



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland  
(Housing and Property Chamber) under Section 16 of the Housing (Scotland)  
Act 1988**

**Chamber Ref: FTS/HPC/CV/18/1908**

**Re: Property at 62 Springbells Road, Annan, Dumfriesshire, DG12 6LG (“the  
Property”)**

**Parties:**

**Mr Allan Johnstone, Mrs Tracey Johnstone, Mill Hill Farm, Gretna,  
Dumfriesshire, DG16 5HZ (“the Applicants”)**

**Mr Andrzej Kosciuk, Mrs Natalie Jesiolowska, Clarence Cottage, Toppinghead,  
Kirkpatrick Fleming, Lockerbie, DG11 3BE (“the Respondents”)**

**Tribunal Members:**

**Melanie Barbour (Legal Member) and Ahsan Khan (Ordinary 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 Respondents, on the basis that the Respondents through  
unreasonable behaviour in the conduct of the case has put the  
Applicants to unnecessary and 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  
Applicant’s in relation to (i) the work involved to ascertain who housing  
benefit was paid to, when it was paid and over what period for the  
property; and arranging to have a witness from the local authority attend  
the hearing on the 4 March 2019 and arranging to have that witness  
stand down; and (ii) the work involved to demonstrate that no loan for  
£10,000 had been given by the Applicants to the Respondents.**

## Procedural Background

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 70 of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Rules”) seeking an order for payment of the sum of £12,800 in relation to rent arrears.
2. Both parties were legally represented throughout the proceedings. The Applicants’ representative, Mr Hann, from Messrs Hann & Co. The Respondents’ agent Ms Raymond, from Messrs JHS Law.
3. The Respondent’s representative wrote seeking a postponement, advising that his firm had recently been instructed and asking for time to investigate the Respondents position having regard inter alia, to the first Respondent having been employed by the Applicants; that the Respondents had received and repaid two loans to the Applicants; that on occasion invoices issued by the Respondents to the Applicants had been offset against rent arrears; and that local housing allowance (housing benefit) had been paid directly to the Applicants.
4. The Applicants objected to the postponement request advising that they accepted that the First Respondent had carried out work for the Applicants, however those sums had been settled and this was a separate matter to the rent account; the Applicants denied having received payments of housing benefit; and the Applicants accepted that they had loaned £2000 but not £10,000.
5. The application was first heard at a case management discussion on 19 November 2018. At the case management discussion the Respondents position was:
  - 5.1. The Applicants had engaged the first named Respondent to carry out work on their behalf and invoices had been rendered, which the Respondents said they had expected to be off set against the rent; it was the Respondents position that the sums due for those works should have been applied to the

rent account in terms of the alleged agreement between the parties and could therefore impact on the sums due;

5.2. The Applicants had received housing benefit directly, which should have been applied to the rent account; the Respondents representative advised that he would have to undertake further investigations with the local authority to determine what payments of housing benefit had been made and to whom. The Applicants representative produced an email he had recently received from the local authority confirming payments of housing benefit were paid directly to the Respondents. He confirmed that he would lodge the email.

5.3. The Applicants loaned the Respondents money totalling £12,000 and applied payments (which were intended as rent) to interest applied arbitrarily to the loan sums. The Respondents representative advised that he required time to investigate and clarify what sums had been intended as rent in respect of this ground. The Applicants advised that that the loan of £2000 had been repaid.

6. The Respondents were directed by the tribunal to submit full details of the payments they alleged had been made, together with vouching in the form of invoices or statements from the local authority, by 10 December 2018.
7. The Respondents first List of Documents with accompanying documents were submitted to the tribunal by letter from JHS Law on 7 December 2018.
8. The case was continued to a further case management discussion on 15 January 2019. The Respondents confirmed that they were continuing to defend the application, disputing the following issues:-
  - 8.1. That certain works had been carried out by the first Respondent for the Applicants, and invoices produced by them should have been off-set against rent due to the Applicants.
  - 8.2. Whether further housing benefit payments had been made to the Respondents which had been paid over to the Applicants in respect of rent due.
  - 8.3. Whether cash payments had been made by the Respondents to the Applicants in respect of rent due.

9. The tribunal directed parties to,
  - 9.1. The Respondents to lodge written confirmation of all housing benefit payments made by the local authority to the Respondents during the course of the tenancy.
  - 9.2. The Respondents to lodge a copy of the full text message conversation between the parties, which includes the text message lodged by the Applicant in which the second Respondent says "I only know that the debt is £12,800."
  - 9.3. Both parties to lodge any further documents that they intend to rely on at the hearing by way of a numbered inventory
  - 9.4. Both parties to lodge any witness lists
  - 9.5. Both parties to lodge any further written submissions that they wish to rely on
  
10. The Respondents' second set of documents was submitted by letter dated 8 February 2019.
  
11. The Applicants' final documents list was submitted by email on 25 February 2019, their List of Documents numbered 1-78.
  
12. The application proceeded to a hearing on 4 March 2019.
  
13. At the outset of the hearing a number of preliminary matters were raised as follows:
  - 13.1. The Applicants confirmed that they wished to amend the sum they claimed to £12,450.00.
  - 13.2. The Respondents confirmed that they were still disputing that any of this sum was due and owing by them.
  - 13.3. Case management discussion Note of 19 November 2018 Point 1, the Respondents confirmed that they had carried out work for the Applicants; and this work to be offset against rent due.
  - 13.4. Case management discussion Note of 19 November 2018 Point 2, The Respondents accepted that housing benefit had been paid direct to them for the property, during the periods and for the amount set out in the Applicants' Documents 67 and 68.

- 13.5. Case management discussion Note of 19 November 2018 Point 3, The Respondents confirmed that the only loan which had been made by the Applicants to the Respondents was a loan of £2000. The reference to the other loan of £10000 referred to was no longer the position of the Respondents.
- 13.6. The Applicants noted that the latest position of the Respondents was that any work done in lieu of rent had not been invoiced. They noted that this was a change from the Respondents earlier position, that invoices submitted were to be offset against rent due. The Respondents confirmed that their defence was that they had carried out work to a number of properties owned by the Applicants and this was carried out in lieu of rental payments and without any invoices being submitted to the Applicants.
- 13.7. Case Management Discussion Note of 15 January 2019 Point 1, the Respondents confirmed that this remained an issue of dispute under deletion of the words "*and invoices produced*".
- 13.8. Case Management Discussion Note of 15 January 2019 Point 2 the Respondents were no longer disputing this issue regarding housing benefits payments being made to them.
- 13.9. Case Management Discussion Note of 15 January 2019 Point 3 was still disputed, i.e. that cash payments had been made by the Respondents to the Applicants in respect of rent due and this would be addressed in evidence.
- 13.10. Further preliminary points were then addressed:-
- 13.11. The tribunal requested confirmation of the total amount of housing benefit paid to the Respondents during the period when the rent arrears were said to have accrued namely March 2014 – July 2016. Parties agreed that during the period when rent was claimed to be due from March 2014 – July 2016 housing benefit totalling £11,078.45 had been paid for the property; that there was alleged outstanding rent due which was not covered by any housing benefit payments totalling £1,371.55.
- 13.12. The tribunal sought the parties' position on whether the tribunal had jurisdiction to deal with application, if it were accepted that housing benefit had been paid during the period when the rent arrears arose; did the

Respondents counter claim not sit within the jurisdiction of the sheriff court, as a payment action under a contract for works.

13.13. The Respondents accepted the issue of jurisdiction which had been raised; and moved to adjourn the hearing to allow a payment action to be raised in the sheriff court, submitting that while this matter appeared out with the jurisdiction of the tribunal, the sheriff court proceedings may have a bearing on the outcome of those proceedings before the tribunal.

13.14. The Applicants opposed the motion to adjourn, submitting the application had been on-going for some time; the questions posed in the counter claim could be dealt with separately through the court action, rent due should be dealt with separately. If the tribunal were minded to grant the adjournment they asked the tribunal to note the following points, that the issue of housing benefit has been live throughout these proceedings and discussed at both CMDs; they had cited a housing benefit officer to attend today's hearing and had only stood her down on Friday, after receiving confirmation from the Respondents that they were no longer disputing this issue; they had been put to unnecessary and unreasonable expense by the Respondents; and they considered it inconceivable that the Respondents would not have been aware that they were in receipt of housing benefit for such a long time and for such a large sum of money; they referred to the previous issue of the loan of £10,000 which was later dropped as a ground of argument; the allegation of interest being applied to the rent account; they submitted that there needed to be an equitable approach to this matter and the approach of the Respondents was unreasonable and they invited the tribunal to award expenses in their favour.

13.15. The Respondents opposed the motion for expenses on the basis that it would be prejudicial to award them at this stage of the proceedings. Further those expenses were the exception and not the rule. They submitted that there has been confusion between the financial relationships between the parties which is convoluted, they were living in one property and renovating lots of other properties owned by the Applicants and it was a complex case. There was no rent book, and it was not easy to trace payments and there was some confusion.

13.16. The Applicants confirmed that they were seeking an order for all sums due.

13.17. The tribunal adjourned the hearing until 10 May 2019 to allow the Respondent to raise proceedings in the sheriff court to seek to recover any unpaid invoices due to them from the Applicants.

14. At the hearing on 10 May 2019 the Applicants' agent submitted that :

14.1. All works done by the Respondents for the Applicants had been paid for and he submitted that these works were out with the jurisdiction of the Housing and Property Chamber. He considered that as the Respondents had been receiving housing benefit they were therefore personally barred from defending these proceedings. He submitted that there was sufficient information and agreed facts before the Tribunal for an order to be made without the requirement for any evidence to be led. He submitted that parties were agreed that housing benefit had been paid; parties were agreed it had not been paid to the Applicants; it was agreed that the Respondents had occupied the Property and rent was due for the Property.

14.2. He noted that there was a difference in the amount of rent arrears claimed against the total housing benefit paid to the Respondents. He advised that the Applicants were prepared to accept an order in relation to the reduced sum equating to the housing benefit paid of £11,078.45.

14.3. He submitted that if the hearing were to proceed today then clarification required to be provided by the Respondents in relation to what work is alleged to cover the outstanding rent due in relation to the balance. He submitted that the Respondents should not be able to lead evidence for sums which are not due for the period when housing benefit was being paid.

14.4. He also submitted that there had been no fair notice in relation to case management discussion Note 2 point 3, and whether there had been cash payments made by the Respondents to the Applicants.

15. The Respondents' agent submitted that the hearing should be postponed.

15.1. She advised that the Respondents were not disputing that the housing benefit had been paid to them;

- 15.2. they also accepted that the housing benefit was not paid to the Applicants;
- 15.3. They were not putting forward another defence in respect of the rent arrears sought against the housing benefit paid.
- 15.4. They had not provided notice of any payments made to the Applicants during the period when housing benefit had been paid.
- 15.5. However given the connection between the works carried out by the Respondents and their intention to raise an action in the sheriff court the hearing should be postponed to allow that case to proceed.

16. The tribunal found that,

- 16.1. There was no dispute that rent payments were due.
- 16.2. There was also no dispute that housing benefit had been paid to the Respondents.
- 16.3. It was not disputed that the housing benefit had not been paid to the Applicants.
- 16.4. What remained in dispute before this tribunal was whether there were arrears of rent (not covered by housing benefit) and had these rent arrears been paid by the Respondents working for the Applicants.

17. The Tribunal made no finding as to what work was carried out by the Respondents for the Applicants and what arrangements were in place for any work done. As Housing Benefit had been paid for rent in respect of the Property (covering the period now claimed by the Applicant), the Tribunal considered that any works done by the Respondents on behalf for the Applicants could not have been in respect of that rent for that period. This position was accepted by the Respondents.

- 17.1. Had the Applicants still been seeking the larger sum of rent arrears, then evidence would have had to have been led regarding the "*work done in lieu of rent*", however as they had restricted the sum they were seeking to only that due for the period when housing benefit was being paid; and as there was no disagreement between parties on the those facts, then the Tribunal agreed that it did not require to hear evidence as there was no



dispute on those issues. There was no notice by the Respondent of any other payment being made towards rent (Case Management Discussion Note of 15 January 2019 Point 3).

18. The Applicants moved for expenses to be awarded against the Respondents on the day of the hearing. The tribunal agreed that the parties could have time to prepare and submit written representations in respect of a claim for expenses. The Applicant had until 31 May 2019 to make a claim for expense. The Respondent had until 21 June 2019 to respond to any claim made by the Applicant.

#### Written Submission on Expenses

19. The Applicants submitted a written claim for expenses on 22 May 2019.

20. The Respondents did not submit any response to the Applicants' claim for expenses.

21. The Applicants' agent submitted that the Respondents conduct was unreasonable in relation to the way they had conducted proceedings, reference is made to the terms of the Applicants' agent's letter of 22 May 2019 setting out in detail their reason for seeking expenses.

22. The letter included that :-

- *The Respondents have acted unreasonably in the way they have conducted these proceedings by alleging at the case management hearing on 19 November inter alia: That the Applicant has engaged the first Respondent to carry you work on their behalf and invoices had been rendered which the said Respondent had expected to be offset against the rent; Housing benefit was paid directly to the Applicants; and that the Applicants had loaned monies from the Respondents in the sum of £12,000 and applied payments which were intended as rent to interest applied arbitrarily to the loan sums.*

- *Reference was made to the case management note for a summary of the grounds of defence.*
- *They noted that grounds of defence 1(b) and (c) were eventually abandoned. In respect of the defence set out in 1(a) this was subsequently amended at the Hearing on 4<sup>th</sup> March by deleting the words “invoices had been rendered” from the ground of defence.*
- *With regards to the original ground of defence 1(a) the Applicants were put to the expense of a substantial paper exercise in respect of marrying up invoices rendered against the Applicant’s bank statements. The exercise took many hours and eventually the Applicant’s agents were able to account for all of the 60 invoices rendered against bank statements of the Applicants. They make reference to the list of documents for the Applicants numbers 2-60.*
- *Turning to ground of defence 1(b) they submitted that the Respondents would have known that the defence had no basis of truth given the substantial sum involved (£11,078.45) and the duration that housing benefit was paid to them direct. They submitted that it was inconceivable that they did not know who was receiving housing benefit in the circumstances. They referred to the Respondents documents, number 8, bank statements showing two entries dated 2 August 2015 and September 2015 appearing to show housing benefit being paid. They submitted that the Applicants were therefore put to the added expense of having to correspond with the housing benefit section to seek confirmation of who received the housing benefit payments.*
- *The Applicants submitted that the third ground of defence set out in 1(c) which the Respondents eventually admitted to being untrue and conceded that there was no loan of £10,000.*

- *The Respondents acted unreasonably in their conduct at the case management discussion on 15 January 2019, as they submitted a further ground of defence, namely that cash payments had been made by the Respondents in respect of rent due; and by continuing to advance the defence of offset against rendered invoices*
- *With regard to the defence of cash payments being made the Applicants submitted that this ground was abandoned by the Respondents.*
- *They submitted that the Respondents continued to advance the defence of offset, notwithstanding production of vouching from the Applicants confirming payment of all invoices rendered.*
- *They submitted that the Respondents acted unreasonably in waiting until 1 March 2019 to advise the Applicant's agents that they would not be advancing the defence that housing benefit was paid directly to the Applicants. The Applicants had been put to the expense of arranging for a witness from the housing benefit section of Dumfries and Galloway Council to attend the forthcoming tribunal hearing.*
- *They referred to the Respondents, the outset of the tribunal hearing, advising of a new defence, that works had been carried out that had not been invoiced and that they had carried out these works in lieu of rent.*
- *They submitted that on 4 March 2019 the Respondents accepted that there was no loan and the reference to loan was no longer the position of the Respondents.*
- *The Respondents accepted that housing benefit has been paid to them directly.*
- *The Respondents made false statements during these proceedings including that housing benefit had been paid direct to the Applicants, loans and interest being applied to the rent account, invoices rendered and off-*

*set with rent, cash payment etc. these claims made by the Respondents were false and wholly without merit; the Respondents grounds of defence shifted continually throughout proceedings, which appeared to coincide with vouching being produced by the Applicants to the contrary. All three of the original grounds were dropped by the Respondents before conclusion of the case. Each ground of defence was clearly stated. It is inconceivable their agent had acted without proper instructions given his experience as a lawyer, or he had somehow misunderstood their position over the course of not just one hearing but three.*

- *The ultimate defence of work for rent incriminated the first Respondent. Effectively they allege that that the first Respondent was admitting benefit fraud. It is a well preserved principle of law that you should not benefit from a dishonest act. The defence is tantamount to criminal conduct on the part of the Respondents.*
- *The housing benefit defence to the claim and the allegation that the Applicants received the housing benefit had no reasonable prospects of success and the pursuit of such defence was unreasonable given the Respondents knew or ought to have known that they had no prospects of success on this point. It appears that the Respondents were trying to “hoodwink” the tribunal at the expense of the Applicants. Their conduct in this regard was wholly improper to make such false averment.*
- *The Respondents made spurious claims. To then instruct their agent to advance was wholly unreasonable.*
- *The Applicants referred to Lady Smith in Nicolson Highlandwear Ltd v Nicolson [2010] IRLR 859 at para 21 that the authorities “demonstrate, an employment tribunal can be expected to conclude that there has been unreasonableness on the part of a party where he/she is shown to have been dishonest in relation to his/her claim and then to exercise its discretion so as to make an award of expenses in favour of the other party.” They submit that this line of reasoning applies equally to*

*Respondents who are dishonest in relation to their defences: the tribunal's costs jurisdiction is a two-way street and applies equally to Applicants and Respondents.*

- *Invoices rendered and off set for rent. Argument no prospects of success and unreasonable conduct. The Respondents contend this point. The production of vouching by the Applicants confirming payment of all invoices appears to have caused the Respondents to make a change of tack by changing their position to – no invoices were rendered.*
- *They suggest that there was no reasonable prospect of their first position succeeding in light of the vouching produced by the Applicants.*
- *The Applicants also submit that the Respondents knew or ought to know that their defence had no reasonable prospects of success. It was accordingly unreasonable for them to persist with their initial stated defences in this regard.*
- *Exercise of discretion. They highlight that Nicolson is authority for the proposition that where there is dishonest conduct that the tribunal ought to exercise its discretion in favour of making an award of expenses.*
- *The Applicants respectfully request that the tribunal to exercise its discretion by awarding expenses on a party/party basis. Or award an amount to reflect an award at that level.*

#### Application of Rule 40

23. Rule 40 Expenses provides that,

*(1) The first tier tribunal may award expenses as taxed by the Auditor of the Court of Session against a 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.*

24. The procedural conduct of the case is set out in the beginning of this decision.

The submission by the Applicants is thereafter narrated. There was no submission by the Respondents in response to the Applicant's written claim for expenses, the tribunal has had regard to the submission made by the Respondents' agent at the hearing on 4 March 2019.

25. Rule 40 is permissive and not mandatory.

26. It appeared to the tribunal that there had been a long and complicated history between the parties, which was more than merely a relationship of landlord and tenant. It extended to one involving a contract(s) of work over a number of years; and a relationship involving the loan of money and its repayment. It may also have extended to the purchase of equipment by the Respondents and retention of it by the Applicants; and the preparation by the second Applicant of invoices for works done by the first Respondent for the Applicants and third parties. The Applicants do not dispute that they instructed the Respondents to undertake work for them, however what they did dispute was the amount of work instructed, and what was and what not paid was. The rent arrears had arisen over a number of years from March 2014 to July 2017 with apparently no or little effort by the Applicants to recover those arrears as they were accruing. The invoices submitted however show the Applicants continued to regularly instruct the Respondents to carry out work for them over that 2 and half year period.

27. At the commencement of the hearing on 4 March 2019 the issue of jurisdiction was raised, given that housing benefit was accepted to have been paid to the Respondents. As noted by the Applicants the Respondents had been represented by experienced solicitors, and therefore had received the benefit of independent legal advice on this application and their proposed defence. It

appeared to the tribunal that the Respondents and their legal advisor had not considered beforehand the jurisdictional issues arising from their defence; and that they considered that the issues of contract for works, invoices issued and not issued, cash paid, rent paid, loans provided and repaid, and the lease of the property to all be interlinked and closely related to one another. The tribunal considers that it was for that reason, and not some nefarious attempt to commit a benefit fraud or otherwise mislead the tribunal, that the defence had proceeded in the way it had. Had jurisdiction surrounding civil matters arising from the assured tenancy between the parties not transferred to the First Tier Tribunal, then it is possible that any action raised in the Sheriff Court would have considered all the various issues which were before the tribunal on 4 March 2019.

28. The tribunal considers it of relevance to consider the case of *Parker v Inkersall Investments Ltd (2-19 SLT (Sh Ct) 41)* where that action was dismissed by Sheriff Jamieson on the ground that it had been raised in the wrong forum. The sheriff went on however to add a postscript regarding the First Tier Tribunal's civil jurisdiction. He noted there was nothing in the wording of the legislation in section 16 of the Housing (Scotland) Act 2014 which restricted the transfer of the sheriff's jurisdiction to the tribunal in respect of any matter arising from assured tenancies; its civil jurisdiction may well extend to any remedy within the sheriff's jurisdiction, provided the action of civil proceedings arises from a relevant tenancy. Sheriff Jamieson went on to consider a more cautious interpretation might be to limit the transferred jurisdiction to contractual duties arising from the tenancy itself. He provided examples of matters which he did not consider would have been in Parliament's contemplation when the powers transferred to the First Tier Tribunal. The relevant point in respect of the present case is that the issue of jurisdiction is not altogether black and white and may require consideration in some cases. The tribunal considers that this was one such case where the question of jurisdiction was complicated given the various issues arising between the parties.

29. In the present case, the tribunal considers that there were issues not within the jurisdiction of this tribunal, however, we did not believe that the jurisdictional

issues were necessarily immediately apparent to the Respondents or their representatives. We consider that the issues raised by the Respondents were closely related to one another, and they believed they could all have been dealt with under one application. The First Tier Tribunal's jurisdiction over these cases is relatively new and there will be cases where a number of different legal rights and issues overlap. We did not therefore find that the Respondents behaviour in the conduct of the case was unreasonable in this regard. For that reason the tribunal does not find that there should be any award of expenses in relation to the Respondent's general defence of the Application however there are some specific issues that there should be an award of expenses for.

30. In relation to the defence that invoices were rendered and they should be used to off-set rent we do not award expenses. While this defence would have involved the Applicant's doing an accounting, we note the invoices lodged were paid on the same day that they were raised. It would therefore be relatively straightforward to match the invoices to the payments made. In addition the Respondents claimed that the invoices were prepared by the second Applicant and if this is so, we consider that the accounting would have been all the more straightforward. While the Applicants' demonstrated that they have bank account statements showing payments for the invoices, we do not consider that the Respondents conduct was unreasonable given the multi-faceted relationship history between the parties set out above and the fact that it had not occurred to the Respondents that there was a jurisdictional issue to consider.

31. The issue of work done without invoices to be of set against rent, we do not award expenses for the same reason as set out in the preceding paragraph. Further, we consider that there was fair notice of this defence, having regard to the Respondents' first set of Documents, as we noted that it raised this defence (see Documents 4-7). They were intimated to the tribunal and other party by letter dated 7 December 2018. We note the Applicants' Document 1 (schedule) responds to this issue. This issue was then further dealt with by the Respondents lodging further documents including photographs of the properties they alleged they worked on by letter dated 8 February 2019.



32. Having regard to the issue of housing benefit. The question of it having been paid directly to the Respondents, the period when it had been paid, and the sum which had been paid should have been clear to the Respondents, even if not known to their agent. Had the Respondents provided this information as directed to do so at the first and second case management discussions, then the Applicants would not have had to obtain that information themselves, and further make efforts to have a witness from the Council attend the hearing in March 2019. We consider that the Respondents behaviour to have been unreasonable on this issue, and therefore award expenses to the Applicants for the work involved in contacting the local authority to ascertain if housing benefit was paid, who it was paid to and over what period. We would also award expenses to the Applicants in relation to the work involved in arranging to have a witness from the local authority attend the hearing on the 4 March 2019 and subsequently arrange to have that witness stand down.

33. We consider that the behaviour of the Respondents in proposing that a loan of £10,000 was a defence to be unreasonable, as this loan does not appear to have been substantiated to any degree by the Respondents, and was insisted upon until the hearing was due to commence on 4 March 2019. In so far as the Applicants had to take steps to demonstrate that no loan for £10000 had been given by them, they are entitled to the expenses for that expenditure.

34. The defence that cash payments had been made by the Respondents to the Applicants. At the second hearing on 10 May 2019, the Respondents agent advised that the Respondents were not putting forward any defence in relation to the period when housing benefit had been paid. This defence had been intimated by them at the case management discussion on 14 January 2019 and further, at the commencement of the hearing in March 2019. No notice was given as to value of the payments which the Respondents alleged had been made. While the Applicants may have been put to some work in addressing this matter, for the reasons outlined above regarding the complicated relationship between the parties and the fact that the Respondents in our opinion thought that all matters could be considered by the tribunal, we did not find that their conduct was so unreasonable that there should be an award of expenses under this heading.

35. To the extent as set out above in paragraphs 32 and 33 the tribunal is satisfied that the Respondents have behaved unreasonably in the conduct of the case in terms of Rule 40 of the 2017 Rules.

36. The tribunal is exercising its discretion to award expenses to the Applicants in terms of Rule 40 of the 2017 Rules as taxed by the auditor of the Court of Session, on the basis that the Respondents through their unreasonable behaviour in the conduct of the case has put the Applicants to unnecessary or unreasonable expense incurred by the Respondents; and in terms of Rule 40 (2) to cover the unnecessary or unreasonable expense incurred by the Applicant's in relation to (i) the work involved to ascertain who housing benefit was paid to, when it was paid and over what period for the property; and arranging to have a witness from the local authority attend the hearing on the 4 March 2019 and arranging to have that witness stand down; and (ii) the work involved to demonstrate that no loan for £10,000 had been given by the Applicants to the Respondents.

### **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.**

**M Barbour**

**6 August 2019**

**Legal Member/Chair**

**Date**