FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/LRM/2023/0009**
Property	**:**	**226 Upper Richmond Road, London, SW15 6TG**
Applicant	**:**	**226 URR RTM Limited**
Representative	**:**	**Philip Sissons (Counsel) instructed by Gaby Hardwicke Solicitors**
Respondent	**:**	**Heavenly Homes London Limited**
Representative	**:**	**Faisel Sadiq (Counsel) instructed by Fladgate LLP Solicitors.**
Type of application	**:**	**Right to Manage - Costs**
Tribunal member	**:**	**Judge Robert Latham** **Richard Waterhouse FRICS**
Venue of paper determination		**10 Alfred Place, WC1E 7LR**
Date of decision	**:**	**9 September 2024**

DECISION

Decision of the Tribunal

(i) The Tribunal assesses that costs of £27,131 (inclusive of VAT) are payable by the Applicant to the Respondent pursuant to section 88 of the Commonhold and Leasehold Reform Act 2002.

(ii) The Tribunal does not make an order for costs against the Respondent pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Substantive Application

1. On 19 October 2023, 226 URR RTM Limited (“URR”) issued this application under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination that, on the relevant date, the Applicant RTM company was entitled to acquire the Right to Manage ("RTM") in relation to 226 Upper Richmond Road, London, SW15 6TG ("the Premises").

2. On 1 August 2023, the Applicant served its Claim Notice pursuant to section 79 of the Act stating that it intended to acquire the RTM the Premises on 4 December 2023. On 31 August 2023, the Respondent freeholder served a Counter-notice disputing the claim, alleging that the Applicant had failed to establish compliance with sections 72(6) and 79(5) of the Act.

3. On 31 October 2023, the Tribunal gave Directions. The Procedural Judge identified the issue to be decided, namely whether on the date on which the notice of claim was given, the Applicant was entitled to acquire the RTM of the Premises.

4. On 27 November 2023, the Respondent filed its Statement of Case. It identified two substantive grounds for opposing the application:

   (i) that the Premises are non-qualifying premises as the non-residential parts exceed 25% of the total internal floor area of the Building so that, pursuant to section 72(6) and Schedule 6, paragraph 1 of the Act, the Premises do not qualify (“Issue 1”);

   (ii) that on the relevant date, the members of URR did not include a number of qualifying tenants of flats which was at least one half of the total number of flats in the Premises (“Issue 2”).

5. On 27 March 2024, this matter was set down for hearing before this Tribunal. The parties filed a Bundle of Documents extending to 717 pages together with a Supplementary Bundle. Mr Philip Sissons (Counsel) instructed by Gaby Hardwicke Solicitors appeared for the Applicant; Mr Faisel Sadiq (Counsel) instructed by Fladgate LLP Solicitors appeared for the Respondent.

6. On the eve of the hearing, the Respondent conceded Issue 1. After a joint inspection on 13 March 2024, their expert, Mr Nesbitt, had computed the internal floor area of the commercial premises to be 344.70 sqm and the residential premises to be 1,027.22 sqm. The percentage of the commercial premises was 25.13%, which was marginally higher than the critical figure of 25%. However, in a conference on the eve of the hearing, the Respondent ascertained that Mr Nesbitt had misapplied the decision of Mann J in *Westbrook Dolphin Square Limited v Friends Life Limited* [2014] EWHC 2433 (Ch); [2015] 1 WLR 1713. Mann J had held that when calculating the non-residential area of the premises, common parts that

exclusively serve non-residential areas of the premises should be exclude.

7. The hearing therefore was restricted to Issue 2. The Tribunal was not referred to the Supplementary Bundle which included the supplementary reports from the experts. It was common ground that as at the relevant date, URR had ten members and that there are 14 flats in the Premises. However, in respect of four of the qualifying flats, only one of two joint tenants was a member of the RTM Company. The Respondent contended that in consequence, the "qualifying tenant" of these four flats was not a member, since all of the joint tenants must be a member for the "qualifying tenant" to be a member. There were therefore only six qualifying tenants who were members of URR and the 50% threshold was not met.

8. There was no decided decision on this important point of principle which raised an interesting issue of law. It had not appeared to be straight forward. The Tribunal heard oral argument from Counsel and concluded the hearing at 12.25. However, the Tribunal afforded Counsel the opportunity to make further written submissions which were filed on 12 April. The Tribunal was greatly assisted by the oral and written submissions made by both Counsel.

9. Having considered URR's Articles of Association which adopted the Articles prescribed by the RTM Companies (Model Articles) (England) Regulations 2009/2767, it became clear to the Tribunal that both joint tenants needed to be a member of the RTM Company. The application therefore failed because only six of the 14 qualifying tenants were members of URR and the 50% threshold was not met. The Tribunal notified the parties of its decision on 29 April 2024. The Applicant has not sought permission to appeal.

The Current Applications for Costs

10. On 24 May 2024, the Tribunal received two applications:

(i) The Respondent applies for its costs pursuant to section 88(2) of the Act. The Respondent claims costs totalling £69,409.20 (inclusive of VAT).

(ii) The Applicant applies for its costs pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Applicant claims costs of £71,952.60. The Applicant further argues that the Respondent should not be entitled to its Section 88(3) costs in so far as those costs relate to Ground 1.

11. On 6 June 2024, the Tribunal gave Directions for these applications to be determined on the papers. Neither party has requested an oral hearing. On 28 August, the Respondent filed an agreed Bundle totalling 297 pages. References this Bundle are prefixed by "p.__" and to the Application Bundle are "AB.__".

12. When the Respondent filed the Bundle, it included a Supplemental Schedule of Cost incurred since 28 June 2024. On 2 September 2024, the Applicant made further submissions contending that the Respondent was not entitled to claim any costs after 29 April 2024, the date on which the claim notice ceased to have effect. The Applicant relies upon the decision of the Court of Appeal in *Eastern Pyramid Group v Spire House RTM Company Limited* [2012] EWCA Civ 1658.

The Section 88(2) Costs Application

The Law

13. Section 88 of the Act provides:

> "(1) A RTM company is liable for reasonable costs incurred by a person who is—
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> (a) landlord under a lease of the whole or any part of any premises,
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> (b) party to such a lease otherwise than as landlord or tenant, or
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> (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, in consequence of a claim notice given by the company in relation to the premises.
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> (2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.
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> (3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.
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> (4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by the appropriate tribunal."

14. The Act confers rights on tenants of leasehold flats to acquire the Right to Manage their flats without the need to show any fault by their landlord. It is a matter of basic fairness, necessary to avoid the statute from becoming penal, that the tenant exercising their statutory right should reimburse the costs necessarily incurred by any person in receipt of such a claim in satisfying themselves that the claim is properly made and in completing the formal steps required by the Act.

15. On the other hand, the statute is not intended to provide an opportunity for the professional advisers of landlords to charge excessive fees. Section 88(2) provides a ceiling by reference to the reasonable expectations of a person paying the costs from their own pocket; the costs of work which would not have been incurred, or which would have been carried out more cheaply, if the landlord was personally liable to meet them are not reasonable costs which the tenant is required to pay. Section 88(2) provides protection for both landlords and tenants: for landlords against being out of pocket when compelled to surrender the right to manage and for tenants against being required to pay more than is reasonable.

16. Section 88(3) makes express provision where disputes arise over the Right to Manage. A RTM company is liable for the costs incurred by the landlord before the Tribunal only if the tribunal dismisses the application.

17. By section 89(2) of the Act, the RTM Company's liability to pay costs ceases when the claim notice ceases to have effect. By section 84(6), the notice ceases to have effect when a Tribunal finally determines that the RTM Company was not on the relevant date entitled to acquire the RTM. It is common ground that the Claim Notice ceased to have effect on 29 April 2024, the date of the Tribunal's determination.

18. The Applicant refers the Tribunal to the judgement of Birss LJ in *Eastern Pyramid Group* at [22]:

> "Sections 88 and 89 concern costs. Section 88(1) provides that the RTM Company is liable for the reasonable costs in consequence of a claim notice, of a defined set of persons. That defined set is, again, the Landlord and Managers. Sub-section 88(3) provides that the RTM Company is liable for the costs of such a person in any proceedings before the tribunal but only if the tribunal dismisses the RTM Company's claim for entitlement. By s89(2) the RTM Company's liability for costs under s88 when a claim notice is withdrawn is for those costs incurred down to the time of withdrawal."

19. The Tribunal is satisfied that the Birss LJ is doing no more than statute. The RTMs' liability in respect of any costs incurred by the landlord in opposing the Claim Notice ceased on 29 April 2024. However, the landlord is thereafter entitled to its reasonable costs in having its claim for its Section 88 costs assessed.

20. The parties are claiming substantial sums for costs incurred after the Tribunal's decision, the Respondent claims £14,673.59 and the Respondent £13,900. This is normally a no costs jurisdiction. Whilst the Respondent is entitled to its reasonable costs in having its Section 88 costs assessed, it is not entitled to its costs in defending the Applicant's Rule 13(1)(b) application.

The Parties Submissions

21. The Respondent's assessment of its costs is set out in two documents: (i) Statement of Costs (28.6.24) at p.28-36; and (ii) Supplemental Statement of Coasts (21.8.24) at p.86-87. The Statement of Costs claims costs of £64,254.16. Of this, £9,518.39 relates to "costs recovery". The Supplemental Statement of Costs claims an additional £5,155.20 in respect of costs incurred after 28 June 2024. Thus a total of £69,409.36 is claimed of which £14,673.59 was incurred after 29 April 2024. The Schedules do not seek to apportion the costs in respect of the respect costs relating to (i) the Ground 1/Ground 2 issues; or (ii) the two cost applications.

22. The Applicant's Statement of Case is at p.72-77 and the Respondent's Reply at p.78-85. The Applicant raises the following points:

(i) The costs in respect of Ground 1 should be disallowed in its entirety. 90% of the costs of the application related to this. The costs of instructing the surveyor should be disallowed. The Respondent's costs should be limited to £5,307.10. The Respondent responds that section 88(2) is not drafted so as to limit a landlord only to recovering costs on the grounds on which it succeeds. It was reasonable for the Respondent to pursue Ground 1 given the importance of the case to the landlord. The Applicant was seeking to deprive the Respondent of its right to manage a high-end development in a prestigious and high value area of London. The Respondent had pursued this Ground relying on the advice of its expert, Mr Nesbitt. The Respondent had conceded this point when it became apparent that Mr Nesbitt had misapplied the law in failing to have regard to the approach mandated by the High Court in *Westbrook Dolphin Square Limited*.

(ii) The hourly rates claimed are excessive. An excessive amount of work was carried out by a Grade A fee earner. The total time costs should be reduced by 60%, namely from £44,233.91 to £17,689.56.

Band A	**Guide Rate**	**Rate Claimed**	**% in excess of Guideline**
A	£398	£600-£630	50-58%
B	£260	£450	73%
C	£148	£200-230	35-55%

The Respondent replies that the Guideline Rates are only guidelines (see Adam Johnson J in *Lappett Manufacturing Company Limited v Rassam* [2022] EWHC (Ch) at [12]). A departure can be justified in cases involving a specialist areas of law. Ground 2 raised a novel and complex issue of law.

(iii) A number of specific items are challenged:

(a) 5.6 hrs at £600 p/h for attendance on documents in Part 3 – pleadings is excessive. The statement of case was settled by counsel, no more than 2 hrs would be appropriate for input from a Grade A fee earner. The Respondent replies that the suggestion of duplication is misconceived. The Solicitor drafted the Statement of Case, Counsel drafted the Reply.

(b) The application dated 22 December 2023 for an extension of time was entirely the result of the Landlord's failure to comply with the existing deadline of a response to the RTM Company's reply. No explanation was given as to why the original deadline could not be met. The RTM Co should not, regardless of any other points, be required to pay these costs. The total of Part 5 (£1,280) should be disallowed. The Respondent repliers that the timetable had been set on the papers and without any input from the parties. An extension of time was therefore justified.

(c) The application dated 22 January 2024 was for an order for joint inspections by experts. This should be disallowed because it related only to the abandoned Ground 1 and/or because the application was refused and the RTM Co should not have to pay the Landlord's costs of a failed application. The total of Part 6 (£3,700) should be disallowed. The Respondent replies that the fact that the application for a joint inspection was refused, does not mean that the application was unreasonable.

(d) The application dated 20 March 2024 was for permission to rely on a supplemental report from the Landlord's expert Mr Nesbit. This should be disallowed because it related on to the abandoned Ground 1 and/or it was for the Landlord's sole benefit and necessary due to a failure to put its evidence in proper order at an earlier stage; and/or (c) it could have been dealt with by agreement without the need for a formal application. The total of Part 7 (£1,070.87) should be disallowed. The Respondent replies that that the application for permission to rely on a supplementary report from their expert was reasonable.

(e) A total of 13.42 hours (across all fee grades) is excessive for 'General case management', particularly given the time spent on specific aspects of the case and claimed elsewhere. This part should be reduced by 50%, a deduction of £3,620.42. The Respondent replies the costs claimed for case management were reasonable.

(f) A total of 15.3 hours (across all fee grades) is excessive for 'Costs Recovery', given that the Landlord's statement of case has been prepared by counsel and a fee is also claimed for a costs draftsman. This should be reduced by 50%, a reduction of £3,406.07. The Respondent replies that it was reasonable to involve both a costs draftsman and counsel in the assessment of costs. The Applicant had made serious attacks on the Respondent's conduct of the litigation.

The Rule 13(1)(b) Costs Application

23. The parties accept that *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (LC); [2016] L&TR 34 is the leading authority of Rule 13(1)(b). The Upper Tribunal (at [28]) adopted a three-stage approach. The first stage is to consider the reasonableness of the conduct. The second stage is whether in the light of the unreasonable conduct, the Tribunal ought to make and order for costs and the third is the terms of any costs order. The Tribunal is satisfied that in the current case, the issue is whether the Applicant is able to satisfy the first stage, namely unreasonable conduct sufficient to justify a penal costs order.

24. This is normally a no costs jurisdiction. Rule 13(1)(b) of the Tribunal Rules only permits a Tribunal to make a penal costs order if satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings. In *Willow Court*, the Upper Tribunal ("UT") gave detailed guidance on what constitutes unreasonable behaviour (emphasis added):

> 22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in *Ridehalgh v Horsefield* [1994] Ch 205. We therefore restrict ourselves to mentioning *Cancino v Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). Cancino provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.
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> 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 10 unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and

reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in Ridehalgh at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals 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.

25. The UT address the situation where an applicant withdraws their claim at [35] to [37]. Parties should be encouraged make sensible concessions. Concessions are an important part of contemporary litigation.

The Parties' Submissions

26. The Applicant's assessment of its costs is in its Updated Schedule of Costs (updated to 30.7.24) is at p.169-224. The Applicant claims £71,952.60, of which £13,900 relates to "post-decision and costs".

27. The Applicant's Statement of Case is at is at p.88-163; the Respondent's submissions at p225-236 and the Applicant's Reply at p.280-288. The Applicant suggests that the following unreasonable conduct justifies a penal costs order:

(1) The Respondent served its counter-notice on 31 August 2023 without any proper basis for asserting that the commercial floor areas exceeded 25%. The Notice merely stated without any explanation that "s. 72 (6) and paragraph 1 of Schedule 6" was not satisfied (at AB.49-50).

(2) The Respondent then failed to reply to the letter from the Applicant's solicitors, dated 6 September 2023 (at AB.51-52), which enclosed a report from the Applicant's surveyor demonstrating that the Premises were well below the 25% threshold. The Respondent notes that Mr Dolties concluded that the non-residential parts of the building were only 9.4% of the total. He subsequently revised this to 14.2% based on VOA and 16.4% based on EPC.

(3) The Respondent failed to engage with the Applicant prior to the application being made on 19 October 2023. The Respondent accept that they did not obtain a report from Mr Nesbit until 22 November 2023 (at AB.149-161).

(4) The Respondent failed to investigate the floor area before the application was issued. The Respondent accepts this.

(5) The Respondent then filed a Statement of Case on 22 January 2024 which asserted, expressly, that Mr Nesbitt had followed the approach in *Westbrook Dolphin Square*. It now appears clear that there was no basis whatsoever for that assertion.

(6) The Respondent then sought an extension of time and made an unsuccessful application for a joint inspection, very shortly before the application was due to be determined on the papers. The Applicant incurred costs in addressing these matters.

(7) The Respondent paid no heed to the Tribunal's refusal of its application or the warning that seeking further inspections/evidence was disproportionate.

(8) Having embarked on this campaign, the result was to produce a supplemental report from Mr Nesbitt which contained the same flaws as the original report and failed to provide a breakdown of his

measurement of the ground floor (or otherwise to attempt to explain the significant divergence from the measurements produced by Mr Dolties).

(9) The Respondent delayed another 6 days before making the inevitable concession, during which time counsel's fees were incurred.

28. The Respondent accepts that it filed its Statement of Case which asserted that Mr Nesbitt had followed the approach in *Westbrook Dolphin Square*. This had been the Respondent's understanding. However, it was only later that it became apparent that Mr Nesbitt had misunderstood the effect of *Westbrook Dolphin Square*. This had only become apparent at a conference with Counsel on 26 March 2024, the day before the hearing. This was the first occasion on which a conference had been possible, because of Mr Nesbitt's availability. At 17.54, Mr Sadiq notified Mr Sissons that the Respondent would no longer be taking this point.

The Tribunal's Determination

29. In considering these applications, the Tribunal has regard to the following:

(i) The Applicant was seeking to deprive the landlord of its right to manage its property. The Respondent was therefore entitled to put the Applicant to strict proof that it satisfied the statutory requirements.

(ii) Both parties instructed specialist solicitors. They should have had regard the Overriding Objective in rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Both parties had a duty to cooperate with the Tribunal to ensure that the application could be determined in a proportionate manner.

(iv) This is normally a no costs jurisdiction. However, section 88 gives the landlord a statutory right to its "reasonable costs" when a Tribunal dismisses a RTM application. Any party has a right to apply for penal costs under rule 13(1)(b), but only when a party has acted manifestly unreasonably.

30. The Tribunal is surprised by the costs incurred by the parties both in connection with the substantive application (Applicant: £58,053; Respondent: £54,736) and the costs incurred thereafter (Applicant: £13,900; Respondent: £14,673.59). The Premises are a high value property in Richmond. This is not Prime Central London. Both parties have engaged Grade A Solicitors and experienced counsel at all stages.

31. On 31 October 2023, a Procedural Judge gave Directions on the papers (at AB.84-87). At this stage, the substance of the issues in dispute was not apparent and the Judge considered that the application could be determined on the papers. The reason for this was that the Respondent

had not specified the substance of its objections either in its Counter-notice or in the pre-action correspondence.

32. The Tribunal is satisfied that this case was not suitable for a paper determination. The moment that it became apparent that there was a real dispute about the non-residential parts of the Premises (Issue 1) directions should have been sought in respect of expert evidence and an oral hearing. The Respondent must bear primary responsibility for this. Their expert did not inspect the Premises until 20 November 2023. His report, dated 22 November 2023, was fundamentally flawed because he misunderstood the effect of *Westbrook Dolphin Square*. On 18 December 2023, the Applicant filed their Reply which pointed out the flaws in Mr Nesbitt's approach (at AB.172-180). Mr Nesbitt had assessed the commercial premises at 25.13% which was only marginally above the critical figure of 25%. His report therefore required anxious scrutiny in any event. This only occurred on 12 April 2024, at a conference with Counsel.

33. Because the parties had focussed on Issue 1, neither recognised the importance of Issue 2. This raised the interesting legal point of whether all joint tenants must be members of the RTM Company in order to be a "qualifying tenant" in computing the 50% threshold. There was no binding authority on this issue. This required an oral hearing. The Tribunal benefitted greatly from the oral and further written submission of Counsel.

34. The Tribunal is satisfied that the Applicant's application for costs under Rule 13(1)(b) is hopeless. The Respondent initially sought to put the Applicant to proof. It then instructed an experienced expert. It acted on the advice of its expert. The Respondent's failure to identify the flaw in their expert's approach until a late stage, cannot constitute unreasonable conduct that meets the high threshold for a penal costs order. It is not enough that the Respondent took a bad point. The acid test is whether there was a reasonable explanation for the Respondent's conduct. There was. It was acting on the advice of its expert.

35. However, the Tribunal is satisfied that the section 88 costs claimed by the Respondent should be substantially reduced. Whilst the high threshold for a Rule 13(1)(b) costs order is not met, the Tribunal is satisfied that the Respondent should not have taken the Issue 1 point. The Respondent was the developer of the subject Premises. It had access to all the construction drawings, designs, planning consents and lease plans. The Respondent raised the Issue 1 objection some weeks before Mr Nesbett was instructed. It should have applied its mind to this issue before it served its Counter-notice. The Applicant provided the Respondent with their expert's report six weeks before this application was issued. The Respondent failed to engage on this. The Respondent must accept the consequences of the fundamental error which was subsequently made by their expert.

36. The Tribunal therefore makes two reductions to the sum of £54,735.77 in respect of the sums claimed by the Respondent for the substantive application. First, the Tribunal makes a 50% reduction relating to the costs attributable to Ground 1. This reduces the costs to £27,367.88. Secondly, the Tribunal makes a further reduction of 10% because it considers that the level of the costs claimed are unreasonably high. The Tribunal therefore assesses the costs of the substantive application at £24,631 (including VAT).

37. In making the 50% reduction, the Tribunal has sought to do the best that we can on the material before us. The Respondent has not sought to apportion costs between Issues 1 and 2. Whilst we accept that more than 50% of the costs prior to the hearing would have been attributable to Issue 1, the hearing and the subsequent written submissions related solely to Issue 2. We do not accept the Applicant's argument that Issue 2 could have been determined on the papers. It raised an interesting legal issue upon which there was no binding authority. Legal argument would have been required at an oral hearing.

38. The Tribunal makes the further reduction of 10% because it considers that that the hourly rates claimed are unduly high (see [22] above). Further, an excessive amount of work was carried out by a Grade A fee earner, particularly given the involvement of Counsel. The other points raised by the Applicant are reflected in the 50% reduction which we have made.

39. Secondly, the Tribunal turns to the reasonable costs to which the Respondent is entitled in making its application for its Section 88 costs. The Tribunal accepts that the RTMs' liability in respect of any costs incurred by the landlord in opposing the Claim Notice ceased on 29 April 2024. However, the landlord is thereafter entitled to its reasonable costs in having its claim for its Section 88 costs assessed. In assessing these costs, we are dealing with the costs relating to its Section 88 application. Its response to the Rule 13(1)(b) application falls outside this and is rather covered by the Tribunal's "no costs jurisdiction".

40. The Respondent is claiming a total of £14,673.59 in respect of its costs incurred after 29 April 2024. After the Tribunal issued our decision, the only outstanding issues were those relating to costs. The costs claimed are manifestly excessive. We are satisfied that a sum of £2,500 (inclusive of VAT) is the reasonable sum.

41. The Tribunal therefore assesses the Respondent's Section 88 costs in the sum of £24,631 + £2,500, namely £27,131 (inclusive of VAT).

Judge Robert Latham
9 September 2024

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).