FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AH/HMK/2020/0021**
HMCTS	**:**	**P: PAPERREMOTE**
Property	**:**	**49 Russell Hill Road, Croydon, CR8 2XB**
Applicants	**:**	**1. Katarzyna Kaszowska;** **2. Sebastian Dirycz;** **3. Dermot Welsh;** **4. Rosie Maliper;** **5. Marco Cavalcanti;** **6. Lucy Enriquez;** **7. Carmen Sylvia Reyes;** **8. Diego Iudicissa;** **9. William Massey** **10. Evermercy Kusure**
Representative	**:**	**George Penny (Flat Justice)**
Respondents	**:**	**Dominic White**
Representative for Second Respondent	**:**	**Laura Phillips (Counsel) instructed Greenwoods GRM LLP**
Type of Application	**:**	**Costs – Rule 13(1)(b)**
Tribunal Member	**:**	**Judge Robert Latham** **Antony Parkinson MRICS**
Venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**7 May 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was P:PAPER REMOTE. The Directions provided for the application to be determined on the papers unless any party requested a hearing. No party has requested a hearing. The tribunal has had regard to the documents specified in paragraph 3 of this decision.

Decision

The Tribunal does not make an order for costs against the Respondent pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Background

1. On 24 June 2020, the ten Applicants issued their application each seeking Rent Repayment Orders ("RROs") under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") against Mr Joost van Gestel and Mr Dominic White. In Section 4 of their application, they stated that their landlord was Camelot which had entered into liquidation in November 2019. The application was therefore brought against the directors which they asserted was allowed by section 251 of the Housing Act 2004 ("the 2004 Act"). In Section 9 of their application, they stated that they relied on offences under section 72(1) (control or management of an unlicenced HMO) and 95(1) (control or management of an unlicenced house) of the 2004 Act.

2. The Applicants were represented by Mr George Perry, from Flat Justice, a Community Interest Company. It is not known whether he is legally qualified. Flat Justice are experienced in this type of application. At the commencement of the hearing, Mr Perry applied to discontinue the case against Mr van Gestel. This application was opposed by Ms Laura Phillips (Counsel) who appeared for the Respondent. The Tribunal acceded to this application.

3. In our determination, dated 22 February 2021, we noted that the application raised a range a number of interesting and difficult issues which we were required to determine. We identified six such issues. We considered that the application had been well prepared and well presented by both sides. We recorded our gratitude to both advocates "who had provided invaluable assistance on the range of difficult issues which we were required to address", ensuring that the hearing was completed within one day which had been allocated. We were satisfied that all the witnesses, who included a number of the Applicants, had done their best to assist the Tribunal. We discussed the six issues which had been raised. We dismissed the application, because we concluded that we had no jurisdiction to make

a RRO against Mr White, who was a director of the landlord company. On 23 March, we granted the Applicant permission to appeal being satisfied that the appeal raised a point of principle of general importance.

4. On 11 March 2021, the Respondent applied for an order for costs on the indemnity basis in the sum of £35,700 under Rule 13(1)(b) of Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). On 23 March, the Tribunal gave Directions, pursuant to which: (i) the Applicant has filed their Statement of Case; and (ii) The Respondent has filed a Reply.

The Law

5. Rule 13 of the Tribunal Rules provides in so far as is relevant to this application (emphasis added):

> 13.Orders for costs, reimbursement of fees and interest on costs
>
> (1) The Tribunal may make an order in respect of costs only—
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in
>
> .....
>
> (ii) a residential property case;

6. In *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC)), the Upper Tribunal ("UT") gave guidance on how First-tier Tribunals ("FTTs") should apply this rule. The UT consisted of the Deputy President of the UT and the President of the FTT. It is a decision to which any party seeking a penal costs order under Rule 13 must have careful regard in framing any application for costs. The UT set out a three-stage test: Has the person acted unreasonable applying an objective standard? If unreasonable conduct is found, should an order for costs be made or not? If so, what should the terms of the order be? The UT gave detailed guidance on what constitutes unreasonable behaviour (emphasis added):

> 22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in *Ridehalgh v Horsefield* [1994] Ch 205. We therefore restrict ourselves to mentioning *Cancino v Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and

Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). Cancino provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.

23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in Ridehalgh on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that 10 unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in Ridehalgh at 232E, despite the slightly different context. "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?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of

> proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship.

The Tribunal's Determination

7. The Tribunal is satisfied that this is not a case for any award of costs under Rule 13(1)(b). The UT set out a three-stage test:

> (i) Has the person acted unreasonably applying an objective standard?
>
> (ii) If unreasonable conduct is found, should an order for costs be made or not?
>
> (iii) If so, what should the terms of the order be?

The Tribunal is satisfied that this application fails at the first hurdle.

8. The Respondent contends that the application was brought for an improper motive namely "by a desire, and part of an organised strategy, to put pressure on the respondent". Their desired outcome was that Watchtower, of which the Respondent was also a director, should relinquish its interest in the property and that Croydon should rather licence it to a Housing Co-op of which the Applicants are members:

> "the true reason the applicants made claim against Mr White was to place pressure on him personally, through the stress inconvenience and financial burden of litigation, to act in his capacity as a Director of Watchtower to cease Watchtower's involvement with the property"

9. The Respondent further contends that the Applicants were aware that their claim was, at best, highly speculative and unlikely to succeed. There had never been any dispute between the parties that the property falls within the statutory definition of an HMO required to be licensed under section of the 2004 Act. It is also stated that the applicants had accepted that Camelot had approached Croydon to apply for an HMO licence and

had been told that the property was exempt from the licensing regime, because Croydon could not issue a licence to itself, but that both Camelot and Croydon Council continued to treat the property as if it were an HMO, including through Council HMO inspections.

10. The Tribunal notes that this is not how the Respondent had framed their response in their Statement of Case for the substantive application:

> "2.1 The property 49 Russell Hill Croydon was and is exempt from the HMO licensing regime
>
> 2.2 Camelot had not committed an offence; nor had it been convicted of an offence relating to the property 49 Russell Hill Croydon
>
> 2.3 Section 251 of the Housing Act 2004 cannot be engaged since there is no evidence that Camelot had committed an offence; and no evidence was been presented to show that an offence had been committed by Camelot with the consent, connivance or attributable to any neglect on the part of the Second Respondent."

11. In our determination, we found that there had been a duty on Camelot to licence the property. The onus was on the Respondent to establish that Camelot had had a reasonable excuse for not having licenced it.

12. At the heart of this application was the issue as to whether a RRO can be made against a director of a landlord company. The Applicants contended, on the advice of Flat Justice, that it was so arguable. Mr Penny argued, with conviction, that it was possible to do so. His argument was supported by a Skeleton Argument and a number of authorities. Section 251 of the 2004 Act provides for offences by bodies corporate. It does not create a new offence, but rather allows proceedings under section 72(1) to be brought against directors personally for actions by corporate bodies under their control. Mr Penny argued that a tenant should be able to cast their net widely in order to secure an effective remedy against a rogue landlord. In this case, Camelot was put into liquidation and the property was transferred to Watchtower. The Respondent was a director of both companies.

13. Mr Penny relied upon the recent decisions of *Goldsbrough v CA Property Management Ltd* and *Rakusen v Jepson*, in which the Upper Tribunal has had to grapple with whether there may be more than one landlord against whom a RRO could be sought. A critical issue was whether the landlord had committed an offence under section 72(1) of the 2004 Act. Section 251 provides that a director may be personally liable. In *Golsdbrough*, Judge Elizabeth Cooke had identified that "Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence". In *Rakusen*, Martin Rodger QC, the Deputy Chamber President, has now

granted permission to appeal. These decisions highlight the uncertainty of the law in this area. They are also examples of tenants seeking to raise a novel point, which others might have suggested was unarguable.

14. The Tribunal does not accept that this application was brought for an ulterior and improper motive. The fact that the Applicants have waged a legitimate political campaign for Croydon to transfer the licence of the property to their Housing Co-op, does not justify an assertion that this application for a RRO was brought for an improper purpose. The Respondent has adduced no evidence that the Applicants had been advised by Flat Justice that their case was hopeless. Such allegations of bad faith should only be made if supported by clear evidence.

15. The fact that this Tribunal rejected the Applicants' contention that a RRO could be sought against a director, does not justify a finding that it was unreasonable for the Applicants to raise that argument. It would have a chilling effect upon the development of law in this country were parties to be penalised for advancing novel points of law, particularly in an area as complex of housing law. A court or tribunal may reject an argument in forceful terms, only for its decision to be reversed on appeal with equal conviction.

16. The Applicants have noted that the Tribunal have granted them permission to appeal. Even had we concluded that the appeal no reasonable prospect of a success, it would not justify a finding of unreasonable conduct. It is not enough that the conduct leads in the event to an unsuccessful outcome. Tribunals use their case management powers to control applications which have no reasonable prospect of success. This was not an application which was manifestly unarguable.

17. The Respondent note in their Reply, that the decision to grant permission to appeal was based on a misunderstanding of the decision in LON/00BJ/HMF/2020/0106. We agree with their analysis. Although the tribunal had decided that the directors would have been liable under section 251 of the 2004 Act, it decided that it would not could not make a RRO against them. This was one of several cases in which this argument has been raised. It may be that no such argument has succeeded. However, in this case, Justice for Tenants, another Community Interest Company, considered that the point was arguable.

18. Since the Legal Aid and Advice Act 1949, legal aid has opened up the possibility for parties to raise new points of law and to develop the existing law. Such cases need to be brought because of the importance of the issues at stake, not only for the individuals involved, but also for a great number of other people. No legal aid is available before this Tribunal. However, Community Interest Companies such as Flat Justice, enable parties of limited means such as these Applicants to seek access to justice which would not otherwise be available to them.

Judge Robert Latham
7 May 2021

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.