FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FY/HNA/2019/0021 & 0022**
Properties	**:**	**First Floor Flat and Top Floor Flat at 2 Alberta Terrace, Nottingham NG7 6JA**
Applicant	**:**	**Bright Estate Agents Limited**
Representative	**:**	**Bright Legal**
Respondent	**:**	**Nottingham City Council**
Representative	**:**	**Solicitor to the Council**
Type of application	**:**	**Application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member	**:**	**Judge C Goodall**
Date and place of hearing	**:**	**None – determined on written representations**
Date of decision	**:**	**14 November 2019**

DECISION ON AN APPLICATION FOR COSTS

Background

1. The Applicant is the freehold owner and landlord of two residential flats at 2 Alberta Terrace, Nottingham NG7 6JA ("the Properties"). On 18 July 2019, the Respondent served separate notices for each flat ("the Notices") on the Applicant imposing a financial penalty under section 249A of the Housing Act 2004 ("the Act"). The allegation in each Notice was that the Applicant had failed to licence the flat under section 85 of the Act, which is an offence under section 95(1) of the Act. Notice of intent to serve the Notices had been given to the Applicant by letter dated 13 June 2019.

2. The Applicant appealed against the Notices on the standard form, those appeal forms being dated 2 August 2019.

3. Directions on how the Tribunal would deal with the appeals were issued, dated 12 August 2019. The Respondent was directed to provide its written case and evidence in support of the Notices by 2 September 2019. The Tribunal arranged a hearing date for 14 November 2019.

4. On 30 August 2019, the Respondent withdrew the Notices in writing and wrote to the Tribunal to confirm its action, requesting confirmation that the proceedings in respect of the Notices had now ceased.

5. The Tribunal has determined that the substantive appeals are effectively withdrawn, but by letter dated 16 September 2019, the Applicant applied for an order for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal((Property Chamber) Rules 2013. The costs claimed total £2,720.00.

6. Directions to deal with the costs application dated 17 September 2019 were issued. Written statements of case were required from each party. The application was to be dealt with on written representations unless either party requested an oral hearing. Neither has done so.

7. The Applicant did not provide any additional representations. It's case for a costs order is set out in a letter to the Tribunal dated 16 September 2019, which principally drew attention to the content of a letter sent to the Respondent dated 29 July 2019. It also relied upon its original grounds for appeal against the Notices.

8. The Respondent's case on the costs application is set out in a submission dated 4 November 2019 from Connie Green, Solicitor for the Respondent.

9. This decision is the Tribunal's determination on the Applicant's costs application.

The Law relating to licensing and financial penalties

10. Section 249A of the Act gives local authorities a power to issue financial penalty notices if they are satisfied, beyond reasonable doubt, that a relevant housing offence has been committed. A failure to apply for a licence in an area of selective licensing is a relevant housing offence.

11. Schedule 13A of the Act governs the procedure relating to financial penalty notices. There is a two-stage process. The first stage is to serve notice of intent to impose a financial penalty. Paragraphs 1 and 2 provide:

> "1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").
>
> 2(1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.
>
> 2(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—
>
> (a) at any time when the conduct is continuing, or
>
> (b) within the period of 6 months beginning with the last day on which the conduct occurs.
>
> 2(3) For the purposes of this paragraph a person's conduct includes a failure to act."

12. Paragraphs 3 and 4 of Schedule 13A set out the content of the notices of intent, including a right to make representations. These provisions are not relevant in this case.

13. Paragraph 5 provides that the local authority must decide whether to issue a final notice after the end of the consultation period, and if they decide to do so, paragraphs 6 – 8 make provision for the content of that notice. Again, those provisions are not relevant to this case

14. Paragraph 9 of Schedule 13 A provides:

> "(1) A local housing authority may at any time—
>
> (a) withdraw a notice of intent or final notice, or
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> (b) reduce the amount specified in a notice of intent or final notice.
>
> (2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given."

The Applicant's case

15. In its letter of 29 July 2019, the Applicant's solicitor challenged the validity of the Notices on the basis that the notice of intent to serve the Notices (dated 13 June 2019) had been out of time. Their case was that the date on which the Respondent had notice of the conduct to which the penalty notices related was 27 November 2018 (presumably this being the date of receipt of the Respondent's letter dated 26 November 2018 – see below). Because notices of intent have to be served within 6 months of this date (see the six-month rule in paragraph 2(1) of Schedule 13A above), they say that the notices of intent were out of time when served on 13 June 2019. They say (in their letter of 16 September 2019) that therefore the Notices themselves were invalid. The Applicant's case is that issuing invalid Notices is an unreasonable act in the bringing or conduct of proceedings for which costs should be awarded under Rule 13.

16. On the timing of their client's application for a licence, the Applicant's case appears to be that they accept there was a requirement to apply for a licence. They explain that the Applicant was notified of this requirement by the Respondent in a letter dated 26 November 2018 in which the Applicant was given 10 days to apply. This letter was not supplied to the Tribunal. They say that a failed attempt to submit a licence application was made on 27 November 2018, but the failure was due to "issues with the Respondent's on-line portal". The Applicant appears to accept that a compliant application for a licence was not submitted until 11 March 2019, but attributes some delay to the provision of incorrect information by the Respondent.

17. In paragraph 3 of its Grounds of Appeal, the Applicant concedes that there was a period when the Properties were let unlicensed but says that the period of breach was less than 8 weeks, and it is disproportionate to issue financial penalty notices for this length of time. The Tribunal does not have the date of commencement of any tenancies at the Properties, but the Applicant's solicitors letter refers to their client providing copies of the tenancy agreements to the Respondent on 27 November 2018.

The Respondent's case

18. On the timing of the issue of the notices of intent, the Respondent relies upon paragraph 2(2) of Schedule 13A, alleging that there was a continuing failure to apply for a licence until 7 January 2019, this being the date when an application for a licence was received by the Respondent, though it had to be returned (the reason is not given). Though the Respondent agrees that a fully compliant licence was not received until 11 March 2019, it has not sought to penalise the Applicant beyond the date of receipt of the 7 January 2019 application. The Respondent's case is therefore that the date by which it had to serve notice of intent was six months from 7 January 2019.

19. The Respondent gives the reason for withdrawing the Notices as emanating from a full review of the case when the Applicant's grounds of appeal were received, which led to a decision not to pursue financial penalties. It does not concede that the Notices were invalid. It says that on review, it reached a decision that it was not minded to defend the case, so it exercised its statutory right to withdraw the Notices.

20. The Respondent is critical of the failure of the Applicant to establish the necessity to licence the Properties prior to granting tenancies, pointing out that had the Applicant fulfilled its responsibilities in the first place, the incurring of costs would have been avoided altogether.

The law on Rule 13

21. The First-tier Tribunal is not a jurisdiction, unlike the courts, where the unsuccessful party is normally ordered to pay the costs of the successful party. An order for costs is exceptional and can only come about through the application of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant parts of that rule are:

> "Orders for costs, reimbursement of fees and interest on costs
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> 13.—(1) The Tribunal may make an order in respect of costs only—
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> (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
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> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
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> (i) an agricultural land and drainage case,
>
> (ii) a residential property case, or
>
> (iii) a leasehold case; or
>
> (c) in a land registration case.

22. In *Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC),* ("Willow Court") the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13.

23. Firstly, the Tribunal should adopt a three-stage process:

i. Consider whether the person against whom an order is sought has behaved unreasonably:

ii. If so, should the Tribunal exercise its discretion to award costs;

iii. If so, how much should be paid.

24. Secondly, in considering what "unreasonable" conduct comprises, the Upper Tribunal approved the following passage (from *Ridehalgh v Horsefield [1994] Ch 2015*) as encompassing "unreasonable" conduct:

> "… conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on the practitioner's judgement, but it is not unreasonable."

Discussion and determination

25. This costs application turns on whether the original notices of intention (which have not been supplied, but which the Tribunal finds were dated 13 June 2019) were served within time. If not, there would be a strong argument for determining that the Respondent's decision to proceed to issue the Notices was invalid, and it would be difficult to resist the conclusion that the issuing of invalid Notices was an unreasonable step in the bringing or conducting of the proceedings.

26. However, my determination is that the notices of intention were within time. I find that on the basis of the Applicant's admissions, there was an obligation upon the Applicant to have applied for a licence from at best 10 days after the 27 November 2018, but there was a continuing failure to do so until at least 7 January 2019. This window in which there would have been a prima facie case for finding that an offence had been committed is generous to the Applicant as it is possible that the tenancies were granted before 27 November 2018, and of course it is common ground that a valid application for a licence was not in fact received until 11 March 2019.

27. I consider that failure to apply for a licence continued up until at least 7 January 2019, and that paragraph 2(2)(b) of Schedule 13A therefore applies so that the Respondent's obligation to serve notices of intent was to do so within 6 months of 7 January 2019 (i.e. by 6 July 2019). It was therefore within time in serving the notices of intent on 13 June 2019.

28. On that basis I cannot agree that it was unreasonable for the Respondent to serve the Notices themselves. The Act, it seems to me, provides a local authority with a statutory power to impose financial penalties where the provisions of section 249A apply, and it is not unreasonable for them to exercise a statutory power. They also have a statutory power to withdraw the Notices.

29. There is therefore no basis upon which I can find that the first-stage test of Willow Court has been met. There is no basis on which I can order that the

Respondent should pay the Applicant's costs and I therefore dismiss the application.

Appeal

30. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)