FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/26UK/HNF/2022/0024**
Paper decision		
Property	**:**	**236A St Albans Road, Watford, WD244AU**
Applicants	**:**	**Lightshield Limited**
Respondent	**:**	**Noreen Mahendrakumar**
Type of Application	**:**	**Application for costs pursuant to Rule 13**
Tribunal Member	**:**	**Judge Shepherd**
Date of Decision	**:**	**25 April 2023**

DECISION

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1. This case began life as a Rent Repayment Order application brought by Lightshield Limited ("The Applicants"). They were the tenants of premises at 236 A St Albans Road, Watford, WD244AU ("The premises"). The landlord is Noreen Mahendrakumar ("The Respondent") . Self evidently the Applicants are a company. They could not occupy the premises under an assured or assured shorthold tenancy. This immediately raised questions about their application which is to say the least unusual. Most RRO applications are brought by individual tenants or groups of tenants who are in occupation of premises usually pursuant to an AST.

2. On 1st November 2022 the Tribunal decided that it did not have jurisdiction to entertain an RRO application from the company when there were only 4 employees in occupation. The application was subsequently struck out. On 20th December 2022 the case was reinstated on the basis that it may be arguable that the company could apply for an RRO.

3. A witness statement made by the Respondent gave background to the case. The premises consist of a three bedroom property let to the Applicant under a company let from 26th October 2015 to 15th August 2022. The let was agreed on the basis that no more than three employees would be in occupation. Watford the Local Authority operate a mandatory licensing scheme for premises with 5 or more occupiers. The Respondent denied that a license was required in this case. The premises were equipped with functional fire safety equipment. She believed that the premises were being sublet to third parties. Rent arrears built up.

4. On 15th March 2023 the Applicants withdrew their application pursuant to Rule 22 of the Tribunal Procedure (First Tier) (Property Chamber) Rules 2013 ("The Rules"). They had conceded that they could not show the premises had to be licensed. Thereafter the Respondent made an application for costs under Rule 13 of the Rules. She said that the Applicants misled the Tribunal into reinstating the case and they were unlawfully subletting the premises. She claims her costs of £1935. The Applicants failed to defend the costs application and indicated they had no intention of attending the hearing to deal with the matter on 25th April 2023. Their non - attendance prompted this decision to be made on the papers as I had the Respondent's submissions.

The Law on Rent Repayment Orders

The Housing Act 2004 ("the 2004 Act")

5. The 2004 Act introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 of the Act relates to the licencing of Houses in Multiple Occupation ("HMOs") whilst Part 3 relates to the selective licensing of other residential accommodation. The Act creates offences under section 72(1) of having control and management of an unlicenced HMO and under section 95(1) of having control or management of an unlicenced house. On summary conviction, a person who commits an offence is liable to a fine. An additional reedy was that either a local housing authority ("LHA") or an occupier could apply to a FTT for a RRO.

6. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that a building or a part of a building meets the "standard test" if:

   "(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

   (b) the living accommodation is occupied by persons who do not form a single household (see section 258);

   (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

   (d) their occupation of the living accommodation constitutes the only use of that accommodation;

   (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

   (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

7. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence. Article 4 provides that an HMO is of a prescribed description if it (a) is occupied by five or more persons; (b) is occupied by persons living in two or more separate households; and (c) meets the standard test under section 254(2) of the 2004 Act.

8. Section 263 provides:

"(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

(a) receives (whether directly or through an agent or trustee) rents or other payments from–

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with

another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

The Housing and Planning Act 2016 ("the 2016 Act")

9. Part 2 of the 2016 Act introduced a raft of new measures to deal with "rogue landlords and property agents in England". Chapter 2 allows a banning order to be made against a landlord who has been convicted of a banning order offence and Chapter 3 for a data base of rogue landlords and property agents to be established. Section 126 amended the 2004 Act by adding new provisions permitting LHAs to impose Financial Penalties of up to £30,000 for a number of offences as an alternative to prosecution.

10. Chapter 4 introduces a new set of provisions relating to RROs. An additional five offences have been added in respect of which a RRO may now be sought. The maximum award that can be made is the rent paid over a period of 12 months during which the landlord was committing the offence. However, section 46 provides that a tribunal must make the maximum award in specified circumstances. Further, the phrase "such amount as the tribunal considers reasonable in the circumstances" which had appeared in section 74(5) of the 2004 Act, does not appear in the new provisions. It has therefore been accepted that the case law relating to the assessment of a RRO under the 2004 Act is no longer relevant to the 2016 Act.

11. In the Upper Tribunal (reported at [2012] UKUT 298 (LC)), Martin Rodger KC, the Deputy President, had considered the policy of Part 2 of the 2016. He noted (at [64]) that "the policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities of

"rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live. The "main object of the provisions is deterrence rather than compensation."

12. Section 40 provides (emphasis added):

"(1) This Chapter confers power on the First-Tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy."

13. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". The five additional offences are: (i) violence for securing entry contrary to section 6(1) of the Criminal Law Act; (ii) eviction or harassment of occupiers contrary to sections 1(2), (3) or (3A) of the Protection from Eviction Act 1977; (iii) failure to comply with an improvement notice contrary to section 30(1) of the 2004 Act; (iv) failure to comply with prohibition order etc contrary to section 32(1) of the Act; and (v) breach of a banning order contrary to section 21 of the 2004 Act. There is a criminal sanction in respect of some of these offences which may result in imprisonment. In other cases, the local housing authority might be expected to take action in the more serious case. However, recognising that the enforcement action taken by local authorities was been too low, the 2016 Act

was enacted to provide additional protection for vulnerable tenants against rogue landlords.

14. Section 41 deals with applications for RROs. The material parts provide:

"(1) A tenant or a local housing authority may apply to the First-Tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

15. Section 43 provides for the making of RROs:

"(1) The First-Tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted)."

Law on Rule 13 costs

16. Rule 13 of the The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states the following:

13.—(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—

(i)an agricultural land and drainage case,

(ii)a residential property case, or

(iii)a leasehold case; or

(c)in a land registration 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.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a)must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b)may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a)a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b)notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a)summary assessment by the Tribunal;

(b)agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c)detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(1), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(2) and the County Court (Interest on Judgment Debts) Order 1991(3) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

17. The leading case that sets the test is *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC) :

18. The test for unreasonable conduct 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, is there a reasonable explanation for the conduct complained of?

19. A systematic or sequential approach to applications under r.13(1)(b) should be adopted. At the first stage the question is whether the person has acted unreasonably. At the second stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the terms of the order

should be. At both the second and third stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. Whether the party whose conduct is criticised has had access to legal advice is relevant at the first stage of the enquiry, as the behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice; it may also be relevant, though to a lesser degree, at the second and third stages, without allowing it to become an excuse for unreasonable conduct. At the third stage, a causal connection with the costs sought is to be taken into account, but the power is not constrained by the need to establish causation.

20. Applications under r.13(1)(b) 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 dealt with summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. Those submissions are likely to be better framed in light of the tribunal's substantive decision rather than in anticipation of it, and applications at interim stages or before the substantive decision should not be encouraged.

21. At para [142] The Upper Tribunal stated the following in relation to the withdrawal of a claim:

Where, as in tribunal proceedings, there is no general rule that the winner will be entitled to an order for the payment of their costs by the loser, the withdrawal of a claim should not be stigmatised as an admission of defeat or as unreasonable. To allow such a stigma to be attached to withdrawal creates an unhelpful obstacle to the making of sensible concessions.

Application to the present case

22. I consider that the Applicant's application was doomed to failure for a number of reasons. First its had to see that the Applicant, who was not an occupier at the premises had any standing to make the RRO application. These applications necessarily must be made by occupiers due to the meshing of the 2004 Act and the 2016 Act. In determining whether a premises is an HMO only occupiers who occupy as their only or principal home are considered. It is these occupiers that the 2016Act is aimed at. Second the Applicant appears to have realized that it wasn't going to be able to "make up the numbers" in terms of occupiers without including occupiers who were occupying pursuant to unlawful sublets.

23. I bear in mind that the Applicant did not have solicitors on board but consider that they should have done. If they had done they would have been advised that their case was useless.

24. Applying the criteria in Willow Park I have no hesitation in deciding that the Applicants behaved unreasonably by bringing a hopeless case, seeking to rely on unlawful occupiers, withdrawing at a late stage(which was not a "positive withdrawal of the type envisaged in Willow Park) and failing to engage at all with the costs application. The Tribunal should therefore make a costs order and does so. The Applicant shall pay the Respondent her costs summarily assessed at £1953.

Judge Shepherd

25th April 2023

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.