FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AU/HMF/2020/0245**
HMCTS Code		**V: CVPREMOTE**
Property	**:**	**2 Preachers Court, The Charterhouse, 15 Charterhouse Square, London EC1M 6AU**
Applicants	**:**	**Mr Merryck Lowe**
Representative	**:**	**Mr Robert Brown (Counsel) instructed by JMW Solicitors LLP**
Respondent	**:**	**The Governors of Sutton's Hospital in Charterhouse**
Representative	**:**	**Mr Dean Underwood (Counsel) instructed by Stone King LLP**
Type of application	**:**	**Costs – Rule 13(1)(a) and (b)**
Tribunal	**:**	**Judge Robert Latham** **Ms Susan Coughlin MCIEH**
Date of Determination	**:**	**21 September 2022**

DECISION ON RULE 13(1) COSTS APPLICATION

The Tribunal declines to make either a penal costs order against the Applicant under Rule 13(1)(b) or a wasted costs order against his solicitor under Rule 13(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

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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 V: CVPREMOTE. The application would normally have been determined on the papers. However, the Respondent requested a remote hearing.

The Tribunal have had regard to the following documents filed by the parties: (i) The Respondent's Bundle of Documents – 741 pages, reference to which will be prefaced by "R.__"; (ii) The Applicant's Bundle of Documents – 47 pages, reference to which will be prefaced by "A.__"; (iii) The Respondent's Bundle of Authorities – 156 pages; (iv) A 2nd Form N260 claiming additional costs of £8,241.

The Current Application

1. On 27 July 2021, the Governors of Sutton's Hospital in Charterhouse ("the Respondent") issued the current application for costs pursuant to Rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"):

   (i) The Respondent seeks a penal costs order under Rule 13(1)(b) against Mr Merryck Lowe ("the Applicant") on the grounds that he acted unreasonably in "bringing" and "conducting" his application for a Rent Repayment Order ("RRO") pursuant to Part 2 of the Housing and Planning Act 2016 ("H&PA 2016)". The Respondent asserts that his application was hopeless and should not have been brought.

   (ii) The Respondent seeks a wasted costs order under Rule 13(1)(a) against the Applicant's Solicitors, JMW Solicitors LLP ("JMW"). This application is made pursuant to section 29(4) of the Tribunal, Courts and Enforcement Act 2007 ("TCEA 2007"). The Respondent contends that JMW acted negligently and/or unreasonably in bringing and pursing the application.

2. On 27 July 2021, the Respondent issued the following in support of their application: (i) N260 seeking costs in the sum of £19,768 (at R.643); (ii) Skeleton Argument (at R.604-615); (iii) witness statement of Simon Stone (R.620-650); (iv) witness statement of Ann Kenrick (R.616-618).

3. The Applicant has filed the following material in response to this application: (i) Applicant's Response (A.1-15); Applicant's Further Response (at A.16-26); (iii) witness statement of Applicant (at A.27-45). The Applicant has not waived privilege over his correspondence with JMW. Therefore, no evidence has been filed by the Solicitor.

The Hearing

4. Mr Dean Underwood (Counsel) appeared for the Respondent instructed by Stone King LLP. He was accompanied by Mr Tony Pidgeon and Ms Jessica Ventham from his instructing solicitors. Mr Robert Brown (Counsel) appeared for the Applicant and JMW. Both Counsel had appeared at the

original hearing. Neither Counsel called their witnesses. The Tribunal is grateful for the assistance provided by both Counsel.

5. This tribunal is normally a "no costs" jurisdiction. It is rare for a party to seek both a penal costs order against their opponent and a wasted costs order against the solicitor. In *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC)) ("*Willow Court*"), the Upper Tribunal ("UT") gave clear guidance on the principles to be applied in respect of a penal costs order. However, in none of the three cases considered by the UT, were wasted costs orders sought against the solicitor. Although there is a clear overlap between the principles to be applied in determining "penal" and "wasted" costs, the jurisdictions are not identical.

6. In *Willow Court*, the UT Upper Tribunal ("UT") gave guidance on how First-tier Tribunals ("FTTs") should apply Rule 13. The UT consisted of the Deputy President of the UT and the President of the FTT. 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?

7. Our hearing focussed on the first of these three issues. Mr Underwood clarified the basis upon which an order was sought against the Applicant and JMW:

    (i) A penal costs order is sought against the Applicant under Rule 13(1)(b) on two grounds. First, he acted unreasonably in "bringing" his application for a RRO as it was hopeless and bound to fail. It should never have been brought. Mr Underwood did <u>not</u> seek to argue that the Applicant had brought the application solely for the purpose of causing expense and inconvenience to the Respondent. He further contended that the Applicant had acted unreasonably in his "conduct of the proceedings". Mr Underwood raises two specific allegations at [20] of his Skeleton relating to (a) the Reply filed by the Applicant which consisted of 270 pages; and (b) an email which JMW sent to the tribunal on 13 May 2021 (at R.641) which the Respondent describes as "baseless and scurrilous".

    (ii) A wasted costs order is sought against JMW under Rule 13(1)(a)/ section 29(4) of TCEA 2007. At [24] of his Skeleton, Mr Underwood had argued that JMW has acted "negligently and/or unreasonably" in bringing and pursuing the application (the reference to "this appeal" appears to be an error). He continues that "the manifest defects with the RRO application would, or should, have been obvious to solicitors with both specialist knowledge and considerable experience in this area of law". At the hearing, Mr Underwood stated that he no longer proceeded with this ground. He accepted that a legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a

party who pursues a claim which is plainly doomed to fail. Mr Underwood restricted his argument to the unreasonable manner in which JMW had conducted the case, again relying on the two specific allegations specified at [20] of his Skeleton.

8. The Tribunal is required to determine this application in the context of prolonged and protracted proceedings between the parties. We were told that the Respondent has issued two claims for possession in the County Court, both of which the Respondent has been obliged to discontinue. In the first set, the Applicant has claimed costs of £156k of which the Respondent has been ordered to pay £75k on account. In the second set, the Applicant is seeking costs of £21k. There is also a rent deposit claim which is listed for trial in the County Court at Central London.

9. The Respondent is now seeking costs totalling £28,009. Over £10,000 of these costs relate to the current application for costs. Against the background of litigation which has become fraught and emotional, it is important that the Tribunal should have regard to the Overriding Objectives in Rule 3 of the Tribunal Rules. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case.

The Background

10. Since 24 January 2010, Mr Merryck Lowe, the Applicant, has been an assured shorthold tenant of 2 Preachers Court, the Charterhouse, 15 Charterhouse Square, London EC1M 6AU ("the flat"). The Applicant occupies the flat with his disabled son. The flat is located within a complex of buildings arranged around a central garden consisting of an almshouse and hospice, privately rented residential self-contained flats, a chapel, and privately rented self-contained commercial premises. The freeholders of the flat and the other buildings are the Governors of Sutton's Hospital in Charterhouse, the Respondent.

11. On 11 November 2020, the Applicant issued an application to this Tribunal for a RRO pursuant to Part 2 of the H&PA 2016. The application was drafted by JMW. The Applicant sought a RRO in the sum of £14,265, namely 100% of the rent which he had paid over the previous 12 months, giving credit for rent arrears of £19,011. The Applicant alleged that the Respondent had committed two offences: (i) control or management of an unlicenced HMO under section 72(1) of the Housing Act 2004 ("HA 2004") and (ii) harassment pursuant to section 1(3) of the Protection from Eviction Act 1977 ("PEA 1977").

12. On 18 February 2021, Judge Hamilton-Farey considered the application and issued Directions, pursuant to which:

    (i) On 6 April 2021, the Applicant filed his Bundle of Documents. This extended to 208 pages together with some additional video evidence. This included a report from Mr Bruce Maunder Taylor FRICS, which was unsigned.

(ii) On 22 April 2021, the Respondent files its Bundle of Documents. This extended to 63 pages. This included an expert report from Ian Alexander FRICS. The Response is at R.213-218. It was not suggested that the case was hopeless. It argues that Preachers Court is the relevant building which is "independent both vertically and horizontally from the building that contains the Infirmary. Alternatively, if the Infirmary is part of the building, it is contended that it would not be an HMO as it would be regulated by the Care Quality Commission.

(iii) On 6 May 2021, the Applicant filed a Reply (at R.278—285). This addressed why the Applicant contended that the building includes the Infirmary. He contends that it is irrelevant that the Infirmary would be regulated by the Care Quality Commission. He served a bundle of documents extending to 270 pages. This included a signed copy of Mr Maunder Taylor's report. This also includes Guidance from the Care Quality Commission. Finally, it includes a draft Disrepair Schedule of Conditions (at R.417-465) and a Chronology of Harassment (at R.466-469). Had the Applicant intended to reframe his allegations of harassment, he should have sought permission to amend his claim.

13. On 17 May 2021, the application was heard by Judge Jim Shepherd and Mr Appollo Fonka MCIEH. The Applicant was represented by Mr Brown and the Respondent by Mr Underwood. Mr Underwood filed a Skeleton Argument (at R.552-569) in which he contended that the claim was "hopeless". Mr Brown did not produce a Skeleton Argument.

14. On 13 July 2021, the Tribunal dismissed the application, finding that:

    (i) The building in which the flat was situated was not an HMO as defined by section 254 of the HA 2004. The Tribunal (at [40]) found that Preachers Court, the building in which the flat is situated, was separate from the infirmary and the other units in the complex. Preachers Court consisted of office accommodation on the basement, ground and first floor levels; and two self-contained flats on the second floor. A fire door connecting Preachers Court to another building was not sufficient to make it part of a larger building. The Tribunal found (at [39]) that the fire door was self-evidently "emergency only access". The Applicant's argument that he had free access to the Infirmary where he had been allowed to stay when he was unable to stay in his flat was described as "disingenuous". The Tribunal commended Mr Brown (at [8]) for the quality of his advocacy in seeking to persuade them that Preachers Court was part of a larger building. However, this argument was described as a "bit of a stetch". At [41], the Tribunal described how it had taken some time in considering the photographic and video evidence and in "deliberating on the issue". However, it concluded that the Applicant's flat was "plainly" not part of an HMO, because Preacher's Court was to be treated as a separate building. Having considered all the relevant evidence, the answer was "obvious".

    (ii) Mr Brown advanced a further argument that Preachers Court was an HMO as defined by section 257 of the Act. The problem to this

argument was that an HMO licence was only required on 1 February 2021 when an Additional Licencing Scheme was introduced by the London Borough of Islington. Thus, whilst an HMO licence might have been required at the date of the hearing, it was not required on the date on which the application was issued.

(iii) The Applicant failed to establish an offence under section 1(3) of the PEA 1977 because the pleaded allegations were statute barred. Section 41(2)(a) of the H&PA 2016 provides that any offence must be committed in the period of 12 months ending with the day on which the application was made. At [44], the Tribunal noted that even though the witness statement filed by the Applicant referred to further allegations of harassment within the relevant 12 month period, no application had been made to amend the claim. The Directions had required the Applicant to include "full details of the alleged offences" and noted that the tribunal would need to be satisfied beyond reasonable doubt that an offence had been committed.

15. On 3 August 2021, the Applicant sought a review of the decision or, in the alternative, permission to appeal. Judge Shepherd felt it necessary to seek a response from the Respondent before determining these applications. On 7 October 2021 (at R.570), the Tribunal refused permission to appeal.

16. The Applicant renewed its application to the Upper Tribunal. On 23 November 2021 (at p.601), Judge Elizabeth Cooke refused permission to appeal.

The Law

17. Both Counsel addressed us extensively, both in their written and oral submissions, on the law. Whilst applications for penal costs order against a losing party are regular before this tribunal, wasted costs order against a solicitor are rare. This is not a jurisdiction which was addressed by the UT in *Willow Court*.

18. Rule 3 of the Tribunal Rules provides for the Overriding Objective and the parties' obligations to cooperate with the Tribunal and provide (emphasis added):

> ("1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
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>> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
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>> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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>> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

19. The Tribunal is normally a "no costs" jurisdiction. Rule 13 of the Tribunal Rules provides for the limited circumstances in which a costs order can be sought:

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

....

(ii) a residential property case."

20. Section 29 of the TCEA 2007 provides, so far as is relevant:

"(1) The costs of and incidental to–

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party–

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

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

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf."

21. In *Willow Court*, the UT gave detailed guidance on what constitutes unreasonable behaviour in the context of applications for penal cost orders under Rule 13(1)(b) of the Tribunal Rules (emphasis added):

"Unreasonable behaviour

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 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 is 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 element of discretion in rule 13(1)(b)

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only … if a person has acted unreasonably…." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in

mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.

22. The UT gave further guidance which is relevant to the current case:

136. It is not unreasonable to submit genuine claims for determination by the FTT, and the fact that some claims may have a greater chance of success than others makes no difference. It may be unreasonable to bring a claim which is fanciful, which the claimant knows is bound to fail, or which is brought solely for the purpose of causing expense and inconvenience to the respondent; but there is no suggestion that Mr Stone's claims to a greater reimbursement of service charge surpluses than he eventually accepted, to a reduction in his liability for the major works on the grounds that they were too expensive, or to the protection of an order under section 20C of the 1985 Act, were of that nature. On the contrary, the claims related to genuine matters of dispute. The FTT was clearly right, therefore, to proceed on the basis that there had been nothing unreasonable in bringing the claims. What therefore made it unreasonable not to withdraw them earlier than Mr Stone did?"

23. The Respondent is also seeking a wasted costs order under Rule 13(1)(a) against JMW. In the civil court, there is considerable jurisprudence as to when it is appropriate to make such an order under section 29(4) TCEA 2007. The leading authority is the Court of Appeal decision in *Ridehalgh v Horsefield* [1994] Ch 205. At p.232-233, the Court considered what constituted "improper, unreasonable and negligent" conduct. The Court also provided important guidance in respect of a legal representative who pursues a hopeless case (at p.233F – 234F):

> "A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in *Rondel v. Worsley* [1969] 1 A.C. 191, 275:
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> > "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter."
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> As is well known, barristers in independent practice are not permitted to pick and choose their clients. Paragraph 209 of their Code of Conduct provides:
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> > "A barrister in independent practice must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 501, 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person."
>
> As is also well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.
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> It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation

> or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt, the legal representative is entitled to the benefit of it."

24. Rule 13(7)(a) provides that the amount of such costs may be assessed summarily by the Tribunal. In Willow Court, the UT gave important guidance as to how these applications should be determined:

> "43...... We conclude this section of our decision by emphasising that such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. We consider that submissions are likely to be better framed in the light of the tribunal's decision, rather than in anticipation of it, and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation. A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding that it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid.

The Tribunal's Determination

25. Having directed ourselves on the legal principles which we must apply, we are satisfied that we can give our reasons for refusing the application briefly. Firstly, we note that this satellite litigation has become as complicated and as expensive for the parties as the original litigation. This is to be deplored. We have been confronted by bundles extending to 950 pages.

A "Hopeless" Application

26. The Respondent initially sought costs order against both the Applicant and JMW contending that it was manifestly unreasonable to bring a hopeless claim. Mr Underwood contends that the decision to bring the application admits no reasonable explanation. It was "ill-founded in fact, manifestly misconceived in law, unsupported by his own expert evidence, because of his own fault, was always bound to fail".

27. Mr Underwood, wisely, did not pursue his claim for a wasted costs order against JMW. In the light of the guidance given by the Court of Appeal in *Ridehalgh*, there was no evidence that JMW were lending their assistance

to proceedings which were an abuse of process. This argument was hopeless.

28. Mr Underwood confirmed that he was not seeking to suggest that the Applicant was bringing the proceedings solely for the purpose of causing expense or inconvenience to the Respondent. Neither was their any evidence that the Applicant knew that his application was bound to fail. The Applicant instructed competent solicitors who drafted his claim. His case was advanced by experienced Counsel whom the Tribunal commended for the quality of his advocacy. This is a notoriously complex area of the law. The various definitions of "house in multiple occupation" are far from straight forward.

29. The fact that the Tribunal, having carefully considered all the evidence, concluded that it was "obvious" that the building did not include the Infirmary, does not justify a conclusion that the application was bound to fail. Many arguments that may initially seem to be extremely strong fall away when subjected to detailed forensic analysis. As Samuel Johnson pointed out, it is for lawyers to present their client's case; it is for judges and not the lawyers to judge it.

30. We do not accept that the case was hopeless. There was an arguable case that the flat was an HMO. Even had we been satisfied that the case was hopeless, we would not have concluded that it had been an abuse of process for the Applicant to bring application. Had there been any evidence that the Applicant had brought the application for some ulterior motive, we might have reached a different conclusion. There was no such evidence.

31. It is unfortunate that the Applicant pleaded allegations of harassment which were statute barred. However, had the Applicant been alerted to this fact, it is probable that he would have amended his claim to include the allegations which fell within the relevant 12 month period.

32. Mr Underwood criticises the inadequacy of the expert evidence adduced by the Applicant. Mr Maunder Taylor's Report, dated 29 April 2020, is at R.288. It had been commissioned on 20 January 2020 by the Applicant's former solicitor, Child and Child. His brief was to report on the condition of the flat. His instructions are at [1.3.1] (R.288). He was not asked to consider whether the flat was an HMO that required a licence. He inspected the flat on 22 January 2020, some 10 months before these proceedings were issued. The report was not relevant to the issue of whether the flat was an HMO. It would have been relevant had the Tribunal found that the flat was an HMO. There was no obligation on the Applicant to adduce expert evidence. The Directions had not required this.

33. Mr Underwood referred the Tribunal to a letter dated 21 December 2020 (at R.627), in which the Respondent asserted that the RRO was doomed to fail. The letter did not explain why the HMO argument was hopeless. Indeed, this was not the approach adopted when the Respondent filed its Statement of Case (see R.278-285). This was a "without prejudice" letter

seeking to settle possession proceedings. In the event, it was the Respondent who was obliged to discontinue its possession claim.

The Unreasonable Conduct of the Proceedings

34. The Respondent seeks a penal costs order against the Applicant and a wasted costs order against JMW on grounds of their unreasonable conduct of the proceedings. The conduct of which complaint is made in paragraph 20 of Mr Underwood's Skeleton comes nowhere close to constituting the "vexatious" conduct that would justify such an award.

35. Mr Underwood complains of the Reply that was filed by the Applicant (at p.275-551). This was not the "brief reply" that was specified in the Directions. It included new evidence that should have been included in his Statement of Case and to which the Respondent had no opportunity to respond. He complains that the Reply was filed "without apology on the Applicant's part". The criticism seems to have been that an apology was made to the tribunal, but not to the Respondent (see R.636).

36. Any applicant seeking a RRO is seeking a quasi-criminal remedy. The Directions reminded the Applicant that he should provide full details of any alleged offence together with the supporting evidence. An applicant is cautioned that they must prove their case beyond reasonable doubt. Any applicant who fails to comply with these directions is likely to prejudice his case. A Tribunal, applying the Overriding Objectives, will ensure that a respondent will not be prejudiced by the late service of evidence. That is what occurred in this case. The Applicant was not permitted to rely on allegations of harassment which should have been included in his Statement of Case.

37. In any event, the Tribunal is satisfied that the Respondent has overstated its case. The Reply itself is a relatively modest documents of eight pages (at R.278-285). The Applicant provides a signed copy of the report of Mr Maunder Taylor. The Guidance from the Care Quality Commission responded to an issue raised by the Respondent. The Tribunal declined to have regard to the new allegations of acts of harassment.

38. The Tribunal accepts that the material provided by the Applicant in his Reply exceeded what was contemplated by the Directions. However, this did not cause any prejudice to the Respondent. It could not constitute behaviour justifying either a penal or a wasted costs order.

39. Mr Underwood finally relies on an email sent by JMW on 13 May 2021 (at R.641 which is described as "baseless and scurrilous". On 12 May (R.640), the Respondent had sought to adjourn the hearing that had been fixed for 17 May on the ground that three hours would be insufficient for the hearing. JWM suggested that the adjournment was rather sought because it wanted more time to marshal its expert evidence. There was no basis for this suggestion. The Tribunal did not grant an adjournment. The hearing proceeded on 17 May. A full day was allocated to the hearing.

40. JWM should not have suggested that the Respondent was seeking an adjournment for an ulterior purpose. Mr Brown accepted that this was "regrettable". However, it is difficult to see how this should justify a penal/wasted costs order. No costs were incurred as a consequence of this email.

41. The Tribunal dismisses this application for penal costs against the Applicant and wasted costs against JMW. We are not satisfied that either the Applicant has acted unreasonably in bringing this claim, or that either the Applicant or JMW have acted unreasonably in the conduct of this application. The Tribunal gave Directions and both parties have complied with these. Whilst some criticism can be made of the manner in which this application has been conducted, this comes nowhere close to conduct that would justify a penal/wasted costs order. The fact that we have concluded that this Rule 13 costs application was hopeless, does not mean that the Respondent acted unreasonably in bringing it. However, we are concerned at the costs that have been incurred by both sides in dealing with this application. We are also satisfied that this application should have been determined on the papers.

Judge Robert Latham
21 September 2022

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.