FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**BIR/17UB/LIS/2020/0008**
HMCTS code (paper, video, audio)	:	**V:CVPREMOTE**
Property	:	**Heritage Court, Kedleston Close, Belper, Derbyshire**
Applicant	:	**Heritage Court RTM Company Limited**
Representative	:	**RTMF Services Limited**
Respondent	:	**Fairhold Homes (No 14) Limited**
Representative	:	**JB Leitch solicitors**
Type of application	:	**Application for costs order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Members	:	**Judge D Barlow**
Date of Hearing	:	**1 October 2021**

DECISION

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Covid-19 pandemic: description of hearing
This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V:CVP . A face-to-face hearing was not held because it was not practicable, no one requested it and all issues could be determined in a remote hearing.

DECISION OF THE TRIBUNAL

The tribunal refuses the costs application.

REASONS

The background and procedural history

1. This application ('the Costs Application') arises from the Tribunal's decision dated 8 January 2021 ('the Decision'), made in proceedings under section 27A of the Landlord and Tenant Act 1985 ('the Proceedings').

2. The Costs Application was made at the hearing and directions for filing of statements and evidence made by the tribunal within the Decision. The Costs Application was then stayed pending the outcome of the Applicant's applications for permission to appeal the Decision, which was refused by the Tribunal and the Upper Tribunal ('UT')

3. The Applicant is an RTM company which acquired the right to manage Heritage Court on 3 May 2011, pursuant to the provisions of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") and from that date, took over all management functions of the "premises" pursuant to sections 96 and 97 of the 2002 Act.

4. The Respondent is both owner of the reversionary freehold title of Heritage Court and the registered leasehold proprietor of a wardens flat within Heritage Court (" the Wardens Flat") under title DY404540.

5. The background is largely set out in paragraphs 6 – 15 the Decision. The following events are also relevant.

6. In the Proceedings, the Applicant sought a determination under s27A of the 1985 Act ("the Act") of two issues relating to rent charged by the Respondent for use of the Wardens Flat. First, whether under the terms of the lease the landlord was entitled to charge rent for the Wardens Flat for the service

charge years in question and secondly, whether the rent charged for each of those years was a reasonable amount ("the Issues").

7. The Applicant also requested a transfer of the case to the UT under Rule 25, for it to be heard with a pending appeal of Fountain Retirement Housing Association Ltd, concerning flats at Batworth Park House, under reference LRX/4/2020 ("the Fountain Retirement appeal"). Mr Joiner wrote to the tribunal explaining that the issues in both cases were the same, i.e. whether the landlord is entitled to charge rent for the use of a managers flat, as part of the service charge.

8. The Respondent filed a statement opposing the Rule 25 transfer, for three reasons. Under Reason A (the issues in disputes are likely to be further appealed to the UT), the Respondent raised an additional concern that the Applicant was an RTM company with management responsibilities and confirmed that it would be seeking advice regarding the jurisdiction of the FTT to consider the application. If a jurisdictional challenge was pursued, the Respondent stated that it should be dealt with as a preliminary issue in the FTT.

9. The transfer application was denied but the Proceedings were stayed on 25 May 2020, pending the handing down of the decision in the Fountain Retirement Appeal. The parties were given leave to apply for the stay to be lifted and directed to update the tribunal within 14 days of the handing down of the appeal decision.

10. The Fountain Retirement Appeal decision was handed down on 23 July 2020 (*citation - Retirement Lease Housing Association Limited v Schellerup [2020] UKUT 0232 (LC))*, but neither party notified the tribunal, applied for the stay to be lifted or sought further directions.

11. On 2 September 2020, the tribunal asked the parties to confirm if any issues remained in dispute, so that it could make further directions. On 8 September, the Respondent wrote to the Applicant explaining that the Issues differed from those in the 'notional rent' cases determined by the Fountain Retirement appeal, because the lease contained an explicit reference to 'rent(s)' for provision of the Wardens Flat. The letter concluded that the lease satisfied the requirement for the Wardens Flat rent(s) to be paid via the service charge in accordance with the reasons provided by the UT. Significantly however, the letter does not refer to any ongoing jurisdictional issue.

12. On 16 September 2020, the Respondent replied to the tribunal's letter of 2 September 2020 requesting that the case be disposed of under Rule 6(2) on the grounds that Mr Joiner had not responded to their correspondence of 8 September to confirm whether or not there were any outstanding issues. The issue of jurisdiction was not raised.

13. The tribunal did not dispose of the proceedings, but instead on 16 September 2020, made substantive directions for the parties to file

statements and evidence and for the matter to be set down for hearing. A hearing date of 8 January 2021 was later fixed.

14. The Applicant was represented throughout by Mr Joiner of RTMF Services Limited ("RTMF"). RTMF is also the company secretary of the Applicant.

15. Mr Joiner filed a Statement of Case on 16 October 2020, which made clear the Applicant was seeking to challenge the rent charged for the Wardens Flat because the lease failed to specify a rent, or include any mechanism for a rent to be calculated. Mr Joiner contended that it was reasonable therefore to assume that regular payment of a rack rent was not intended and reference to the words "together with rent(s)" in Schedule 4 paragraph 1.2.10 of the Lease was intended to mean only rent incurred if it was necessary to engage a relief or additional manager. Mr Joiner set out various authorities for this including *The Earl of Cadogan v 27/29 Sloane Gardens Ltd [2006] L&TR; Panagopoulos v Earl Cadogan [2010] EWCA Civ 1259 and Gilje v Charlegrove Securities Ltd [2002] 1 EGLR 41*. He also referred to the legal principles set out in *Retirement Lease Housing Association Limited v Schellerup [2020] UKUT 0232 (LC)*.

16. On 7 November 2020, the Respondent filed its Statement of Case (settled by counsel), in which it set out the issue of jurisdiction as its principle case and sought a determination that the application should be struck out under Rule 9(2)(a). Detailed argument in support of the strike out request is at paragraphs 19 to 28 of the statement. The remainder of the Respondent's statement, (paragraphs 29 – 58), addresses the substantive Issues in the case.

17. The directions of 16 September 2020, provide for the Applicant to file a Reply if it wished. No Reply was filed by Mr Joiner addressing the strike out request or otherwise.

18. On 7 January 2021 (the eve of the hearing), Mr Joiner filed a skeleton argument of 150 page including authorities, together with a 200 page bundle of additional authorities. He dismissed the jurisdictional challenge in four brief paragraphs that did not address the relevant points. His argument was simply that the RTM company was obliged to demand and collect the service charge and the tribunal had jurisdiction under s27A to determine both the proper construction of the lease (*Southend-on-Sea BC v Skiggs [2006] 2 EGLR 87(LT)),* where necessary to determine liability and quantum; and the scope of the service charge demanded. Furthermore, the application was prompted by the Respondent's letter before action dated 16 January 2019 (in evidence). The remainder of the skeleton argument and authorities was directed to the substantive Issues.

19. Mr Joiner confirmed in evidence at the substantive hearing that the application had been made as a direct response to the letter before action dated 16 January 2019, received from the Respondent's solicitors. The content of the letter is relevant to the Respondent's Costs Application. It points out that the Heritage Court leases make provision for payment of

service charge for accommodation of the House Manager, at paragraph 1.2.11 of the Fourth Schedule to the leases and that despite management functions having been acquired by the Applicant RTM, the rents remained payable to the Respondent. The letter goes on to threaten proceedings for recovery of the arrears including winding up proceedings.

20. On 8 January 2021, the Application was struck out by the tribunal after hearing argument on the Respondent's jurisdictional challenge as a preliminary issue. A detailed Decision confirming the tribunal's reasons was issued on 27 January 2021. The reasons were broadly consistent with the arguments put forward by the Respondent on 9 November 2020 in its statement of case.

21. On 24 February 2021, the Applicant sought permission from the FTT to appeal the Decision which was refused. This was followed by an application to the UT for leave to appeal on the same grounds, which was also refused on the grounds that there was no reasonable prospect of a successful appeal. The UT commenting that the FTT was right to strike out the application and that "*It might have been preferable for the determination to have been made under rule 9(3)(e) (no reasonable prospect of the application succeeding) or rule 9(3)(d) (abuse of process) but given the way in which the applicant's case was presented the FTT was also entitled to make use of rule 9(2) (absence of jurisdiction)*".

The law

22. The Respondent seeks a costs order under rule 13(1)(b) of the 2013 Rules. It alleges that the Applicant acted unreasonably in bringing and conducting the Proceedings. It does not seek an order for wasted costs under rule 13(1)(a).

23. Rule 13(1)(b) is engaged where a party has acted *"…unreasonably in bringing, defending or conducting proceedings…*". The Tribunal's power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act'), which provides:

> *"(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."*

It follows that any Rule 13(1)(b) order must be limited to the costs of and incidental to the Proceedings before this Tribunal.

24. Rule 3(1) of the 2013 Rules provides that *"The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly."* This extends to *"dealing with the case in ways that 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"* (rule 3(2)(a)).

25. Both parties referred to the UT's decision in ***Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC),*** which outlined a three-stage test for deciding rule 13 applications. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order. The second and third stages both involve the exercise of judicial discretion, having regard to all relevant circumstances and there need not be a causal connection between the unreasonable conduct and the costs incurred. Given the requirements of the three stages, Rule 13 applications are fact sensitive.

26. At paragraph 20, the UT referred to the leading authority on wasted costs, ***Ridehalgh v Horsefield [1994] Ch,*** where Sir Thomas Bingham MR considered the expressions *"improper, unreasonable or negligent"* and said:

> *""Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalties. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."*
>
> *"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes 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 a practitioner's judgment, but is not unreasonable."*

27. At paragraph 24 of ***Willow Court***, the UT said *"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 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 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?"

28. At paragraph 26, the UT went on to say:
"We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation and to discourage obstruction, pettiness and gamesmanship."

29. The absence of legal advice is relevant at the first stage of the inquiry (paragraph 32) and, to a lesser extent, the second and third stages (paragraph 33). At paragraph 34, the UT referred to ***Cancino v Secretary of State for the Home Department [2015] UKFTT 00059 (IAC),*** which concerned a corresponding cost rule in the Immigration and Asylum Chamber. At paragraph 26 of Cancino the UT gave the following guidance:

"First, the conduct of litigants in person cannot normally be evaluated by reference to the standards of qualified lawyers. Thus the same standard of reasonableness cannot generally be applied. On the other hand the status of unrepresented litigants cannot be permitted to operate as a carte blanche to misuse the process of the tribunal. The appropriate balance must be struck in every case. In conducting this exercise, tribunals will be alert to the distinction between pursuing a doomed appeal in the teeth of legal advice and doing likewise without the benefit thereof… Stated succinctly, every unrepresented litigant must, on the one hand be permitted appropriate latitude. On the other hand, no unrepresented litigate can be permitted to misuse the process of the tribunal. The overarching principle of fact sensitivity looms large once again."

30. At paragraph 43 of ***Willow Court***, the UT emphasised that Rule 13(1)(b) 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."*

The Respondent's application

Unreasonable conduct

31. The costs application was prepared by the Respondent's solicitor who submitted that the Applicant had acted unreasonably in several respects, principally by:

    a. Bringing proceedings against the Respondent that were misconceived.

    b. Failing to take account of the concerns about jurisdiction, highlighted by the Respondent in its written objection to the transfer application.

    c. Failing to notify the tribunal of the handing down of the decision in the Fountain Retirement appeal within 14 days of 23 July 2020, or at all.

    d. Failing to notify the tribunal or the Respondent whether the Applicant wished to continue with the application after the stay and if so the legal basis for proceeding with it.

    e. Failing to engage with the Respondent's correspondence on 8 September and 16 September 2020 about restarting the proceedings.

    f. Failing to file a Reply or otherwise deal with the jurisdictional issue set out in detail in the Respondent's Statement of Case dated 9 November 2021, causing the Respondent to incur the considerable costs and expenses of preparing for a full hearing of the substantive issues on 8 January 2021.

32. The Respondent contends that as a consequence of the Applicant's failures, the Respondent was put to considerable unnecessary expense which was disproportionate to the claim. The conduct of the Applicant was not therefore in keeping with the overriding objective and was unreasonable.

33. A reasonable person in the Applicant's position would, the Respondent contends, have complied with the tribunal's directions, engaged with the Respondent and considered the issue of jurisdiction prior to submitting the application or, at the very least after it had been set out in detail within the Respondent's statement of case on 9 November 2020.

34. The Respondent also contends that it is incumbent on a person bringing an application to ensure that it is within the jurisdiction of the tribunal. Particularly when the Applicant is represented by a person holding themselves out as having knowledge and experience of FTT process procedure. The failure of RTMF to act with competence in this regard was negligent and unreasonable.

35. At the hearing Mr Cohen expanded on the Respondent's grounds. He began by explaining that the Issues in the application were a matter of some consequence to the Respondent. The rent for the Wardens Flat for the 6 year period in question totalled over £50,000.00, moreover, if the challenge was successful it would effectively deprive the Respondent from any future rental income leaving it with a worthless asset.

36. In relation to the bringing of misconceived proceedings, Mr Cohen made some additional points. First he argued that not only was this always a dispute between the landlord and the management company about rent, not a service charge case, but that Mr Joiner either knew that to be the case or, that he should have known it, given his level of experience and expertise. In fact, the jurisdiction point was so obvious the Applicant did not need to be legally qualified to see that the application was doomed.

37. Secondly, that the Applicant was not a litigant in person, it was represented by RTMF throughout. A limited company who deployed Mr Joiner as its advocate and which held itself out on its website as having considerable expertise and experience of FTT law and procedure, equivalent to that of a solicitor. It was, Mr Cohen contended, evident from the quality of the submissions made in the s27A application and the statement of case filed on 16 October 2020 that Mr Joiner was a sophisticated litigant. Furthermore, the quality of the argument put forward in Mr Joiner's skeleton argument and authorities bundle filed on 7 January 2021, demonstrate that Mr Joiner had a good functional working knowledge of the law. To regard the Applicant as a litigant in person (LIP) would he submitted, completely mis-represent the position. The Applicant had a contractual and tortious relationship with RTMF who was representing it, and if a costs order was made because the Applicant had been poorly served by RTMF, it could sue in the same way as a party represented by a poor law firm.

38. During the hearing, mainly in response to the submissions of Ms Coyle concerning the limits of Mr Joiners experience, Mr Cohen went further and speculated that Mr Joiner not only knew the FTT did not have jurisdiction to determine the Issues under s27A of the Act, but also that he was hoping to manipulate the tribunal process to bring the case within s27A. Mr Cohen based his conjecture on Mr Joiners role as advocate for one on the tenants in the Fountain Retirement appeal, which was a bilateral case between a landlord and its tenants, i.e. not a case which involved an RTM company. This was a case in which full submissions were made by the tenants under s27A, whom Mr Joiner represented at the FTT and the UT as sole advocate. Mr Cohen submitted that it would have been evident to Mr Joiner from his experience in this case that the proper respondent to a challenge under s27A of the Act was the RTM company, but because that did not secure the desired outcome, Mr Joiner issued against the landlord Respondent, knowing it was no longer responsible for the service charges, but in the hope of manipulating the tribunal into hearing the claim. The application was therefore not only misconceived but also vexatious.

39. To summarise, Mr Cohen argued that the application was so obviously misconceived that an unqualified LIP should have been able to identify its failings, that in any event, the Applicant was represented by Mr Joiner of RTMF who was a sophisticated litigator well versed in FTT law and procedure, and finally that Mr Joiner did recognise that this was a rent dispute with the landlord that could not be brought under s27A, but he bowled ahead anyway hoping to manipulate the tribunal process.

40. In relation to Mr Joiner's failings since issue of proceedings Mr Cohen also made several submissions. There were, he contended, repeated failures to comply with directions. It was accepted that Mr Joiner had suffered serious health during the Proceedings, but this was not communicated to the Respondent until July 2021 in connection with directions on the Costs Application. Mr Cohen submitted that it could not have been impossible for either Mr Joiner or his staff to have communicated with the Respondent on this sooner.

41. Although not required by the directions to file a Reply, as the central issue concerning jurisdiction raised by the Respondent on 9 November 2020 required a rebuttal, it was unreasonable for this not to have been filed earlier than the eve of the hearing. This left the Respondent having to wrestle with a 150 page skeleton argument and an additional 200 pages of authorities, on the eve of the hearing.

42. Even then Mr Joiner failed to engage with the issues set out in the Respondents statement, he dismissed the jurisdiction issue in a few brief paragraphs and so fervent was his belief in his misplaced cause, that he went on twice to seek leave to appeal the FTT decision.

43. Mr Cohen submitted that Mr Joiners application to the UT bore scrutiny not just as an illustration of Mr Joiners continued intransigence, but because the UT's findings indicate that the case was so bad it was able to find no less than three Rules under which it could be struck out, including, Rule 9(3)(e) *no reasonable prospect of success* and Rule 9(3)(d) *abuse of process*. He also conjectured that the UT's comments could be taken to indicate that the remaining grounds under rule 9(3)(d) *frivolous or vexatious* might also have been in play.

44. In relation to ***Willow Court***, Mr Cohen submitted that the question - *is there a reasonable explanation for the conduct?* required a value judgement, but ultimately it was for the Applicant to provide the reasonable explanation. Mr Cohen said that he could see no reasonable explanation because the only explanation proffered by Mr Joiner was that set out in paragraph 8 of his Reply to the Respondent's statement on the Costs Application; which in summary is that the FTT got it wrong, the UT got it wrong and neither provided any statutory or legal authority in support of the proposition that the FTT did not have jurisdiction. This was further evidence of Mr Joiners staggering intransigence.

45. The question does not change, whether the Applicant is an LIP or represented. The answer may however change because it alters the criteria

against which the conduct is assessed. Mr Cohen submitted that the Applicant's conduct should be adjudged against that of competently represented party. It may have been poorly advised by Mr Joiner to pursue this application, but the Applicant cannot now recast itself as an LIP.

Ought the FTT make an order for costs

46. Mr Cohen submitted that at all stages the Applicant had behaved inappropriately, the consequence being that the Respondent had to carry the can in this case. The Respondent appreciated that Mr Joiner had been ill for a period, but he employs five staff and it is not difficult to respond to an email. The Respondent's conduct was, Mr Cohen submitted, impossible to criticise. It agreed to the stay prior to statements of case being directed and it set out its jurisdictional challenge in full within its statement of case when directed to file it. The Respondent has complied with all directions of the tribunal unlike Mr Joiner whose 11th hour submissions put the Respondent in a tailspin.

47. The case was of significant consequence to the Respondent who began the proceedings £35,000 down and was obliged to defend the proceedings fully and properly because an adverse finding would have a prejudicial effect its proprietary interest. The Respondent was therefore obliged to incur substantial costs protecting its rights.

48. Mr Cohen further submitted that the Respondents costs were unnecessarily increased by Mr Joiner's failure to respond to the Respondent statement of case in November 2020. Mr Joiner has since attempted to recast his conduct as a failure to understand the jurisdictional issue, but the claim failed for five separate reasons. It was always a case about rent which Mr Joiner knew full well, because that is how he described it in every document filed in the proceedings. He nevertheless proceeded with the case even after the jurisdictional challenge was set out fully in the Respondent's 9 November 2020 statement. Mr Joiner has appeared as advocate in many cases, his repeated appeals are vexatious and show that whatever the Respondent did, this was always going to end up before the tribunal because Mr Joiner believed in his case so fervently.

49. To summarise Mr Cohen submitted that an order for costs was appropriate when taking into account the degree of the Applicant's failure, which the UT had characterised as an abuse of process; Mr Joiners expertise which included representing parties on serious UT cases; the way in which the claim was progressed by Mr Joiner; and the serious sums of money the Respondent was obliged to expend to deal with the claim.

Terms of the order

50. As to the third limb of the three tests in ***Willow Court*** Mr Cohen invited the tribunal to summarily assess the costs on the standard basis. The

Respondent had appended to the Costs Application, two detailed statements of costs with supporting invoices and fee notes.

51. The total amount claimed under the first Statement of Costs dated 24 February 2021, which covers the period from commencement of proceedings to preparation of the first statement of costs - totals **£24,384.24**, broken down as follows:
    - Solicitor's costs £11,557.70
    - counsel's fees £8,750.00
    - VAT £4,061.54
    - Court fee £15.00

52. The total amount claimed under the second Statement of Costs dated 31 August 2021, which covers the period from preparing the first statement of costs up to and including the costs hearing - totals **£10,827.00**, broken down as follows:

Solicitor's costs	£4022.50
counsel's fees	£5,000.00
VAT	£1,804.50

53. The hourly rate claimed by the solicitors in the first statement of costs was, grade A fee earner at £250 per hour, grade B at £192 per hour, grade C at £161 per hour and grade D at £118 per hour, in each case exclusive of VAT.

54. In the second statement of costs, grade A at £275 per hour, grade B at £192 per hour, grade C £161 per hour and grade D £118 per hour, in each case exclusive of VAT.

55. The cost statements summarised the fee earners time split between attendances and work done on documents. Miss Crampin's fee note shows fees for advice, drafting the statement of case and updating it, totalled £2,250, plus VAT of £650, together with a brief fee for the hearing on 8 January 2021, of £5,500.00 plus VAT of £1,100.00. Mr Cohen's brief fee for the costs hearing was shown on the second statement as being £5,000 plus VAT of £1,000.00.

The Applicant's case

Unreasonable conduct

56. The Applicant filed a response to the Costs Application on 11 August 2021, setting out its grounds of opposition. Ms Coyle also filed a skeleton argument expanding on some of the Applicant's points, which she developed further at the hearing in response to Mr Cohens submissions.

57. She submitted that the jurisdictional issue was not obvious. If it had been the tribunal would have raised it when first considering the application. Instead the application was considered by the tribunal, along with the transfer application, following which directions were made concerning the stay.

58. Although the Respondent raised a concern about the tribunal's jurisdiction in its objection to the transfer application, it provided no detail or grounds for any such challenge, just that the Respondent was taking advice. The fact that the Respondent consented to the stay is, Ms Coyle submitted, inconsistent with any argument that the jurisdictional point was so obvious you didn't need to be legally qualified to spot it. Furthermore, the correspondence from the Respondent on the 8 September and 16 September 2020, does not return to the issue of jurisdiction. It was reasonable therefore for the Applicant to assume that the Respondent had dropped it having received advice.

59. Ms Coyle said that Mr Joiner did not respond to the correspondence because from about July 2020 onward he was undergoing treatment for cancer. He did not have access to emails during this period and although RTMF has five employees, they are not qualified to deal with FTT matters. The emails would therefore have been directed to Mr Joiner. Regrettably therefore, Mr Joiner was unable to attend to the case from July through September 2020. It was accepted that Mr Joiners ill-health was not communicated to the Respondent until July 2021, but it would, she submitted, have been evident from the details provided on the nature of the cancer treatment that Mr Joiner had been in serious ill-health for some time.

60. The Respondent did not particularise its case on jurisdiction until the 9 November 2020. Ms Coyle submitted that if the point was an obvious one, the Respondent should have applied for the application to be struck out at the earliest time, before incurring substantial legal costs on the preparation of the statement of case, witness statements and counsel's fees. If assessed against the failure of the Respondent to help itself or the tribunal by making an appropriate application at an earlier time, the Applicant's conduct cannot be adjudged to be unreasonable.

61. When asked why Mr Joiner had failed to engage with the jurisdictional challenge after 9 November 2020, by filing a Reply, Ms Coyle said that the time frame to reply by 18 November 2020 was quite short for an LIP, and also that, at the time, Mr Joiner did not believe jurisdiction was an issue. This was because he was seeking was a determination that the rent was not a service charge under s18 of the Act, which he believed fell squarely within a s27A application. Ms Coyle said that the problem was, Mr Joiner's failure to understand the distinction between leaseholders as tenants and leaseholders as shareholders of the RTM. Mr Joiner now appreciates that his stance was erroneous in law, but he isn't legally qualified and at the time genuinely believed that he had named the correct parties to the proceedings.

62. Ms Coyle submitted that there was a reasonable explanation for the conduct of the Applicant. It had received a letter from the Respondent on 16

December 2019, threatening legal proceedings, including winding up proceedings, if the outstanding rent for the Wardens Flat was not paid. Mr Joiner did not believe that the leaseholders were liable to pay the rent and following recent tribunal success in challenging notional rents for a similar Wardens Flat, decided to issue the Proceedings under s27A. This was not designed to harass the Respondent but because Mr Joiner genuinely believed it to be the correct jurisdiction to challenge whether the rents were relevant costs under s18 of the Act.

63. Ms Coyle said that Mr Joiners failure to issue the Proceedings against the correct parties was a consequence of his lack of legal knowledge concerning the legal status of the leaseholders. The Proceedings were intended to determine a genuine issue and not to harass the Respondent, who had not helped itself by sending a letter before action that cast the rent as a service charge item that the Applicant was able to recover from the leaseholders under their leases. Had Mr Joiner named the correct parties to the claim, it was a solid claim which would have proceeded.

64. Ms Coyle pointed to various paragraphs in Mr Joiner's statements which highlight his genuine, albeit mistaken belief, that the FTT did have jurisdiction to hear the claim, including paragraph 19 of Mr Joiners request to the UT for permission to appeal. Mr Joiner explains in paragraph 19 why in his view the leaseholders did not need to made parties to the proceedings. It would, he states, be an absurdity for the leaseholders to be in dispute with themselves and create a conflict of interest with the directors of the Applicant who were also leaseholders. The leaseholders were in agreement with the Applicant on the Issues and would not oppose the application, it would therefore be a waste of time and resources for all parties and contrary to the overriding objective.

65. Ms Coyle also took me to the grounds for Mr Joiners appeal in which he states that it must be the case that if a landlord (in this case the Applicant) is uncertain whether a particular item is chargeable and payable as service charge, the FTT is the appropriate tribunal to determine this under s27A. Mr Joiner's reason for issuing and continuing the proceedings was to obtain a determination of the payability and reasonableness of the Wardens Flat rent as part of the service charge. It is not, she submitted, unreasonable or vexatious to challenge a letter before action through proceedings and Mr Joiners has put forward consistent sound reasons for the challenge, he just issued against the wrong parties because he genuinely did not understand why the leaseholders needed to be joined.

66. Ms Coyle said that this was not a case where the Applicant had attempted to mislead the tribunal or had been dishonest in its representations. The Issues in the claim were not she submitted misconceived or vexatious. Mr Joiner had already succeeded in a similar case before the FTT and genuinely believed that this case was correctly pursued. He simply misunderstood how the procedure applied in relation to this particular application, also, he was less attentive to the directions due to a period of serious ill-health.

67. Ms Coyle submitted that when assessing the standard against which the Applicant's conduct should be adjudged, it should be that of an LIP. RTMF is the company secretary of the Applicant and was representing the Applicant in these proceedings for no additional fee. Mr Joiner is not legally qualified. Although RTMF holds itself out as having some expertise in FTT proceedings, the representations on its website are just in relation to RTM applications including applications to the FTT. Mr Joiners tribunal experience is mainly in relation to RTM applications under the 2002 Act and his website does not hold RTMF out as having any expertise in service charge cases.

68. Ms Coyle said that Mr Joiner was of course able to research the law independently because these days it was all accessible on the internet, but the fact that he bombarded the tribunal with authorities was more indicative of a lack of relevant knowledge than any real expertise. The Applicant is a group of retired people represented by Mr Joiner who is not legally qualified and at best can only be regarded as a McKenzie friend with no expertise in s27A applications. He is akin to a lay representative who is unfamiliar with substantive law and procedure and his conduct should not therefore be regarded as unreasonable.

69. Ms Coyle said that the issue in the Fountain Retirement appeal began life as a dispute concerning the operation of s94 of the 2002 Act, but was eventually determined under s27A of the Act. Furthermore, the appeal involved two cases, one of the other respondents was represented and she led the representations for the leaseholders, not Mr Joiner.

70. Mr Cohen made several points in response to Ms Coyle's submissions. He objected to Ms Coyle introducing evidence of Mr Joiner's ill-health in her skeleton argument and in her submissions. Mr Joiner had not raised his health as a reason for failing to comply with directions in the Proceedings when he responded to the Costs Application. Mr Cohen therefore invited the tribunal to disregard the submissions concerning Mr Joiner's ill-health as being presented too late for the Respondent to fairly consider them. When it was suggested that Mr Joiner was present and could give evidence on this point, Mr Cohen said that he did not want to be bounced into cross-examining Mr Joiner on his health, he simply asked the tribunal to disregard Mr Joiner's illness as providing any justification for the delays in this case.

71. Mr Cohen commented that Ms Coyle's submissions concerning a couple of paragraphs in the application and the Applicant's statement of case supported some elision between the issue of rent and service charge which in his view was not supportable. He submitted that the application had always been about the construction of the lease which was clear from paragraphs 12 and 16 of the Applicant's statement of case and from the submissions in Mr Joiners skeleton argument, in particular conclusion at paragraph 57. Determination was always a two-step process, the first step being to determine the nature of the charge (i.e. is there liability to pay rent) and only if then do you get to step two, which is whether the rent is payable as service charge. As the FTT had no jurisdiction to determine the first step the application was misconceived.

72. Mr Cohen submitted that the motivation for the application was clearly set out in the documents submitted by Mr Joiner within the Proceedings, this was always a case about rent and not service charge, and his re-packaged submissions within the Costs Application should not be given any weight.

73. Mr Cohen also submitted that the Respondent's conduct was not remotely relevant to the Costs Application. Had it raised the issue of jurisdiction earlier, it would have made no difference such was the fervency of Mr Joiners conviction that the FTT did have jurisdiction. The Respondent cannot be criticised for agreeing to a stay because statements of case had not been exchanged at that stage. Furthermore, it is unlikely to have been causative of any consequence, because even when the jurisdictional issues were subsequently pleaded in full Mr Joiner simply didn't accept that the FTT lacked jurisdiction.

74. Moreover, even had the Respondent requested a preliminary issue hearing in September 2020, given the short timetable provided for in the September Directions, the issue would still more likely have been dealt with as a preliminary point at the substantive hearing.

Ought the FTT make an order for costs

75. Ms Coyle submitted that the tribunal ought not to make an order costs because the Applicant was not legally represented, and the application was a genuine attempt to obtain determination as to whether that Wardens Flat rent is payable as a service charge.

76. Mr Joiner is not a specialist in section 18 or s27A of the Act . Although he has some specialism in the acquisition of rights to manage, the process of setting up RTM companies and of tribunal procedure in relation to RTM applications, he has little experience of service charge applications and made a genuine mistake about who should be the proper respondent to this application. In short Ms Coyle submissions were that Mr Joiner should be treated as a lay representative, and she relied in her skeleton argument on the observation in ***Willow Court*** – *"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*."

77. Ms Coyle also submitted that this was not a case where Mr Joiner had sought to mislead the FTT or the Respondent, it was not one of zealous deceit or harassment, if anything Mr Joiner was following the issues identified by the FTT in the September 2020 directions.

78. To the extent that there was delay in complying with directions Ms Coyle submitted that this was due to ill-health and not improper motive Also, Mr Joiner's conduct cannot be described as unreasonable just because the

Applicant was unsuccessful or because other more cautious legal representatives might have acted differently.

79. Furthermore, the Respondent had not helped itself in this case. It could have applied for the jurisdictional issue to be determined at a preliminary hearing before incurring the substantial costs of preparing its statements and instructing counsel, but did not.

The terms of any order

80. In his reply to the Respondents application for costs, Mr Joiner did not provide any argument on terms of any order or a detailed response to the Respondent's Statements of Costs, other than to state that the total costs claimed by the Respondent were wholly disproportionate and that the Respondent was seeking to quash a legitimate claim by the sheer weight of its financial resources without any consideration of proportionality. Mr Joiner submitted that the Applicant's resources were a factor because it is a management vehicle owned by retired individuals in sheltered accommodation.

81. In her skeleton argument Ms Coyle reserved the right to comment on the individual items of expenditure at the hearing where she made the following challenges:

First Statement of Costs

(a) In relation to the hourly charge out rates for fee earners, Ms Coyle offered no challenge.

(b) Ms Coyle challenged the total hours charged on attendance on the client by letter out/email/telephone of 25.8 hours as excessive given that the issues were predominantly legal and would not involve that degree of client attendance. Mr Cohen submitted that the attendances were over a period of time and concerned the potential loss of 125 year rental.

(c) Ms Coyle thought the attendance on opponents of 3.5 hours was also high having only seen a couple of emails and two letters from the Respondent's lawyers.

(d) Ms Coyle also submitted that 13.7 hours for letters out/email/telephone attendance on others was excessive and questioned who the others were. Mr Cohen said the time had been spent liaising with counsel and Falcon Chambers to organise conferences and with the FTT chasing progress after the stay.

(e) Mr Cohen also confirmed that the hours claimed in the Statements of Costs reflected actual time spent by the fee earners and were not based on unit costs.

(f) Ms Coyle challenged the 6.2 hours claimed by the solicitors for the hearing on the basis that it lasted less than half a day. Mr Cohen said that the time possibly included travel time

together with pre-and post-hearing calls with counsel and the clients.

(g) In relation to documents Ms Coyle noted that there had been extensive use of counsel to draft the statement of case, advise on the issues and represent the Respondent at the hearing. She therefore challenged the amount charged for the preparation of bundles, considering the applicant statement and drafting instructions to counsel as being too high. Ms Coyle also thought three hours was excessive for preparation of the first Cost Statements but that one and a half hours might be reasonable.

(h) Mr Cohen submitted that total time spent on documents over the period of time in question is not excessive given that the court bundle ran to some 900 pages.

(i) Ms Coyle challenged counsel's fees of £5,500 plus VAT for a half day hearing as being excessive but did not suggest what level of fee would be reasonable for counsel of Ms Crampin's seniority. Mr Cohen said that if one assumed counsel's charge out rate to be about £300 per hour, the fee note would include preparation time of approximately 12 hours, which he did not consider unreasonable given that this was a legally heavy matter involving a 900 page bundle. The brief fee was largely a consequence of the way Mr Joiner had gone about conducting his case. Ms Coyle disagreed submitting the counsel drafted the statement of case, was well acquainted with the issues and any sensible lawyer could see that the late submissions from Mr Joiner did not take his case much further. Counsel would have gone through any additional material quickly and 12 hours preparation for that is inflated.

<u>Second Statement of Costs</u>

(a) There was no challenge to the fee earner hourly rates charged.

(b) Ms Coyle made the same challenges to the time spent on letters out/email/telephone attendances with the client as above, reiterating that the costs application was entirely a legal issue and not one that needed lengthy instructions from the client. Mr Joiner's appeals did not involve the Respondent and no costs should be allowed for time spent on consideration of Mr Joiner's appeals other than consideration of the short decisions of the FTT and UT refusing leave to appeal.

(c) Ms Coyle challenged the 4 hours claimed for attendance on others, given that appeared to be just for liaising with counsel's chambers and the FTT on the listing of the costs hearing.

(d) Ms Coyle also challenged the two hours spent drafting the short reply to Mr Joiner's response and the preparation time

for the costs hearing of three hours as excessive. The court bundle was prepared for the substantive hearing and only needed updating with the costs application documents.

(e) Ms Coyle challenged Mr Cohen's fee of £5000 for a half day costs hearing on the basis that the work did not compare with that carried out for the substantive hearing by a more senior counsel whose fees were almost the same. Mr Cohen said that the costs application involved very different issues, he had to consider a 900 page bundle which covered the substantive hearing and had spent the best part of a day preparing, but was content to leave determination of the reasonableness of his fee to the tribunal.

The tribunal's determination

Unreasonable Conduct

82. The threshold for making a Rule 13(1)(b) costs order is a high one. As stated at paragraph 24 of ***Willow Court*** "…the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level."

83. I have first considered whether the Applicant had acted unreasonably in bringing and conducting the Proceedings. In doing so, I only considered the period from 24 April 2020, being the date of the section 27A application, until the conclusion of the hearing on 8 January 2021. The Applicant's conduct on the appeals' is not relevant, other than to possibly confirm a pattern of motivation or behaviour already identified when considering the Applicant's conduct in the Proceedings.

84. The Respondent argues that the Applicant is not an LIP, it was represented by a sophisticated litigator whose conduct should be viewed against the standard one would expect from a legally qualified representative. Mr Joiner is certainly experienced in law and procedure relating the RTM legislation under the 2002 Act, as boasted on his website, and has extensive experience of representing RTM companies before the FTT on RTM applications and to a lesser extent the UT. However, there was no compelling evidence that Mr Joiners company, RTMF, holds itself out as having expertise on any other area of leasehold dispute including service charges. RTMF, is the Applicant's corporate company secretary and Mr Joiner represented the Applicant in that capacity, presumably as part of the secretarial services provided for RTMF's agreed fees.

85. Mr Joiner did present lengthy reasoned argument citing appropriate authorities in support of his primary case, much of which appears to follow the line of argument that was successfully deployed by the respondents to the Fountain Retirement appeal. However, the limits of Mr Joiners knowledge and experience are apparent in his failure to address some significant and material differences in the lease terms to that of the appeal case, or to correctly work out who the proper applicant and respondents

should be to a s27A application affecting the leaseholders liability to pay, the RTM companies management obligations and also the proprietary interest of the landlord under the leases.

86. Mr Joiners involvement as representative of the Batworth Park House leaseholders in the Fountain Retirement appeal, appears from the UT decision to have been minimal, if he made any representations they are not mentioned. There is nothing in the decision to indicate that Mr Joiner's knowledge of the substantive law and procedure of service charges or of general legal principle, was such as to make it fair for him to be held to the standards of a qualified lawyer. The case started in the FTT, a jurisdiction that encourages litigants to represent themselves regardless of their level of sophistication, and they shouldn't be discouraged from appealing those decisions to the upper courts for fear it could be construed as giving them a gloss of professionalism, that might in turn cause them to be held to a higher standard.

87. Indeed, the limits of Mr Joiner's expertise became painfully apparent at the substantive hearing where he struggled and ultimately failed to understand the fatal flaw in his case. It was a basic misapprehension about the rights and powers of the leaseholders as shareholders of the Applicant, as against their proprietary rights as leaseholders under their leases. Mr Joiner may have appreciated that a court cannot determine the liability of a non-party to pay anything, but he made what is a common error of believing that the leaseholders were, in effect, represented though their shareholding in the Applicant.

88. His belief was strongly held, he referred to it in both his appeals and in his response to the costs application. I am satisfied from observing Mr Joiner at the substantive hearing and from considering his representations and submissions since, that Mr Joiner is a serious and sincere representative who genuinely believed in his argument, genuinely believed that the FTT and the UT had got it wrong and that he was only able to reconsider his position after instructing counsel to represent him on the costs application.

89. I do not accept that there is any evidence to support Mr Cohen's conjecture that Mr Joiner knew the application was vexatious but nevertheless pursued it with intent to mislead the tribunal and harass the Respondent. The reasons given by the UT when refusing Mr Joiners application for leave to appeal are not relevant. The UT did not consider Mr Joiner's conduct or make any finding of unreasonableness against the Applicant. The UT simply confirmed that the application was liable to be struck out under three Rules, including Rule 9(3)(d) – for abuse of process. It did not suggest that the proceedings were either frivolous of vexatious.

90. There is nothing inherently unreasonable in pursuing an unsuccessful case, however it may be unreasonable to pursue a case that is totally devoid of merit, particularly if a fatal weakness has been spelt out by the other party. The Issues in the case were not devoid of merit, the Applicant sought a perfectly legitimate determination of the payability and reasonableness of

the Wardens Flat rent. The fatal weakness was the absence of any leaseholder as a party.

91. The question is whether given Mr Joiner's familiarity with tribunal procedure, it should have been obvious to him when issuing the Proceedings, or certainly after receiving the Respondent's statement of case on 9 November 2020, that without joining at least one leaseholder as a party the application was bound to fail.

92. Ms Coyle argues that jurisdiction issue was far from obvious and I agree. It was not picked up by the tribunal when the application was first considered or when substantive directions were made in September 2020. The Respondent mentioned in its objection to the transfer, that it was seeking advice on a jurisdictional point but did not actually particularise its concerns until filing its statement of case on 9 November 2020. A statement that was settled by counsel after providing advice on 3 November 2020. Mr Joiner may be familiar with RTM legislation and tribunal procedure, but he is not a lawyer. Significantly, the Respondent who was represented by solicitors throughout, nonetheless required advice from counsel on the jurisdictional point and instructed counsel to settle the arguments put forward in its statement. This is completely inconsistent with Mr Cohen's submission that the jurisdictional issue was so obvious it didn't need a lawyer to spot it. Furthermore, Mr Joiner's misapprehension about the status of leaseholders as shareholders, is all too common for his misapprehension on this point to be regarded as unreasonable.

93. Mr Joiner's failure to engage with the Respondent's argument after the 9 November 2020 is more surprising, although explicable. Ms Coyle said that he didn't file a reply to the jurisdictional issue because he thought the Respondent had got it wrong. Mr Joiner instead focussed the limited time available to him on developing his skeleton argument in support of the substantive case, presumably anticipating the tribunal would dismiss the strike out application as a preliminary matter.

94. It is clear from the decision in ***Willow Court*** that although Mr Joiner is not a lawyer it does not follow that a costs award should never be made. His conduct needs to viewed in the proper context, including the standard or skill expected of someone with Mr Joiners experience, but without the benefit of professional legal advice. In considering his conduct after the 9 November 2020, I accept that it would have been helpful for Mr Joiner to have adopted a more flexible approach and to have given greater respect to the Respondent's statement. His experience has, if anything, inspired over-confidence in the rightness of his arguments and a rather combative approach to Proceedings, which in this case has resulted in significant work for the parties and the tribunal. However, the jurisdictional point was not obvious in itself, or easy for a non-lawyer to grapple with, based only on the arguments set out in the Respondent's statement. On balance therefore I do not find that Mr Joiner's failure to properly appreciate the weakness of his case after the 9 November 2020, to be unreasonable.

95. As to the Respondent's other grounds, which include Mr Joiner's failure to comply with directions, in particular the direction to notify the tribunal of the handing down of the decision in the Fountain Retirement appeal. I find that neither party complied fully with that direction, in fact there was no response from either party until the tribunal wrote to them on the 2 September 2020 to ask what was happening and whether there were any outstanding issues. Although parties should comply with directions, they often fail to comply fully, and the late compliance by each party in this instance does not amount to unreasonable conduct.

96. Mr Joiner's failure to engage with the Respondent's correspondence of 8 and 18 September is also characterised as unreasonable conduct. Ms Coyle explained that Mr Joiner's failure to attend to the letters from the tribunal and the Respondent in September 2020 was a consequence of treatment he was having for cancer. Mr Cohen objected to late submissions on this point but did not suggest that Mr Joiner had not been ill, just that the recent submissions should be disregarded because he didn't communicate it at the time or mention it in his response to the costs application.

97. To the extent that it may be relevant to the Respondent's allegation of unreasonable conduct, I have not needed to consider the submissions concerning Mr Joiners health. The tribunal issued substantive directions on 16 September 2020 which Mr Joiner complied with. His failure to engage with the Respondent over a comparatively short period of time in September 2020 does not amount to unreasonable conduct, with or without any consideration of Mr Joiner's health.

98. To summarise, for the above reasons I do find that the Respondent has demonstrated that the Applicant had acted unreasonably for the purposes of Rule 13(1)(b) of the Tribunal Rules. As the application has failed to pass the first stage of the test set out in ***Willow Court***, it follows that it is unnecessary to go on to consider stages two and three. Accordingly, the Respondent's cost application is refused.

Name: Judge D.Barlow **Date:** 22 November 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).