FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/OOML/LAM/2020/0017**
Property	**:**	**Lainson House, Dyke Road, Brighton BN1 3JS**
Applicants	**:**	**(1) Suzanne Eames** **(2) Sylvie Riot and Keith Exall**
Respondent	**:**	**RAQ Estate Management Ltd.**
Representative	**:**	**Dean Wilson Solicitors**
Type of Application	**:**	**Rule 13 Tribunal Procedure (First Tier Tribunal((Property Chamber) Rules 2013.**
Tribunal Member	**:**	**Judge M Davey**
Date of Decision with reasons	**:**	**7 February 2022**

DECISION

1. The Application for an Order under Rule 13(1) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules") is dismissed.

2. The Tribunal orders under Rule 13(2) of the 2013 Rules the Respondent to reimburse the lead Applicant the Tribunal application fee of £100.

REASONS FOR DECISION

The Application

1. The matter dealt with in this application, dated 8 December 2021, for costs and reimbursement of application fee relates to an application ("the AOM Application") dated 6 October 2020 (and received on 22 November 2020). The AOM Application, by Ms Suzanne Eames, was made under section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act") and requested the appointment by the Tribunal of a Manager of Lainson House, Dyke Road, Brighton BN1 3JS ("the Building").

2. Ms Eames' Application was also made on behalf of Mr Keith Exall and Ms Lucy Riot, leaseholders of Flat 1, Lainson House. (References to the Applicant(s) hereafter include Mr Exall and Ms Riot unless otherwise stated). Ms Eames is the leaseholder of Flat 2, Lainson House. The Applicants hold their respective flats in the Building under leases granted for terms of 125 years.

3. The Applicants additionally sought orders, under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 Act ("the 2002 Act"), preventing the Landlord (i.e. the respondent Management Company in this case) from recovering the whole or part of the costs of the proceedings by way of a future service charge or administration charge demand.

The preliminary determination

4. The six Blocks on the estate are served by a Combined Heat and Power Plant ("CHP"), which supplies hot water and space heating to all flats on

the Estate via a Heat Interface Unit ("HIU") located in each flat which measures the fuel consumption of the flat.

5. In 2019, for reasons set out in the Tribunal's preliminary determination referred to below, the Respondent Management Company, by way of what they described as a trial, partially turned off the CHP heat supply to one of the Blocks (Cawthorne House) for one summer month and in the summer of 2020 turned off the heat supply to all of the Estate (including another block, Lainson House) for the summer quarter.

6. On 11 April 2021, the Tribunal, having considered the lengthy written submissions from the parties on the preliminary issue of whether the summer shutdown in June 2020 amounted to a breach of covenant by the Respondent, made a paper determination that the Respondent was in breach of an obligation in the Lease relating to the management of the Building by turning off the CHP Equipment (the Communal Heating and Hot Water system) and suspending or terminating the provision of heating and hot water to the building. The Tribunal also found that the Respondent's action thereby breached the covenant for quiet enjoyment in the Lease.

7. After a two day hearing by video link on 27 and 28 September 2021 the Tribunal determined that, notwithstanding the preliminary determination, it was not satisfied that it was just and equitable to appoint a manager. Its written decision with reasons was issued on 11 November 2021. However, the Tribunal made an Order under section 20C of the 1985 Act, limited to the proceedings relating to the preliminary matter, that the costs incurred by the Landlord in connection with the proceedings should not be treated as relevant costs for the purposes of any future service charge demand made of the Applicants.

The Rule 13 claim

8. The Applicants now seek recovery from the Respondent of legal costs incurred by the Applicants before making their AOM application, such costs to be limited to the proceedings in so far as they related to the preliminary matter. The costs in question were incurred by Ms Suzy Eames and consist of the fee of £1,534 plus VAT of £306.80 charged by ODT Solicitors for advice work on the Applicant's claim that there had been breaches of covenant by the Respondent and for drafting and serving on the Respondent a notice under section 22 of the Landlord and Tenant Act 1987. The Applicant also seeks an Order for recovery of the Tribunal AOM application fee of £100. Judge M Davey considered the application on 2 February 2022 on the basis of the written submissions of the parties.

Rule 13

9. Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber Rules 2013, in so far as relevant, provides that

> (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 –
>
> .....(iii) a leasehold case
>
> (2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
>
> (2) The Tribunal may make an order under this rule on an application or on its own initiative.

The Applicant's submissions

10. In essence the Applicants seek to establish that the Respondent acted unreasonably in defending or conducting the proceedings, that is to say the proceedings relating to the preliminary matter.

11. To that end they make reference to a number of issues surrounding the dispute that they had raised already in the submissions relating to the preliminary and substantive stages of the Tribunal proceedings.

12. They summarise the grounds relied on as follows.

1. The Respondent acted unreasonably by misleading leaseholders into believing that costs savings would be achieved by a shutdown using emotional language and "green activism".
2. The Respondent acted unreasonably by not taking into account the advice of the freeholder's legal representative that the Respondent's proposed shutdown of the heating system would be a breach of covenant.
3. The Respondent acted unreasonably because they did not listen to the leaseholders of Lainson House and Beves House who had stated that the proposed action was not only a breach of covenant but also unwanted by leaseholders.
4. The Respondent acted unreasonably because they did not acknowledge the legal advice obtained by the Applicants.
5. The Respondent acted unreasonably because they did not offer to enter into a dispute resolution debate when requested by the Applicants.
6. The Respondent acted unreasonably because no leaseholder had requested the shutdown, nor significantly had complained of excess heat within the blocks as established in the cross examination of Mr Dopson at the hearing.

7. The Respondent acted unreasonably because the directors of the Respondent Company who had mandated the shutdown provided witness statements that the Respondent relied on in the preliminary matter.
8. The Respondent acted unreasonably because it stated that its actions were a trial but its statement of case contradicted this.
9. The Respondent was found to be in breach of two covenants in the Lease.

The Respondent's submissions

13. The Respondent says that the Tribunal's power to make an order is derived from section 29 of the Tribunals Courts and Enforcement Act 2007, which refers to the costs of and incidental to the (Tribunal) proceedings. It argues that because the Applicant's solicitor's charge is dated 9 July 2020 and the AOM application was made on 20 November 2020 the charge is insufficiently proximate to the proceedings to be recoverable under Rule 13.

14. It further argues that in any event Rule 13 is only concerned with conduct of the Respondent which may be considered unreasonable and that the overriding test is whether a reasonable person in the position of the Respondent would have conducted himself or herself in the manner complained of. It says that here has been no finding in either of the two Tribunal determinations that the Respondent has acted unreasonably in defending or conducting the proceedings.

15. The Respondent also cites passages from the preliminary and final Tribunal determinations that it relies on when arguing that the Rule 13 application seeks to repeat a number of matters of evidence in respect of which findings were made in the substantive proceedings. It says that none of those findings were supportive of the Applicant's further allegations.

16. The Respondent also says that the decisions make no reference to any suggested issues of poor conduct of the proceedings themselves or the Respondent's behaviour being unreasonable or vexatious.

17. With regard to specific matters raised by the Applicants the Respondent replies as follows:

- It did have regard to complaints made by leaseholders, and the opinions of the freeholder and the Applicant's solicitor but simply did not agree with them. It says that this is not unreasonable or vexatious behaviour.
- The Respondent denies that any emotional language used was vexatious or unreasonable and says that this would not reach the threshold required for a Rule 13 Order.
- The Respondent denies that it acted unreasonably in stating that its actions in shutting down the heating system were a trial.

- The Respondent denies that using witness statements from Directors could be said to be unreasonable conduct.

Discussion and determination

18. The first point to note with regard to Rule 13(1) is that the person whose conduct is complained of must have behaved unreasonably in bringing defending or conducting the proceedings. In the present case that means either defending or conducting the proceedings relating to the preliminary matter.

19. The meaning and scope of Rule 13(1) was considered by the Upper Tribunal in *Willow Court Management Company (1985) Limited v Alexander and Others* [2016] UKUT 0290 (LC). In its decision the Upper Tribunal held that

> "When considering the r.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."

The Upper Tribunal continued

> "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 v Horsefield* 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?"

20. In the present case the Applicants suggest that it was unreasonable of the Respondent to have defended the proceedings given the advice obtained by the Applicants and the freeholder as to whether the actions of the Respondent amounted to a breach of covenant.

21. Whether or not the actions taken amounted a to a breach of covenant turned upon the facts and the application of the law (i.e. the construction of the lease) to those facts. The facts were not in dispute. The heating system was switched off. The issue was whether the Lease permitted this action. That turned upon the construction of the Lease, which was an arguable matter that was eventually resolved in favour of the Applicants rather than the Respondent. But was it unreasonable for the Respondent advance to advance the case that it did as to the meaning of the relevant covenant? The Tribunal finds that it was not. The matter of the proper construction of the Lease was something that the Respondent was entitled

to dispute. Indeed the Tribunal had to choose between two rival interpretations of the Lease. Thus there is a reasonable explanation for the Respondent's decision to defend the Applicant's claim that there was a breach or breaches of covenant, notwithstanding that the Respondent's argument was not accepted by the Tribunal.

22. The next issue is whether the Respondent behaved unreasonably in its conduct of the proceedings once they had commenced. The only reference in the Applicants' submission that relates to the actual proceedings is that it was unreasonable for the Respondent to submit witness statements from Directors of the Respondent Company who had supported the shutdown. The Tribunal does not find this to be unreasonable conduct on the part of the Respondent. Both parties were entitled to introduce whichever witnesses they chose who could then be cross-examined by any other party.

23. All the other matters relied on by the Applicants that are alleged to be unreasonable conduct are matters that pre-dated the Tribunal proceedings. Furthermore, they are matters that were raised in the earlier proceedings at the end of which the Tribunal determined that, despite the breaches of covenant, the Respondent had not acted in bad faith in shutting down the heating system.

24. In conclusion there is no evidence that the Respondent behaved unreasonably when conducting the Tribunal proceedings. It follows that the discretionary power of the tribunal to make a Rule 13(1) costs order is not engaged because the preliminary threshold of establishing unreasonable conduct in defending or conducting the proceedings has not been met.

25. This determination means that it is unnecessary for the Tribunal to decide the initial issue raised by the Respondent as to whether the costs claimed by the Applicants had sufficient proximity to the proceedings to be a cost that ought to be recoverable in any event. This requirement is to be found in section 29 of the Tribunals, Courts and Enforcement Act 2007 which refers to the recovery of "costs of and incidental to proceedings" in the Tribunal.

26. Nevertheless, whilst it is true that the ODT invoice is dated 9 July 2020 and the proceedings commenced with the Application of 20 November 2020, the advice to which the cost related also included the drafting and serving of a Landlord and Tenant Act 1987, section 22 notice. The service of such a notice is a required preliminary step to an application for an order for appointment of a manager under section 24 of that Act. In these circumstances, had it been necessary to do so, the Tribunal would have been inclined to find that the cost was sufficiently incidental to the proceedings.

Tribunal Fee

27. By contrast to the matter of a Rule 13(1) Order, the Tribunal is willing to Order, under Rule 13(2), that the Respondent reimburse the lead

Applicant the Tribunal application fee of £100. Rule 13(1) does not limit this power. The Applicant was successful on the preliminary issue and the Tribunal has already made a section 20C Order in favour of the Applicants limited to the costs incurred by the Landlord [i.e. the Respondent] in connection with the proceedings in so far as they relate to the preliminary matter.

Right to appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.