to the Applicant's stated reason for being

unable to attend the CMD and provided details of the Applicant's employer. These were intimated to the Applicant.

**1.11.12. Directions to First Applicant and First Applicant's Employer and responses thereto**

1.11.13. A Direction was issued to parties following the CMD on 21 May 2018, requiring the First Applicant to provide specified information to the tribunal no later than 12 noon on 8 June 2018.

1.11.14. On 23 May 2018 the Applicant sent written representations to the tribunal about his failure to attend the CMD on 21 May 2018. These were intimated to the Respondent's Representative.

1.11.15. The tribunal issued a Direction to the Applicant's employer dated 24 May 2018 asking the employer to provide information to the tribunal no later than 15 June 2018.

1.11.16. On 1 June 2018 the First Applicant's employer confirmed that the Applicant is employed by them and that he was at work on 21 May, although he attended around half an hour to an hour late due to illness. A copy of the letter was intimated to the parties.

**1.11.17. Request for further information from First Applicant; and response thereto**

1.11.18. On 4 June 2018 the tribunal wrote to the Applicant again requesting proof of payment of the tenancy deposit to the Respondent (which had already formed part of the tribunal's Direction issued to the Applicant).

1.11.19. On 5 June 2018 the Applicant submitted screen shots of SMS messages and circled items on the bank statements which had previously been lodged by the Respondent. A copy was intimated to the Respondent's Representative.

**1.11.20. Amendment of Application to add Second Applicant**

1.11.21. Following an inquiry by the tribunal to the Applicant on 16 May 2018, the Application was amended to include the Second Applicant and on 6 June 2018 the Second Applicant gave permission to the first Applicant to act on her behalf in relation to the matter. This was intimated to the Respondent's Representative.



**1.11.22. Written Representations from Respondent**

1.11.23. On 19 June 2018 the Respondent's Representative submitted written representations in which they invited the tribunal to find that the Applicants had not produced probative evidence of payment of the deposit as ordered to do by the tribunal.

1.11.24. Parties were advised that a further CMD would be fixed and that they would be notified of the date, place and time.

**1.11.25. Notification of second CMD on 4 October 2018**

1.11.26. On 4 October 2018 the tribunal notified parties that a CMD had been fixed on 24 October 2018 which parties were required to attend. The Respondent was invited to submit any written representations to the Application by 22 October 2018.

**1.11.27. Written Representations on behalf of Respondent**

1.11.28. On 15 October 2018 the Respondent's Representative sent written representations which attached the letter from the First Applicant's employer dated 1 October 2018. These were intimated to the Applicants.

**1.11.29. Second CMD – 24 October 2018**

1.11.30. On 24 October 2018 a CMD took place and reference is made to the Notes on the CMD prepared by the Legal member, dated the same date. There was no appearance for the Applicants. The Respondent was represented by Mr Jamie Miller of the Respondent's Representative. The Applicants were ordered to produce written evidence of any payments made by them to the Respondent in August 2016 and attend at the next CMD and advised that their failure to do so could lead to dismissal of the hearing.

1.11.31. On 26 October, a copy of the CMD note was sent to parties. The copy to the Applicant was sent by recorded delivery letter. However, there is no "track and trace" evidence from Royal Mail that the letter was signed for by the recipient.

**1.11.32. Notification of third CMD**

1.11.33. On 26 October 2018 the parties were notified by letter of the date, time and place of the next CMD on 28 November 2018 at 1400h at George House, 126 George Street, Edinburgh. That was issued by the tribunal's

administration on 7 November 2018 and was signed for by the Applicants on 9 November 2018.

1.11.34. There was no contact from the Applicants to the tribunal in the period to 24 October 2018. No evidence of payment of deposit was submitted by the Applicants as ordered in the tribunal's previous Direction of 21 May 2018 and repeated in the CMD Note from 24 October 2018.

**1.11.35. Written Representations on behalf of Respondent**

1.11.36. On 8 November 2018 the Respondent's Representative submitted written representations to the tribunal and enclosed unredacted bank statements for the attention of the legal member assigned to deal with the CMD on the basis that as they contained private and sensitive information about the Respondent's income they should not be intimated to the Applicants. The Respondent's Representative also stated that as there was no date specified for the Applicants to produce written evidence of payment of the deposit, it would be unfair to the Respondent if any such evidence was simply produced at the CMD without the Respondent and his representative having the opportunity to consider them. This information was passed to a legal member of the tribunal and also to the legal member who was assigned the CMD on 28 November 2018.

**1.11.37. Third CMD – 28 November 2018**

1.11.38. There was no appearance by the Applicants and no contact with the tribunal's administration in advance of the third CMD in relation to any issue with attendance.

1.11.39. The Respondent attended accompanied by a supporter and was represented by Mr Jamie Miller from the Respondent's Representative.

1.11.40. The tribunal chair indicated that she was considering dismissal of the Application on the basis of the Notes of the previous CMD and the Direction of the tribunal dated 21 May 2018, which had not been obtempered by the Applicants. The Respondent's Representative was invited to make oral representations.

1.11.41. The Respondent's Representative invited the tribunal to dismiss the Application on the basis that the Applicants had not attended again and had not produced any evidence of payments despite being directed to do so.

1.11.42. The tribunal's decision with Statement of reasons dated 28 November 2018 is referred to for its full terms.

1.11.43. During the third CMD, the tribunal clerk checked the position with Royal Mail regarding notification of the hearing and the tribunal chair was satisfied on the basis of the information received that as the notification letter was signed for on 9 November 2018 the Applicants had notice of the date, time and place of the CMD and the fact that they were required to attend. In relation to the CMD note of 24 October 2018, the tribunal chair was not satisfied that there was proof that the letter had been signed for. It is therefore possible that the Applicants were not aware that their failure to attend the CMD and to produce the evidence which they were ordered to produce could lead to dismissal of the action. However, the tribunal had regard to the fact that there was a previous Direction issued to the Applicants ordering them to produce the same information and they had failed to do so. They also failed to appear at the CMD or make any contact with the tribunal despite the notification that they were required to attend.

1.11.44. The Applicants (or one of them) have not appeared at any of the CMDs despite being notified that their attendance is required. The reason stated for non-attendance at the first CMD appears, at best, to be incomplete given that the First Applicant attended work that day, albeit half an hour to one hour late. There is also the possibility that the First Applicant was lying to the tribunal about illness precluding him from attending the CMD.

1.11.45. In all of the circumstances as referred to in the findings in fact in the Decision, the Applicants have failed to cooperate with the First-tier tribunal to such an extent that the tribunal cannot deal with the proceedings justly and fairly. The tribunal therefore dismissed the proceedings in terms of Rule 27(2)(a) of the 2017 Rules.

1.11.46. **Respondent's application for Expenses in terms of Rule 40 of the 2017 Rules**

1.11.47. At the CMD, the Respondent's Representative made an application for expenses in terms of Rule 40 of the 2017 Rules. He made some oral submissions in support of his motion.

1.11.48. The tribunal chair indicated that for reasons of fairness she would invite written representations from the Applicants by means of a Direction which specified a time period for submission of the same; and would also allow the Respondent's Representative to submit any written representations he wished to submit within the same period.

- 1.11.49. The matter of expenses was reserved to be determined at a future date.
- 1.11.50. A Direction of 28 November 2018 ordered parties to produce written representations relative to the matter of expenses by 7 December 2018.
- 1.11.51. As noted above, only the Respondent's Representative lodged written submissions, with supporting evidence and authorities. The Applicants sent an email on 7 December 2018 which did not specifically relate to the Respondent's Application for expenses.

## **1.12. Applicants' behaviour in the conduct of the case**

- 1.12.1. Rule 40 of the 2017 Rules requires the Respondent to satisfy the tribunal that the Applicant's has through unreasonable behaviour in the conduct of a case has put the Respondent to unnecessary or unreasonable expense.
- 1.12.2. "*Unreasonable behaviour*" is not further defined in the 2017 Rules, nor are there any reported Scottish authorities on the interpretation of "*unreasonable behaviour*" for the purposes of Rule 40.
- 1.12.3. *Ridelhaugh v Horsefield 1994 Ch 205*, is an English Court of Appeal authority in respect of wasted costs orders in litigation in terms of Section 51 of the Supreme Court Act 1981. It is not directly in point with the present matter, in that it considers whether solicitors' conduct was "*improper, unreasonable or negligent*" in terms of section 51(7) of the 1981 Act. It is of assistance in the present matter in that it provides (albeit for the purposes of the application of that legislation) a definition of "*unreasonable*" as "*conduct which did not permit of a reasonable explanation.*"
- 1.12.4. *Willow Court Management Co (1985) Ltd v Alexander 2016 UKUT 290 (LC)* is an English Upper Tribunal (Lands Chamber) decision in respect of three appeals from the First-tier Tribunal in England, in respect of orders for costs made by the First-tier Tribunal in England, under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, ("2013 Rules of Procedure"), against a party for "*acting unreasonably in bringing, defending or conducting proceedings*". The Upper Tribunal applied *Ridelhaugh*, above, and gave guidance on the First-tier Tribunal's discretion in such cases to award costs due to a party's unreasonable behaviour, holding that the test for unreasonable conduct

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 is there a reasonable explanation for the conduct complained of?*” [H6]. Thereafter the Upper Tribunal proposed a three-stage systematic or sequential approach to applications, with the first stage question as whether the person has acted unreasonably. At the second stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the order should be.

1.12.5. This tribunal is not bound by the decisions in *Willow Court Management* or *Ridehalgh*, above. The statutory provisions under consideration in those English cases differ in their terms from Rule 40 in the 2017 Rules. The decisions are of assistance in that they suggest that the tribunal should decide what is meant by “unreasonable” and thereafter adopt a sequential approach to such applications (having regard to the terms of the statutory provisions).

1.13. In the present Application, the tribunal is satisfied that the Applicants have behaved unreasonably in the conduct of the case; and the tribunal is further satisfied that the Applicants have thereby caused unnecessary and unreasonable expense to the Respondent; all in terms of Rule 40 of the 2017 Rules.

1.14. In particular, the First Applicant acted unreasonably in failing to attend the first CMD on 21 May 2018 and providing (via an email from his wife on the morning of the CMD) the reason of illness, which in fact turned out to be demonstrably incomplete or false, to the extent that he attended work on the same day and he provided no reason why attendance at the tribunal would be different from attendance at work. The tribunal is of the view that a reasonable person in the position of the Applicant would not have conducted himself in the manner complained of.

1.15. The First Applicant's unreasonable behaviour in respect of the failure to attend the first CMD necessitated the fixing of a second CMD. Had the First Applicant attended the CMD on 21 May 2018 rather than choosing to attend his place of work (whether or not he was truthful about being ill), the Application could have been dealt with at the first CMD.

1.16. As a result of the Applicant's unreasonable behaviour in the conduct of the case in relation to the failure to attend the first CMD, the Respondent thereby incurred the expense of instructing his Representative to attend the second CMD on 24 October 2018, at a cost of £200.

- 1.17. The Applicants acted unreasonably in failing to attend the second CMD or make any contact with the tribunal. Directions were issued by the tribunal, which the Applicants failed to obtemper. A reasonable person in the position of the Applicants would not have conducted themselves in the manner complained of.
- 1.18. As a result of the Applicants' said failures in respect of attendance at the first two CMDs or to obtemper the Directions of the tribunal, a third CMD was fixed for 28 November 2018 and notified to parties.
- 1.19. The Applicants acted unreasonably in failing to obtemper the tribunal's Directions to produce medical information relative to the failure to attend the CMD and to provide specified evidence in support of their Application, which ultimately lead to dismissal of the Application at the third CMD on 28 November 2018. A reasonable person in the position of the Applicants would not have conducted themselves in the manner complained of.
- 1.20. The Respondent's Representative's attendance at the third CMD on 28 November 2018, at a cost of £120.00 was an unnecessary expense incurred by the Respondent as a result of the Applicants' unreasonable behaviour.
- 1.21. The tribunal also notes that in addition to the expenses of instructing legal representation for preparation for and attendance at the second and third CMDs on 24 October and 28 November 2018, the Respondent has incurred the expense of instructing his Representative further to the tribunal's directions of 28 November 2018 to prepare written submissions and supporting material in relation to the application for expenses, which the tribunal considers to be further unnecessary expenses occasioned as a result of the unreasonable behaviour of the Applicants. The amount of the invoice in respect of the above has not yet been intimated to the tribunal.
- 1.22. In reaching its decision, the tribunal has taken account of the fact that the Applicants were unrepresented throughout proceedings but does not consider that that excuses any instances of their unreasonable behaviour, as summarised above. The tribunal further notes that despite being provided with the opportunity to do so, the Applicants have chosen not to lodge any submissions in relation to the Respondent's application for expenses in terms of Rule 40.
- 1.23. The tribunal therefore awards expenses as taxed by the Auditor of the Court of Session against the Applicants, on the basis that the Applicants through unreasonable behaviour in the conduct of a case have put the Respondent to unnecessary or unreasonable expense, in terms of Rule 40 of the 2017 Rules.

1.24. In terms of Rule 40(2), the amount of the expenses awarded under Rule 40 must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made. In relation to the present proceedings, those expenses comprise: (1) the expenses of instruction of the Respondent's Representative in respect of preparation for and attendance at the second CMD on 24 October 2018 at a fixed fee of £200; (2) the expenses of instruction of the Respondent's Representative in respect of preparation for and attendance at the third CMD on 28 November 2018 at a fixed fee of £120; and (3) the expenses of instruction of the Respondent's Representative in respect of obtempering the Directions of the tribunal of 28 November 2018 in relation to preparation of written submissions and supporting material in relation to the application for expenses (fee to be advised).

## **2. Right of Appeal**

**In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

Susanne L M Tanner

11 March 2019

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Susanne L M Tanner Q.C.  
Legal Member/Chair