



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00FY/HPO/2019/0003**

Property : **1 Beckenham Road, Nottingham, NG7 5NT**

Applicant : **Nottingham's Homeless Housing Limited**

Respondent : **Nottingham City Council**

Type of Application : **An application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**

Tribunal Judge : **Dr Anthony Verduyn**

Tribunal Valuer : **Mr Robert Chumley-Roberts MCIEH JP**

Date of Decision : **16th April 2020**

DECISION

Background

1. In the substantive proceedings in this case, Nottingham City Council (“the Respondent”) had served a Prohibition Order (“the Prohibition Order”) under sections 20 and 21 of the Housing Act 2004 (“the Act”) on Nottingham’s Homeless Housing Limited (“the Applicant”) in respect of the Property. The Prohibition Order was dated 14th November 2019 and stated that:

“The ground floor to 1st floor staircase and 1st floor to 2nd floor staircase of 1 Beckenham Road, Nottingham, NG7 5NT is prohibited for use of access to the 1st and 2nd floor of the dwelling by persons under the age of 5 and persons over the age of 60 until such times as the works specified in schedule 1 are completed. This therefore prohibits use of the 1st floor and 2nd floor of the property for sleeping or living accommodation by any persons under the age of 5 and over the age of 60 until works are completed.”

The Schedule identified a Category 1 Hazard relating to falling on stairs. Between ground and 1st floor the treads were stated to be narrow (200mm) with high risers (average 221mm), with a pitch of 47.9 degrees. Head room was stated to be 1.52m at the 2nd step, 1.74m at the 3rd step and 1.96m at the 4th step. Part of the handrail was secured to a disused cupboard door which was not fully secured. Between 1st and 2nd floors the staircase was similarly criticised for narrow treads, high risers and a pitch of 47.7 degrees. The door from the 2nd floor bedroom opened directly on to the stairs and there was no landing space in front of the door. The scheduled remedy was stated to be the removal and replacement of the staircases, with necessary reordering to the upper floors.

2. The Applicant appealed the Prohibition Order and application was received by this Tribunal on 13th December 2019. The Tribunal accepted the application, albeit late, and this was not challenged by the Respondent. Directions were given for the filing of Statements of Case: 24th January 2020 for the Respondent; and, 14th February 2020 for the Applicant. No direction was made for expert evidence, and absent objection by the Respondent, an inspection and paper determination were directed. The latter was arranged for 5th March 2020.

3. The Respondent's Statement of Case was received by the Tribunal on 27th January 2020 and the Applicant's Statement of Case was received on 14th February 2020, but the inspection did not take place. The Respondent had re-inspected the Property on 12th February 2020. The dimensions and pitch of the staircases were confirmed, but works by the Applicant had resulted in the headroom between 1st and 2nd floor now exceeding 2 metres, there were handrails to both sides of the staircases and increased landing space was provided at the top of the 1st to 2nd floor staircase. Carpets had been replaced. On 4th March 2020 the Respondent revoked the Prohibition Order having determined that the hazard was now Category 2. The Respondent indicated that it was minded to issue a Hazard Awareness Notice under Section 29 of the Act, to all intents and purposes by way of substitution for the Prohibition Order. The costs imposed pursuant to the Prohibition Notice were waived.
4. In response to the revocation of the Prohibition Order, the Applicant applied for its costs pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"). This was done by email on 4th March 2020, followed by a detailed application received on 19th March 2020. The Respondent responded with detailed submissions received on 3rd April 2020. The Tribunal has considered these submissions.

The law on costs under Rule 13

5. The First-tier Tribunal is not a jurisdiction where the unsuccessful party is normally ordered to pay the costs of the successful party (in contrast to the Courts). An order for costs is exceptional and can only come about through the application of Rule 13 of the Rules. The relevant parts of that rule are:

“Orders for costs, reimbursement of fees and interest on costs

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.
6. In Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC), (“Willow Court”) the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13.
 7. Firstly, the Tribunal should adopt a three-stage process:
 - (1) Consider whether the person against whom an order is sought has behaved unreasonably:
 - (2) If so, should the Tribunal exercise its discretion to award costs;
 - (3) If so, how much should be paid.
 8. Secondly, in considering what “unreasonable” conduct comprises, the Upper Tribunal approved the following passage (from Ridehalgh v Horsefield [1994] Ch 2015) as encompassing “unreasonable” conduct:

“... conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on the practitioner’s judgement, but it is not unreasonable.”
 9. The Upper Tribunal commented on the application of this passage (which they approved) in paragraphs 23 and 24 of Willow Court, as follows:

“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. ...”

10. In paragraph 95 of Willow Court, when discussing one specific case in the appeal, the court made some comments which appear to be of general significance concerning how Tribunals should deal with determinations of unreasonable conduct under the first stage of the three stage process, by saying:

“95 ... Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis. We qualify that statement in two respects. We do not intend to draw this limitation too strictly (it may, for example, sometimes be relevant to consider a party’s motive in bringing proceedings, and not just their conduct after the commencement of the proceedings) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct. Secondly, once unreasonable conduct has been established, and the threshold condition for making an order has been satisfied, we consider that it will be relevant in an appropriate case to consider the wider conduct of the respondent, including a course of conduct prior to the proceedings, when the tribunal considers how to exercise the discretion vested in

it. In this case, however, the FTT inadvertently but impermissibly elided the different stages of the analysis.”

The Applicant’s case

11. The initial response from the Applicant to the revocation of the Prohibition Order and intimation of the issue of another notice was to dispute the Category 2 Hazard now asserted by the Respondent, but that would be the subject of a new notice and a fresh appeal (were the Applicant to decide to pursue such an appeal). The Applicant referred next to unreasonable behaviour of the Respondent “throughout the process”, listing a number of points. Detailed submissions followed on 19th March 2020 following directions by the Tribunal.

12. The Applicant’s submissions do not address the relevant law in terms and take a general approach to the allegation of unreasonableness, albeit one based on a very detailed chronology with 14 appended documents. In summary, the allegations are: (1) The Applicant, even before the Prohibition Order was issued, had suggested ways of reducing the risk without the need for replacing the staircases, but the Respondent refused to countenance these, even when the proposed Prohibition Order was reviewed by the manager of the officer responsible for it (the officer being said to be inexperienced by the Applicant). As matters turned out, when the works were carried out by the Applicant, the Respondent reviewed the Property and revoked the Prohibition Order, vindicating the Applicant’s stance; (2) The Applicant had to instruct a consultant to assist with the appeal process at considerable cost, as the Applicant was unfamiliar with this; (3) the Respondent was precipitate in charging the freeholder with costs (reimbursed by the Applicant under the terms of its lease), when the Prohibition Order was under appeal; (4) The Applicant, on advice of the consultant, completed the works it had proposed; (5) On the advice of the consultant, an expert was appointed. He was of the opinion that there was no Category 1 Hazard and began communications directly with the Respondent on 29th January 2020 in an effort to encourage early revocation to save further costs. The expert disagreed with some of the Respondent’s alleged facts and the assessments in its statement of case. A further letter was sent by the expert on 9th February 2020; and (6) A prompt revocation at that point would have saved about half the costs of preparing the Applicant’s

Statement of Case received 14th February 2020, but the Respondent insisted that the Applicant proceed and declined to answer questions in correspondence. The Respondent sought further directions from the Tribunal, but these were refused on 20th February 2020.

The Respondent's Case

13. The Respondent's case is also set out in a lengthy statement with a large number of attached documents. It addresses the Rules, but not the case law in terms. In summary, those submissions assert the following: (1) A Prohibition Order was considered more proportionate than an Improvement Notice. In November 2019 the Respondent was of the view that works proposed by the Applicant would mitigate hazards, but not remove the Category 1 Hazard. There was no certainty that the works would be carried out; (2) the letter of 29th January 2020, received 4th February 2020, showed the works had been carried out. On 6th February 2020 dates for reinspection were proposed, and 12th February 2020 was approved by the Applicant 4 days later. Inspection duly took place and re-assessment was completed on 27th February 2020 identifying falls on the stairs as now a Category 2 Hazard, causing the Prohibition Order to be revoked on 4th March 2020; (3) A revisit when works had been completed would have been essential whatever the impact of the works proposed by the Applicant and the response to communications was reasonably prompt; (4) the Applicant had no permission for expert evidence, as required by Rule 19(2) of the Rules and obtained such evidence at its own cost and risk. It was not necessary to determine the appeal; and (5) the Respondent had sought permission of the Tribunal to respond to the Applicant's letters dated 29th January 2020 and 9th February 2020, because there was to be a paper determination. The Tribunal refused the application, but it was not made without cause. The resultant Tribunal direction explains why the Respondent did not answer the matters raised in those letters. The Tribunal stated that the Respondent could reinspect which, by then, it had done.

Discussion and Decision

14. Pursuant to its application, the Applicant has to establish that the Respondent acted unreasonably in defending the appeal. Such a finding by the Tribunal is essential, otherwise there is no relevant jurisdiction to award costs in favour of the

Applicant. Conduct that is vexatious or designed to harass is plainly unreasonable, but conduct permitting of a reasonable explanation is not. Optimistic or misjudged assessment is not unreasonable (Ridehalgh). The Tribunal has to be careful not to demand standards of behaviour at an unrealistic level (Willow Court).

15. The conduct complained of by the Applicant, and fully set out in its submissions, does not pass the test identified in law. Most of the conduct complained of is no more than one of the usual consequences of the desire to challenge the assessment of the Respondent by way of litigation: namely, the seeking and following of the advice of people knowledgeable in the relevant law and expert practice, to substantiate the challenge, but with the necessary costs consequences. The Respondent was entitled to pursue matters under the Act whilst the appeal was pending, because the Prohibition Order was then in place and arrangements between leaseholder and freeholder were a matter between those parties only and not relevant to the appeal. The core of the criticism is that works proposed at the time of the issue of the Prohibition Order were not then considered adequate, but once executed, caused the Respondent to reassess its position and revoke the order and issue another, lesser, notice. This is insufficient to pass the threshold test in Rule 13: (1) these works had not been done at the time of the issue of the Prohibition Order under appeal, indeed the Applicant accepts that it did them upon subsequent advice of the consultant and had its own expert assess the result. It cannot be said to be unreasonable on the part of the Respondent to assess the works when they had been done, since it was responding appropriately to the request made; (2) experts can legitimately differ in their views. The original officer may have been a graduate without yet having obtained his full professional qualifications, but the Respondent had his decision reviewed by his manager before the issue of the Prohibition Order. The Applicant's expert may have taken a different view from the manager, but competent experts may differ without one or other being unreasonable and it is not unreasonable for the Respondent to rely on its experts. In the result, the Respondent did not find that, after works in mitigation were done, there was no hazard, merely a lesser hazard. Such differing determinations do not indicate that the defending of the appeal was "unreasonable", but show the range of views that might reasonably be taken at

different times and in different circumstances; (3) there is nothing close to vexatious behaviour or harassment alleged by the Applicant and rightly so. The timetable given by the Respondent between the receipt of the communication dated 29th January 2020, reinspection on 12th February 2020 and revocation prior to the inspection of 5th March 2020, was not characterised by undue or unreasonable delay (bearing in mind that this was a paper determination) and seems to have had reasonable regard to the impending inspection. The critical dates in respect of costs incurred was between reinspection of 12th February 2020 and the deadline for the Applicant's Statement of Case on 14th February 2020, because the 12th February 2020 was an inspection date agreed by the parties and reasonably promptly arranged between them after the Respondent had opportunity to consider the letter of 29th January 2020. The period of two days was insufficient for a decision as important as revocation to be taken, and the Applicant was obliged to file its Statement of Case under Tribunal directions. The Respondent's conduct was accordingly not unreasonable.

16. Further, had the Respondent not revoked the Prohibition Order, the appeal would have been determined by the Tribunal. Had the Tribunal decided to revoke the Prohibition Order, it is highly unlikely that it would have awarded costs in favour of the Applicant. The appeal would very much have been within the bounds of conventional appeals of this sort. It is, therefore, very difficult to see how the Tribunal can properly award costs against the Respondent. Indeed, were this application to succeed, then the test of unreasonableness would be largely nugatory and costs shifting prohibited by the Rules would be introduced by other means.
17. The Tribunal therefore rejects the application by the Applicant for its costs.

Appeal

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

the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Tribunal Judge Dr Anthony Verduyn

Dated 16th April 2020