FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BA/BTB/2025/0001**
Property	:	**1-19 Vertex Apartments, 121-123 Kingsland Road and 125-131 Palmerston Road, Wimbledon SW19 1PB**
Applicants	:	**Alice and Ronald Pattinson (Flat 3)** **Matthew Payne (Flat 5)** **Aneta Przygoda (Flat 6)** **Virginia Humpage (Flat 8)** **Fong Gane Pro Ong Seng (Flat 9)** **Ai Jiao and Feng Gao (Flat 10)** **Kevin Kien Veng Chan (Flat 11)** **Richard Skully (Flat 12)** **Gemma Cusworthy (Flat 13)** **Elizabeth Jane Morley (Flat 14)** **Linda Saran (Flat 15)** **Francois-Xavier Basselot (Flat 16)** **Gillian Stewart (Flat 18)** **Richard Sandiford (Flat 19)** **Alan and Brenda Tanset (127 Palmerston Road)** **Karen Tansey (129 Palmerston Road)**
Representative	:	**Mr John Philpott (Solicitor, Graftons)** Receiving his instructions from the RTM directors Ms Stewart and Mr Basselot on behalf of the leaseholders
Respondent	:	**London Borough of Merton**
Representative	:	**Mr Trevor McIntosh** (Building Inspector)
Type of application	:	**For an order for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member(s)	:	**Judge N Carr**
Date of decision	:	**14 August 2025**

DECISION AND REASONS

Order

(1) The Applicants' three applications for rule 13 costs (received on 24 April 2025, 14 May 2025, and 21 July 2025) are dismissed.

Relevant Background

1. The Applicant leaseholders appealed against notices served on them by the London Borough of Merton ('Merton') under section 36(1) of the Building Act 1984 ('section 36 Notices') ('the Act'), requiring the leaseholders to either pull down and remove, or effect alterations to, works said to be in contravention of Building Regulations in force at the time of the completion of Vertex Apartments, consisting of a number of flats and townhouses on a new-build development completed in or around March 2015 ('the premises').

2. The developer of the premises was Mizen Design Build Limited ('MDB'). On 13 March 2015, the LHA provided a completion certificate to MDB.

3. The freehold was then held by Mountfield Road Developments LLP, who at some point transferred ownership to Mizen Developments Limited ('Mizen'), without rights of first refusal being given to leaseholders. Mizen is the current Freeholder. Vertex Apartments RTM Company Ltd has since obtained the right to manage the Premises. It is understood that Mizen has also been given a section 36 notice.

4. The section 36 Notices were given on or around 17 February 2025 (under a month before the ten-year limitation in section 36(4) expired). They required each of the leaseholders, as "owners" to either pull down and remove, or effect alterations to, the following contraventions. It is understood that the report referred to is one that was commissioned and obtained by the leaseholders themselves and shared with the LHA:

   Drainage and waste disposal

   H1 (1) *An adequate system of drainage shall be provided to carry foul water from an appliance within the building to a public sewer.*

   The Guidance would suggest that it should have adequate falls with adequate access for cleansing at changes of gradient and direction.

   Report Item 1.4

   The drainage installation has not been constructed to satisfy the requirement of Building Regulation ***H1***

Means of Warning and Escape

B1. *The building shall be designed and constructed so that there are appropriate provisions for the early warning of fire and appropriate means of escape to a place of safety outside the building capable of being safely and effectively used at all material times.*

It is noted that there is provision for disabled people to gain access to the basement but there is no provision for evacuating them from the basement area safely and effectively at all material times.

B1 *The building shall be designed and constructed so that there are appropriate provisions for the early warning of fire and appropriate means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used at all material times.*

The entrance doors and frames within the structural openings of the apartments do not achieve the required FD30S standard to protect the hallway stairway from a fire in any one of the apartments.

Internal fire spread (structure)

B3 (3) *Where reasonably necessary to inhibit the spread of fire within the building, measure shall be taken to an extent appropriate to the size and intended use of the building, compromising either or both of the following:- Subdivision of the building with fire resistant construction:*

The service areas and service ducts have not been provided with fire resistant separation including the openings into the service ducts providing a minimum of 30 minutes fire resistant separation adequately smoke sealed.

Protection from falling

K1 *Stairs, ladders, and ramps, shall be designed and installed to be safe for people moving between different levels in or about the building.*

The Concrete stairway leading to the basement has variation in the dimension between consecutive risers and goings and do not provide safe movement between levels for people in and around the building.

Building Regulation 7 Materials and workmanship

Building work shall be carried out-

(a) With adequate and proper materials which-

(1) are appropriate for the circumstances in which they are used

(2) Are adequately mixed and prepared, and

(3) Are applied used or fixed so as to adequately perform the functions for which they are designed, and

(b) Used in a workmanlike manner.

I consider that the aluminium coping does not comply with this requirement including the jointing of that coping.

5. By letter dated 12 March 2025, I identified a number of issues, including:

Save, perhaps, for the doors to the flats in the property (and of course, subject to seeing the leases to establish whose responsibility the stated areas are), it would appear to Judge N Carr that the individual leaseholders could not meet the definition of 'owner' in section 126 of the Building Act 1984 (nor indeed could the RTMCo) since the common/shared areas and structure/exterior would not ordinarily be demised to them (and so they would not be entitled to receive a rack rent (or any rent) in respect of them).

6. The other matters were difficulties brought about by misidentification of the correct Applicants to the appeal (the reference to the RTMCo is to Vertex Apartments Right To Manage Company ('VARTM'), in whose name the appeals were brought), which led to a series of correspondence with Mr Philpott in respect of correct identification of the persons with standing to bring the appeal in accordance with sections 40 and 126 of the Act, and basic principles of agency.

7. The parties were invited to provide position statements addressing the matters raised. Merton did not do so. A case management hearing ('CMH') took place on 9 April 2025. Merton did not attend.

8. As part of the CMH bundle, at the Tribunal's request, the Applicants provided a sample lease (of Flat 23). The following definitions and clauses were relevant to the issue identified by the Tribunal:

"the Block"	*means the block of apartments known as 117-123 Kingston Road, London SW19 1PB…*
"the Common Parts"	*means such parts of the Block as are for the time being not comprised or intended in due course to be comprised in any lease grated or to be granted by the Landlord*
"the Demised Premises"	*means the Apartment TOGETHER WITH the appurtenant rights set forth in the Second Schedule hereto BUT EXCEPTING AND RESERVING and SUBJECT TO the rights set forth in the Third Schedule hereto*
"the Apartment"	*means the apartment numbered 23 on the fourth floor of the Block…and edged red on the Floor Plan including for the purpose of*

obligation as well as grant those parts described in the First Schedule hereto as included but excluding those parts therein described as excluded

THE FIRST SCHEDULE
Description of the Apartment

The Apartment INCLUDES:

(a) The internal plastered coverings and the plasterwork of the walls bounding the Apartment and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such walls doors frames and window frames) and the glass fitted in such window frames.

9. Those parts edged red on the plan are ambiguous as to what is supposed to be demarcated within or outside the demise. Mr Philpott's position at the CMH was simply that it would be "*unfair*" and "*inequitable*" for the leaseholders to have responsibility for the entrance doors and frames within the structural openings of the apartments, since they did not build the apartments.

10. Discussion was had over leaseholders' potential redress, including under the Building Safety Act 2022, against the developer/landlord, should the lessees be found to have the obligation in respect of the flat entrance doors and frames.

11. In directions given after that CMH ('the Preliminary Issue Directions'), Judge N Carr identified that whether the leaseholders fell within the definition of "owner" to be found in section 126 of the Act should be determined prior to any more substantive issues in the case.

12. By the Preliminary Issue Directions, Merton was to provide its statement of case first, by 4pm on 24 April 2025.

13. At 12:24pm on 24 April 2025, Mr Philpott make 'a cost application' (internally dated 17 April 2025) seeking a rule 13 order under the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 ('the rules'), using form order1. Set out there was an assertion that the Applicants had incurred £11,132 in legal fees, £360 in managing agent fees, and £6,250 for the fees for VARTM's directors' fees (Mrs Gillian Stewart and Mr Francois-Xavier Basselot). Mr Philpott asserted that because of its failure to attend at the CMH, Merton should pay all of the Applicants' fees to that date, because:

"*Merton has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly. The manner in which Merton has conducted the proceedings is frivolous and vexatious and an abuse of the process of the Tribunal*".

14. By email received by the Tribunal at 4:08pm on 24 April 2025, and copied to Mr Philpott, Mr McIntosh provided the Respondent's "Position Statement" on the preliminary issue. In that statement of case, Mr McIntosh set out the reasons for failing to attend at the CMH, as follows:

    1. *Apologies to the Tribunal for not attending the Case Management Hearing on 9th April 2025 or complying with the request to serve a Position Statement made in a letter dated 12th March 2025.*
    2. *Firstly, dealing with the letter of 12th March 2025, this was not received by the Respondent. The first the Respondent became aware of such a letter was in a letter dated 17th March 2025 that the Representative of the Applicant had sent to the Tribunal. The letter of 12th March 2025 and the Respondent, erroneously as it transpires, assumed that that letter was sent to the Applicants only.*
    3. *Secondly, the Respondent did not receive any formal notification from the Tribunal advising the Respondent of a Case Management Hearing on 9th April 2025.*
    4. *Thirdly, and as stated in paragraph J of the Preliminary Issue Directions issued by Judge Carr on 9th April 2025: "On making enquiries with Mr Philpott, who attended for the leaseholders, he was able to show me email correspondence that demonstrated that Mr McIntosh had acknowledged both bundles provided for use at the CMH by Mr Philpott." The Respondent does not dispute that it acknowledged the Bundle. The heading of the email set at 17.37 on 4th April 2025 providing a link to the Applicant's bundle did state: "Bundle for CMH 9 April 2025". As the Respondent had not received any communication from the Tribunal, it had, erroneously as it transpires, assumed that that the attendance at the CMH was for the Applicants only.*

15. Mr McIntosh further set out Merton's position. That culminated in the following paragraphs:

    13. As to the Applicant's Position Statement, the following observations are made:

    - *Paragraph 16 – The Respondent has never asserted that the Leaseholders are owners of the common parts. It is accepted that they are not….*

    14. Simply put, the Respondent fully accepts that the Applicants have no powers to effect repairs to the common parts. There is, however, a debatable issue as to whether the contravention of B1 applies to the Leaseholders, i.e. the entrance doors and frames within the structural openings of the apartments do not achieve the required FD30S standard to protect the hallway stairway from a fire in any one of the apartments.

15. This is very much dependent upon the terms of the respective Leases of the Applicants and what responsibilities they have in relation to the entrance doors to their respective properties.

16. Four days later, on 28 April 2025, Merton withdrew the section 36 Notices against the leaseholders.

17. By email of 2 May 2025 sent to the Tribunal and Mr Philpott, Mr McIntosh denied that Merton should be liable for rule 13 costs, largely reiterating paragraphs L(2)-(4) above, as follows:

I make the following observations regarding you claim for costs regarding this case for the Tribunal to consider

1. It is not considered that the respondent be ordered to pay the full costs or, indeed, any costs.

2. The reasons being:

(a) The letter of 12th March 2025 was not received by the Respondent. The first the Respondent became aware of such a letter was in a letter dated 17th March 2025 that the Representative of the Applicant had sent to the Tribunal. The Respondent, mistakenly in hindsight, assumed that that letter of 12th March 2025 was sent to the Applicants only as from the nature of the response from the Applicant, they were replying to specific questions being asked of them.

(b) Further, the Respondent did not receive any formal notification from the Tribunal advising the Respondent of a Case Management Hearing on 9th April 2025.

(c) Also, as stated in paragraph J of the Preliminary Issue Directions issued by Judge Carr on 9th April 2025: "On making enquiries with Mr Philpott, who attended for the leaseholders, he was able to show me email correspondence that demonstrated that Mr McIntosh had acknowledged both bundles provided for use at the CMH by Mr Philpott.". The Respondent does not dispute that it acknowledged the Bundle. The heading of the email set at 17.37 on 4th April 2025 providing a link to the Applicant's bundle did state: "Bundle for CMH 9 April 2025". As the Respondent had not received any communication from the Tribunal, it had again, mistakenly in hindsight, assumed that that the attendance at the CMH was for the Applicants only.

18. By email at 12.19pm on 14 May 2025, sixteen days after the section 36 Notices were withdrawn, Mr Philpott filed a six page Reply to Merton's 24 April 2025 statement of case. *Inter alia*, that statement alleges a number of things that it is appropriate to deal with at this point:

- Merton's statement was unsigned, and it was not clear the statement was from Mr McIntosh: since the statement came from Mr McIntosh directly, it is unclear what point is being taken.

- It was sent by an email dated 25 April 2025 at 8:14am: the Tribunal's records show that this is not correct, as referred to above.

- Merton did not reply to a (draft) costs application sent (only) to it by Mr Philpott on 17 April 2025, and that may be the only reason that Merton's statement was made: This submission is not understood. The Preliminary Issue Directions provided for Merton to send its statement of case by 4pm on 24 April 2025. Correlation is not causation.

- The email on which the Tribunal's letter of 12 March 2025 was sent to Mr Philpott was also copied to Mr McIntosh. Mr Philpott accepts that maybe the email ended up in a spam folder, but says it was for Mr McIntosh to be vigilant. Mr Philpott submits that it was in any event unreasonable for Mr Mcintosh to believe that a CMH would be held with only one party, and Mr McIntosh ought to have sought clarification from Mr Philpott or the Tribunal. These points will be dealt with below.

- A further 2.5 pages are spent on the Respondent's statement of case. In particular, Mr Philpott says this

13. … Merton has discretion whether to recover its expenses for works in default, and that such discretion would apply to whom Merton decides to charge. This seems to go to the heart of the matter. The modus operandi *of Merton is to give notices to the freeholder and the lessees initially and use its largesse as discretion to not enforce against the lessees as it sees fit.*

"If such is the case, then the Respondent could seek to recover from the freeholder only if it considers that they bear full responsibility for the works. The Respondent has made clear that it will not enforce against the Leaseholders."

This is unreasonable, frivolous and vexatious. Merton has no basis to charge the lessees with enforcement following the section 36 notices as there is no ownership and no control over the works. It was never a question of discretion of enforcement as liability did not exist. All that Merton has done with this lazy modus operandi *is to create worry for the lessees and unnecessary appeal costs, and implied to the freeholder that the lessees will pay for the section 36 latent defects to the common areas if the freeholder did not do so.*

14. The confusion is further compounded at paragraph 13 of the Statement. Paragraph 13 says:

'The Respondent has never asserted that the Leaseholders are owners of the common parts. It is accepted that they are not.'

Merton has asserted that the lessees are owners of the common parts by its very actions. By issuing section 36 notices to the lessees, which can only be issued against an owner, Merton have said that the lessees are owners. This statement is therefore contradictory. Further, the acceptance has no context. Is it Merton's position now, or when the section 36 notices were issued?

15. Paragraph 14 of the Statement accepts that the lessees have no powers to effect repairs to the common parts. It does not accept that the section 36 notices should not have been issued. Indeed, it seems to imply that the section 36 notices apply to the entrance doors of the flats and the frames.

16. So therefore in summary of Merton's position, the section 36 notices to the lessees will not be enforced by Merton, do not apply to the common parts, still stand according to the Statement as they are not explicitly withdrawn, and may apply to the entrance doors and frames, depending on the lease. This is a confused position. Further, there is no acceptance of unreasonable behaviour or liability for the lessees' appeal costs.

17. To add to the confusion, in a letter dated 28 April 2025 and after the Statement had been issued, Merton wrote to Mr Francois-Xavier Bassecot [sic] *of flat 16 referring to the section 40 BA appeal, saying the Merton withdraws the section 36 notices. Please see Exhibit 1 to the Reply. It says:*

"You are advised that the Council have decided to withdraw the notice served on each of the leaseholders of the estate. The notice to the freeholder remains in place."

This withdrawal is appreciated. However, there is no reason given for the withdrawal, no apology for Merton's conduct or compensation for the section 40 appeal costs. To-date I understand that Ms Gillian Stewart has also received the letter, but am unaware of any other lessees receiving it, and this needs to be confirmed by the managing agent Red Rock. The appeal must remain until all of the Applicants have confirmed receipt. Further, I am unaware of any notification given to the FTT by Merton. The application for costs remains with the FTT.

This argument will be dealt with below.

19. Mr Philpott states at the end of the Reply that he will make a further application for costs. A further rule 13 costs application was in fact made on the same day by form order1, in the further sum of £2,254.00 for legal fees and £1,250.00 for the VARTM directors' fees, on the basis that Merton had "*failed to make a reasoned case in its statement of case*".

20. In the week of 14 May 2025, I was preparing with a view to making a decision in this case the following week. In light of the above, and in particular the letter exhibited by Mr Philpott, I notified that the Tribunal had no remaining jurisdiction to make any order on the appeal if the

notices had been withdrawn. I invited the Applicants to withdraw the appeal, and stated that any rule 13 directions (if the application was pursued) would be given separately.

21. The appeal was withdrawn with the Tribunal's consent. It should be noted that, due to the fact that the First-tier Tribunal (Property Chamber) Fees Order 2013 has not been amended since 25 July 2016, this is one of a large number of jurisdictions subsequently conferred on the Tribunal in which there is no application fee, and so rule 13(2) is inapplicable.

22. Rule 13 costs directions were given on 2 June 2025. By those directions the Applicants were required to set out their full statement of case on respect of the costs, including:

why it was said that the Respondent has acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule, dealing with the issues identified in the Upper Tribunal decision in Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander *[2016] UKUT (LC), with particular reference to the three stages that the Tribunal will need to go through, before making an order under rule 13…*

23. Full details of the costs sought, including a schedule and supporting invoices, were required. Provision was made for a response from Merton by 7 July 2025, and an optional reply from the Applicants by 14 July 2025.

24. By email of 21 July 2025 the Tribunal received the Applicant's 82-page bundle for the rule 13 costs application. The bundle, and separately the covering email, contained a further form order1 seeking rule 13 costs, itself dated 15 July 2025. In that application, Mr Philpott seeks a further £5,635 in legal fees and £848.35 in VARTM directors' costs, on the basis that:

"*Merton has failed to amicably settle or make a reasoned response to the Applicants' costs statement of case… The manner in which Merton has conducted the proceedings is frivolous and vexatious and an abuse of the process of the Tribunal."*

25. The Tribunal contacted Mr Philpott several times to "***confirm that any response from Merton is in the bundle (regardless of whether it is the Applicant's case that it was in time or not, and regardless of whether it met the formal requirements of the directions) please****? If there was* ***no response, he needs to confirm that explicitly***." A response was said to have been sent to the previous case officer's email address on 22 July 2025, but despite requests to do so that email was not forwarded to/received by the new case officer. Finally, by email of 6 August 2025, Mr Philpott stated:

"*I have received automated acknowledgements to my emails to Merton which you should now have. These are not in the bundle and I apologise if they should have been. Merton received my emails with the bundle for agreement plus the third cost application but did not respond save for*

these automated acknowledgements. I do not have a detailed response from Merton to the statement of case to add to the bundle."

26. The above responses from Merton, in particular regarding the failure to attend at the CMH incorporated into its statement of case on 24 April 2025, and its email of 2 May 2025, were not included in the bundle. It was only in the course of preparing this decision, in particular the relevant background above derived from the papers on the Tribunal's file and not in the costs bundle, that I appreciated that Merton made a response (at least to the first costs application) not once but twice, both on 24 April 2025 in its Position Statement and subsequently on 2 May 2025 by email. Mr Philpott took the opportunity to address those matters in the optional reply of 14 May 2025. It would neither be fair nor just to omit to have regard to them.

27. To the extent that is required by Mr Philpott's 'application' to debar the Respondent from further participation in this application, asserted in the "Applicants' note to the bundle" on the page before the Index, it is made neither by the required form order1 nor properly notified to the Respondent with sufficient time to reply. The Tribunal in any event refuses to bar the Respondent. The Applicants are not prejudiced by the inclusion of Mr McIntosh's submissions above, which they have in fact responded to, and on which the Tribunal can make findings. The Respondent would be prejudiced because it is clear that those submissions were in direct response to the first rule 13 application, and in response to an email from a case officer on 24 April 2025 asking for the Respondent's comments on that application by 4pm on 8 May 2025.

28. The total claim for rule 13 costs is in fact misstated in paragraph 1 of the Applicants' statement of case, because of the third application. Tallying together the sums in the three applications, the Applicants seek:

Legal costs		£19,021.00
Managing Agents Fees		£360
VARTM directors' fees		£8,348.35
	Total:	**£27,729.35**

Law

29. Rule 13 sets out, so far as relevant, as follows:

> 13 Orders for costs, reimbursement of fees and interest on costs
>
> (1) … the Tribunal may make an order in respect of costs only –
>
> … (b) if a person has acted unreasonably in bringing, defending or conducting proceedings…

30. The now well-trodden test in *Willow Court Management Co (1985) Limited v Alexander* [2016] UKUT 290 (LC) sets out as follows:

28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found to be demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of the order should be.

31. In *Ridehalgh v Horsefield & Anr* [1994] Ch 205 (CA) (itself dealing with wasted costs), at paras E-G 232 it was said that the question of whether conduct is unreasonable turns on whether it permits of a reasonable explanation:

"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 it is not unreasonable.

32. In *Lea & Ors v GP Ilfracombe Management Company Limited* [2024] EWCA Civ 1241, it was noted that for conduct to be unreasonable it did not have to also be vexatious or designed to harass (¶9 and 10), though it could include such conduct. They are but ways in which unreasonable conduct can be described or established, and the terms are not to be elided. The Tribunal's discretion, as read together with section 29 Tribunal, Courts and Enforcement Act 2007, is wider than that:

11. To that extent, therefore, the UT in Assethold Limited v Lessees of Flats 1-14 Corben Mews *[2023] UKUT 71 (LC); [2023] L.&T.R.12, at [62], was wrong to suggest that an order for costs under rule 13(1)(b) will only be made where the paying party's behaviour has been vexatious, and designed to harass the other party rather than to advance the resolution of the case. Moreover, although any citation of* Ridehalgh *in this context must bear in mind that there are three overlapping requirements to be met for a wasted costs order, of which unreasonable conduct is only one, that makes no material difference to the applicable test for unreasonable conduct, which is that articulated by Sir Thomas Bingham MR.*

12. The Ridehalgh *approach was expressly approved and applied in* Dammerman v Lanyon Bowdler LLP *[2017] EWCA Civ 269; [2017] CP*

REP 25, at [30]-[31], which was concerned with the similar jurisdiction under CPR 27.14(2)(g) to award costs in small claims litigation where there had been unreasonable conduct. The Court of Appeal confirmed at [30] and [31] that the test to be applied when considering unreasonable conduct in the context of small claims was that set out in Ridehalgh.

13. Ridehalgh *and* Willow Court *emphasise the fact-specific nature of the test for unreasonable conduct. It is therefore not appropriate for this court to give more general guidance as to what does or does not constitute unreasonable behaviour, a point also made in* Dammerman. *That is also consistent with the policy that the courts should avoid going beyond the CPR to identify rules, default positions, presumptions, starting points and the like, when addressing costs disputes: see* Excelsior Commercial & Industrial Holdings Ltd v Salisbury *[2002] EWCA Civ 879 at [32] and* Thakkar v Mican *[2024] EWCA Civ 552 at [20].*

…

15. Subject to what I have said above, sufficient guidance in respect of rule 13(1)(b) is set out in Ridehalgh *and* Willow Court. *A good practical rule is for the tribunal to ask: would a reasonable person acting reasonably have acted in this way? Is there a reasonable explanation for the conduct in issue?*

Decision and Reasons

Stage one "Unreasonable" conduct, capable of "reasonable explanation

33. The Applicants rely on the following submissions:

(a) The first application is predicated on Merton having acted unreasonably in defending the case as there was no case to answer (by which the Tribunal assumes that Mr Philpott means that the Respondent had no prospect of success);

(b) VARTM never received a satisfactory explanation for the basis on which the section 36 Notices were given, which Mr Philpott says is a breach of natural justice.

(c) Mr Philpott reproduces emails he sent to Mr McIntosh on 6 February 2025 and 11 February 2025, and asserts an email was sent by VARTM on 24 February 2025, in all of which Mr Philpott asserts to Mr McIntosh that there "is no legal basis to issue a section 36 notice to a leaseholder" and requiring Merton to justify its stance.

(d) Mr Philpott then makes submission about three points in a letter sent to VARTM by Mr McIntosh on 8 May 2025, after the section 36 notices had been withdrawn. He relies on the responses, as he says that they establish that the serving of the section 36 Notices was unreasonable. VARTM has raised a stage 2 complaint to Merton in consequence.

(e) Mr Philpott relies on his position statement provided for the CMH, in which he asserted that it would be "*inequitable*" for the lessees to be seen as owners in the common parts, and asserts that Merton acted unreasonably by failing to provide a position statement for the CMH as directed so that "[t]*he lessees … prepared the bundle of documents for the CMC… not being able to fully understand the case against the lessees*".

(f) Mr Philpott relies on my identification of the preliminary issue in the Preliminary Issue Direction preambles, and maintains that Merton should have cancelled the section 36 Notices on 10 April 2025 when Mr Philpott emailed Mr McIntosh requiring him to do so.

(g) Mr Philpott refers to Merton's Position Statement of 24 April 2025 in which it gave its reasons for failing to attend at the CMH or provide a position statement, but does not include them in the bundle or exhibit them in the costs bundle or repeat the responses made earlier as set out above.

(h) Mr Philpott asserts that Merton's case as set out in that Position Statement is confused, and fails to make a reasoned case.

(i) Mr Philpott asserts that on 28 April 2025 Merton withdrew the section 36 Notices as confirmed in the letter to Mr Basselot, but did not apologise, offer compensation, or notify the Tribunal.

(j) The second application is further costs incurred in drafting the Reply to Merton's Position Statement (received by the Tribunal on 14 May 2025). Mr Philpott asserts that as Mr McIntosh did not "*immediately inform*" Mr Philpott the extent of the withdrawal of the section 36 Notices, he was forced to draft the Reply, incurring unnecessary fees.

(k) Mr Philpott relies, for the third application, on Merton's failure to engage in settlement negotiations in respect of the rule 13 costs sought.

34. In answer to the first question to be addressed as identified in *Willow Court*, Mr Philpott relies on the following grounds (though they are said not to be exhaustive):

i. Issuing a section 36 Notice without giving a legal basis;

ii. Not advising lessees competently of the appeals process;

iii. Failing to attend the CMH;

iv. Asserting the section 36 Notice was justified but that it would not enforce against the lessees;

v. Not checking the leases;

vi. Withdrawing the section 36 Notices at a late stage without consultation;

vii. Not communicating to settle the costs applications; and

viii. Continuing to justify its actions in its complaints procedure.

Decision

35. The threshold for rule 13 costs is high; the conduct complained of must bear of no reasonable explanation from an objective point of view. As stated in *Lea*, context is everything in a rule 13 application, which is why the background above is important. It is within that context that the Tribunal must consider the Applicants' submissions.

36. It is also specifically unreasonableness of the defence or conduct of the proceedings with which the Tribunal's discretion is concerned in this case.

(i) 'Defence' objectively unreasonable?

37. Dealing firstly with the 'defence' – in this case the document labelled Position Statement received from the Respondent on 24 April 2025, I find that objectively analysed, the Respondent's asserted position is not without foundation or unmeritorious.

38. As the Tribunal identified, both in its first letter dated 12 March 2025, and subsequently orally at the CMH on 9 April 2025, the lease makes provision about the apartment doors. Objectively, and being careful not to resolve the issue which is no longer before me and on which other disputes may turn, the lease provisions are at least capable of being read as demising the doors and frames to the leaseholders. Merton had a realistic prospect of that issue being resolved in its favour. That was something I raised with Mr Philpott at the CMH specifically, which led to the further discussion surrounding leaseholders' remedies, were I so to find.

39. This was not a case in which the issue was so clear that the section 36 Notices were therefore fundamentally ill-founded, although Mr Philpott has throughout the correspondence and proceedings demonstrably approached the point as if that is an established fact. Regardless, therefore, of the view Mr Philpott has clearly taken of the remainder of the Position Statement (and in reality, there are good points and bad points on both parties' sides, as is the norm in al but the rarest disputes), there was merit to the contents of it.

40. Nor does the Tribunal consider that the Position Statement is as 'confused' or 'contradictory' as Mr Philpott asserts in the Reply on 14 May 2025. Though it could have been worded better (and it is important to note that Mr McIntosh is not a lawyer, unlike Mr Philpott), it is clear that Merton does not accept Mr Philpott's forcefully put criticism that the section 36 Notice had no legal foundation. There was sufficient evidence to legitimately argue the point (whether, ultimately, the Tribunal had

resolved the preliminary issue one way or the other – and of course as Merton has withdrawn the section 36 Notices, the Tribunal has not done so).

41. Mr Philpott's position simply fails to recognise the vulnerability in his own clients' case in respect of the doors and frames. While Mr Philpott might have decided to adopt a hyperbolic litigation strategy in an effort to obtain settlement, it was for the Applicants in the appeal to demonstrate that the section 36 Notices should be set aside. It appears that the Applicants' conduct of this case was driven by its litigation strategy rather than the objective reality – i.e. that the Applicants had to demonstrate that none of the matters in the section 36 Notices were leaseholder obligations, which required them to successfully argue that their leases could be so construed as not to demise the doors and frames to each of them.

42. Dealing briefly with i. and ii. in paragraph 36 above, these were not matters with which the Tribunal was dealing in the preliminary issue. If they are assertions as to the validity of the section 36 Notices, linked to the appeal application box 15 ground (b), the issue had not yet arisen and it would not be appropriate to, in effect, determine that the section 36 Notices were invalid when this question was not before the Tribunal (it being one that was to be resolved after resolution of the preliminary issue).

43. As to iv., for the reasons above, it is inappropriate to look at that paragraph of the Respondent's Position Statement in isolation from the doors and frames issue. While there might have been mistaken or indeed bad points in the Position Statement, that does not mean that the Respondent's position as a whole was unmeritorious or vexatious.

44. In those circumstances, I find that the Position Statement – and decision to defend the application more generally – was objectively reasonable and not, as Mr Philpott asserts, vexatious or an abuse of the Tribunal's process.

(ii) 'Conduct' objectively unreasonable?

First application

45. Dealing first rule 13 application, based on the failure by Merton to attend at the CMH, Mr Philpott asserts by the first costs application that failure to attend meant that "*the Tribunal cannot deal with the proceedings fairly and justly. The manner in which Merton has conducted the proceedings is frivolous and vexatious.*" In the rule 13 statement of case, Mr Philpott expands that submission to add that "[t]*he lessees … prepared the bundle of documents for the CMC… not being able to fully understand the case against the lessees*".

46. Mr McIntosh apologised for his non-attendance and provided an explanation for it. He describes the continuing source of his misunderstanding being that the Tribunal did not contact him directly.

47. The Tribunal's folder shows that an email dated 12 March 2025 timed at 3.15pm forwarded the 12 March 2025 letter to both Mr Philpott and Mr McIntosh. It is that same letter than contains the directions for the parties' Position Statements, and lists the CMH. There was therefore no subsequent notice of the CMH given.

48. Sending is not, however, proof of receipt, and receipt is not proof of comprehension. Mr Philpott accepts that it is possible that the Tribunal's email did not get to Mr McIntosh. Mr McIntosh accepts Mr Philpott sent it to him subsequently.

49. Mr McIntosh gave his explanation of the circumstances in which he drew the conclusion that the CMH was not for both parties, but for the Applicants only, as set out in the "Background" above. When he read the copy of the 12 March 2025 letter provided by Mr Philpott, he assumed that the directions in it applied only to the Applicants given the nature of the queries in it (the issues around correct Applicants etc). That misunderstanding was carried through to the email that Mr Philpott sent with the Bundle for the CMH, as Mr McIntosh had not received any formal notification of the CMH from the Tribunal.

50. Mr Philpott suggests it was nevertheless for Mr McIntosh to "be vigilant" and seek advice from either Mr Philpott or the Tribunal.

51. As to seeking advice from Mr Philpott, in the position as representative of Merton's opponent, one might understand why Mr McIntosh did not do so in the context of Mr Philpott's correspondence with Merton generally (which would not indicate a flexible or conciliatory approach). The potential conflict arising from any such approach is only underscored by the fact that in his email of 10 April 2025 to Mr McIntosh, Mr Philpott represents my view at the CMH was "*the lessees do not have liability for remediation work to the common parts under the section 36 notices, as they do not have ownership*", but did not also highlight the lease construction issue in respect of the doors and frames.

52. It should be noted that the Tribunal, while it sometimes walks the ringside to ensure fairness, flexibility and parity of arms in pursuit of the overriding objective, cannot enter the that arena to give advice to parties. Nevertheless, in this case simple clarification of the requirement of Merton's attendance could have been given on enquiry. Naturally however, a precondition of seeking 'advice' is an understanding that one needs it. I accept that due to his misunderstanding, Mr McIntosh did not know what he did not know.

53. Although Mr McIntosh's explanation is based in misunderstanding and lack of comprehension of the Tribunal's practices – and indeed, had Mr McIntosh read the 12 March 2025 letter with an understanding of those processes, he might have comprehended that the letter was a reflection of the Tribunal's ambition to agree the next steps in the litigation with both parties at a CMH – poor comprehension is not, without more, unreasonable conduct. Parties – particularly lay parties, and again it must be borne in mind Mr McIntosh is not a lawyer – often misunderstand the

Tribunal's process. If every non-attendance due to misunderstanding was unreasonable conduct, the threshold for rule 13 costs would be significantly eroded.

54. I reject the contention that Merton's failure to attend caused any difficulty to the Tribunal. At the CMH, the Tribunal did as it had been intending to do – decided whether the ownership issue should be taken as a preliminary issue, and directed both parties' evidence/submissions on the question in order to make a determination.

55. I also reject the contention that the Applicants' preparation of the bundle for the hearing was affected by the Respondent's failure to file a Position Statement as 'they did not know what case to answer'. Mr Philpott puts the parties in the wrong positions in that regard – it was the Applicants' case to prove. No case had yet been set out by the Applicants, beyond their initial appeal. Nor did my directions mandate Merton to provide a Position Statement, precisely because the Applicant had yet to set out its full case. The provision was: "*The parties are invited to exchange position statements on the above matters no later than 7 days in advance of the CMH*."

56. In light of the documents provided by the Applicant at the CMH (per my directions, including a sample lease), I was able to deem the Applicants' appeal application and those documents together be the Applicants' case on the preliminary issue. That in fact curtailed the timetable and avoided the need for the Applicant to do more work before the Respondent's response. It laid the foundations for the case the Respondent had to answer. Preparation of the Bundle, with the Applicants' documents (only), was in fact the benefit of the Applicants and not a wasted step or one in which the Applicants were disadvantaged.

57. Most importantly, the CMH was listed for a CMH, not for consideration of strike out/debarring or full hearing of the preliminary issue. The Tribunal would not have been in a position on that day to make any decision on either matter.

58. In those circumstances, I reject the Applicants' contention that the Respondent's failure to attend at the CMH was unreasonable behaviour meeting the *Willow Court* test, and refuse the first rule 13 costs application.

Second application

59. The second costs application is made on the basis both on the 'unreasonable defence' basis, already dealt with above, and on the basis that because Mr McIntosh did not contact Mr Philpott directly, or inform the Tribunal that the section 36 Notices had been withdrawn on 28 April 2025, Mr Philpott had to provide the Reply and incurred further costs in doing so.

60. As set out above, the facts are that the section 36 Notices were withdrawn on 28 April 2025. Mr Basselot, whose withdrawal notice Mr Philpott

provided with that Reply, was one of the directors at the VARTM providing instructions to Mr Philpott on behalf of the leaseholders. Mr Philpott does not make it clear when he was provided that letter by his client's representative, but the contents clearly put him on notice that all of the section 36 Notices given to leaseholders had been withdrawn, as specifically stated.

61. If Mr Philpott was not content with the instructions from his clients' representatives, the correct party from whom to seek clarification as their solicitor, then he could himself have emailed Mr McIntosh for confirmation. Instead, he embarked on a six page statement of case, again in hyperbolic terms, seeking such redress as an apology and compensation from Merton which are outside the bounds of the Tribunal's jurisdiction and not a legitimate reason to maintain the proceedings. While that statement of case engages in significant criticism of the Respondent's rationale for giving the section 36 Notices, it continues to fail to engage with the Applicants' position as regards the doors and frames in the lease terms.

62. Most importantly, withdrawal of the section 36 Notices was the outcome sought by the appeal, and it is inexplicable that, as a consequence of their withdrawal, the Applicants continued to pursue the appeal. I find the reasons as set out in the Reply justifying that approach spurious. The Reply was not a mandatory step, and Mr Philpott ought to have appreciated that the Tribunal had no remaining jurisdiction to affirm, vary or quash the notices, since there remained no such notice in force, let alone order an apology or compensation.

63. Nor is it for Mr Philpott to rely on conduct as if in the position of the Tribunal. It is for the Tribunal, and the Tribunal only, to suggest to a party that it is being prevented from the fair administration of justice and so forth. Mr Philpott's putting the application as if the Tribunal was in some way inconvenienced by Merton failing to tell it the section 36 Notices had been withdrawn

64. One might conclude that in this instance, it was Mr Philpott (or, if inadequately instructed, his client's) conduct that left much to be desired. None of the matters relied on were insurmountable problems in the course of a solicitor's ordinary conduct of a case.

65. I find that Mr McIntosh's conduct, amounting to setting out Merton's case as permitted by the directions, and subsequently taking a view on that case and withdrawing the section 36 Notices, is entirely in accordance with proper litigation conduct and bears of an entirely reasonable explanation in context. That conduct is by no means 'objectively unreasonable'.

66. I dismiss the second rule 13 costs application.

Third Application

67. The third application was made to the Tribunal at the same time as the costs bundle was sent to the Tribunal. Merton was not therefore even given the opportunity to answer it. It relies on Mr McIntosh 'not engaging to settle the costs' of the Applicants as 'unreasonable conduct', and therefore seeks additional sums for the preparation of the costs submission and bundle (including the witness statement of Mrs Stewart).

68. I will deal with that matter shortly. Firstly, it was always for the Applicants to meet the burden of establishing any conduct of the Respondent met the high threshold of unreasonable conduct. The Tribunal is generally non-costs shifting (save where indicated otherwise by statute), and there was no automatic presumption that costs would follow the event.

69. It was not incumbent on the Respondent to simply roll over in the face of Mr Philpott's multiple applications. Whilst it might have been convenient for the Applicants if Merton had agreed some or all the costs sought, Merton not doing so is not 'unreasonable conduct'. The inconvenience for the Applicants is that, there being no automatic entitlement to costs, the rule requires them to establish their case on the rule 13 costs. That is the simple legal position, not brought about by anything Merton did or not do (in the context of the findings above).

70. The Respondent was entitled to leave the matter to the Tribunal to decide. I have done so, unhindered by the lack of response from Merton on the second application, and in circumstances where the Applicants' own conduct has left something to be desired, failing as they did to include in the bundle Merton's responses to the first rule 13 application, and issuing the third application after the direcitons for responses to the previous applications had closed. I have had to rely on previous papers not enclosed in the bundle by Mr Philpott, despite my best efforts to cajole him to revisit the bundle (and being unaware at the time I did so the extent to which the assertion that the Merton had not responded was incorrect).

71. I dismiss the third rule 13 costs application.

Stages two and three of Willow Court

72. Since I am not satisfied that the conduct complained of amounts to "unreasonable" conduct, these stages do not require findings.

73. I limit my observations in regard to *Willow Court* stage two to say that I would not have been satisfied that an order should be made. Had I not found as a fact that failure to attend at the CMH was not unreasonable conduct, I would nevertheless have found, for the reasons stated, that conduct had no impact on the Applicants.

74. At stage three, I therefore further limit my observations to state that, in any event, the amount of costs claimed by Mr Philpott is unreasonably high, given that the application was made on 10 April 2025, one CMH

occurred, and the section 36 Notices were withdrawn on 28 April 2025 before any further steps were required by the Applicants. For the reasons above, much of the work incurred by Mr Philpott in the course of the application was through his own basic misunderstandings and an excessive veal.

75. The schedules provided by Mr Philpott do not identify his grade, though he has included his retainer with VARTM. It is not therefore possible to ascertain whether the rate he charges at is within the guidelines and reasonable.

76. For example, the first schedule indicates that he spent 10.9 hours of time in drafting the appeal to the Tribunal (including corrections and reviews (both his own and after feedback from VARTM) etc), billing £2,507.00 (at a rate of £230 per hour, which appears to be VAT exclusive).

77. The grounds set out in box 15 of the application occupy less than half a typed page (though it is acknowledged the font is smaller than 12). The covering letter is but two pages (that do not add to the grounds). The list of leaseholders that accompanied it is 25 lines long (including headings) and presumably prepared by or in collaboration with Red Rock (the Managing Agent) or VARTM's directors. One cannot help but observe that time spent on the document described appears unreasonable.

78. That disproportionate approach is reflected across all of the schedules provided by Mr Philpott, as borne out by the section dedicated to the Reply above.

79. As for the VARTM directors' costs, I note the contents of Mrs Stewart's witness statement dated 14 July 2025, presumably intended to be in support of the further costs requested for her and Mr Basselot's director time. I do not doubt that the leaseholders have been left in an invidious position by the poor construction practices and conduct of the developer/landlord. However, in reflection of Mr Philpot's own approach, that statement goes far beyond the issues in the preliminary issue, or even in the section 36 Notices appeal. The vast array of matters relied on obscure the key point that there was a discrete preliminary issue before the Tribunal, and that there was indeed a case to answer on that preliminary issue i.e. the leaseholders' demise in respect of the doors and frames.

80. Nor is any explanation given why the directors should be awarded costs in anything other than a litigant in person capacity (and particularly because each of them is a leaseholder with the right to and interest in pursuing their own appeal at proportionate cost) when there is an instructed legal representative.

Conclusion

81. For all of the reasons above, the costs applications are dismissed.

Name: Judge N Carr **Date:** 14 August 2025

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).