FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LRM/2025/0022**
Property	:	**Canary Riverside, Westferry Circus, London E14**
Applicants to Rule 13 Applications	:	**(1) Canary Riverside RTM Company Ltd** **(2) Circus Apartments Limited ("CAL")**
Respondents to Rule 13 Applications	:	**(1) Canary Riverside Estate Management Limited** **(2) Octagon Overseas Limited** **(3) Riverside Crem 3 Limited** **(4) Yianis Hotels 3 Limited**
Type of application	:	**For orders for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	:	**(1) Judge Vance** **(2) Judge Rushton, KC** **(3) Mrs Ratcliff, MRICS**
Date of decision	:	**31 May 2026**

DECISION

Amended 14 July 2026 under Rule 50 to correct an accidental slip and an omission

---

NB: Page references in bold and square brackets below refer to pages in the Rule 13 costs bundle provided by the Applicants (3060 pages). Where preceded by the letters "HB", the reference is to pages in the bundle used for the substantive RTM hearing.

Decision

1. We order the Respondents to pay costs as follows:

(a) **£12,090** including VAT to Canary Riverside RTM Company Ltd; and

(b) **£13,740** including VAT to Circus Apartments Limited.

Background

2. By applications dated 6 January 2026 in respect of Circus Apartments Limited ("CAL") and 7 January 2026 in respect of Canary Riverside RTM Company Limited ("the RTM Co") applications are sought for payment of costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Rule 13(1)(b) provides that the Tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case or a leasehold case.

3. Orders for costs are sought against the Respondents ("the Landlords") in connection with the Tribunal's decision dated 12 December 2025 ("the Decision") in which it determined, pursuant to s.84(3) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the RTM Co was, on the relevant date, entitled to acquire the right to manage large areas of the development known as the Canary Riverside Estate situated on Westferry Circus London E14 ("the Premises").

4. On 12 May 2025, the RTM Co served a claim notice claiming the right to manage the Premises. The Respondents served a counternotice in response on 13 June 2025, disputing that the RTM Company was entitled to acquire the right to manage. On the same date, the RTM Co applied to the Tribunal pursuant to s.84(3) for a determination that it was on the relevant date entitled to acquire the right to manage. CAL was later joined as an interested party to the proceedings by the Tribunal's directions of 16 June 2025 (amended 29 August 2025) **[183]**. It was joined so that it could respond to the following points advanced by the Landlords when they served their counternotice ("the Circus Issues"):

   (a) that the internal floor area of the non-residential parts of the Premises exceeds 50% of the internal floor area of the Premises, meaning that it was excluded from the right to manage by para. 1 of Sch. 6 of the 2002 Act ("the Exclusion Issue");

   (b) that CAL is not a qualifying tenant ("QT") for the purposes of s.75 of the 2002 Act because the land demised by the lease held by Circus Apartments Ltd ("Circus Apartments") is not occupied for residential purposes but is instead occupied for business purposes (and therefore subject to Part 2, Landlord and Tenant Act 1954) ("the QT Issue"). The Landlords' alternative argument was that if CAL is a QT, it is a single QT and not multiple qualifying tenants of the flats comprising Circus Apartments.

5. Both the Exclusion Issue and the QT Issue were abandoned by the Landlords on the morning of the first day of the hearing of the

substantive RTM hearing on 20 October 2026. At around 8am that day their leading counsel, Mr Bates KC, circulated a note and agenda (the "Note") identifying the issues the Landlords considered required determination and which the Landlords had decided to abandon. Both Circus Issues were abandoned. Following argument, we nevertheless decided that it was necessary to determine the QT Issue because the Landlords declined to concede that CAL was a QT, only that whether it was, or not, made no difference to the outcome of the RTM application (see Decision, paras. 24-35). The Landlords then decided not to advance any positive case at the hearing in respect of the QT Issue. Mr Bates did not cross-examine CAL's witness, Mr Smith, and made no legal submissions. We went on to determine that CAL was a QT on the relevant date, and was a QT of 45 flats.

Costs Orders Sought

6. The costs sought by the RTM Co amount to £35,481.50 (inclusive of VAT), which comprise:

   (a) fees incurred for the preparation of addendum report by Mr James Ham, MEng (Hons), a civil and structural engineer, dated 13 October 2025, addressing an issue raised for the first time in a report from the Landlords' expert, Mr Edwin Bergbaum MA(Cantab) CEng FICE FIStructE MCIArb SAAE. The issue was whether the Premises as a whole are structurally detached from the surrounding area for the purposes of s.72(2) of the 2002 Act ("the Structural Detachment Issue");

   (b) costs incurred by the RTM Co in instructing Mr Tom Theakstone, a building surveyor, to report on the internal floor area of the Premises so that it could address ("the Exclusion Issue"); and

   (c) 50% of counsel's fees (instructed under the public access scheme) in connection with the RTM proceedings.

7. CAL seeks an order in the sum of £194,709 plus VAT broken down as follows:

   (a) Part 1: considering and advising on Circus Issues generally - £10,423

   (b) Part 2: liaising with RTM Co and their counsel, Mr Upton, on a Statement of Case regarding Circus Issues - £2,787

   (c) Part 3: considering the Landlords' evidence and preparing the witness statement of Mr Smith (dated 4 August 2025) - £42,584

   (d) Part 4: preparing for and attending 4-day trial - £138,915. This includes counsels' fees of Mr Rainey KC, whose brief fee amounted to £85,000 plus VAT, with three refresher fees of £5,975 each. Mr Rainey's total fees were therefore £102,925 plus VAT.

8. It is very difficult to see how the amount of the costs order sought by CAL could possibly be justified when CAL was added to these proceedings solely to address the two discrete Circus Issues. What CAL appears to be seeking is an inter partes order for recovery of all of its costs, when that is not the purpose of a Rule 13 application. This Tribunal remains a primarily cost neutral jurisdiction and, in this case any Rule 13 costs order must be limited to unreasonable conduct arising from the Landlords' litigation conduct in respect of the two CAL issues identified in the Tribunal's directions.

The legal framework

9. Rule 13(1) of the 2013 Rules provides that the Tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings.

10. Clarification as to how this tribunal should approach a rule 13(1)(b) costs application has been provided in the decision of the Upper Tribunal in *Willow Court Management Company (1985) Ltd v Ms Ratna Alexander* [2016] UKUT (LC). At paragraph 24 of its decision, it approved the guidance given in *Ridehalgh v Horsefeld* [1994] Ch 205 which described "unreasonable" conduct as including conduct that is "vexatious, and designed to harass the other side rather than advance the resolution of the case". It was not enough that the conduct led, in the event, to an unsuccessful outcome.

11. The Upper Tribunal in *Willow Court* set out a three-stage approach to assist in decision making in Rule 13 costs applications. The first stage is whether a person has acted unreasonably. This is an essential pre-condition of the power to award costs under the rule. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable. This requires the application of an objective standard of conduct to the facts of the case. The second and third stages involve the exercise of discretion on the part of the tribunal. At the second stage the tribunal must consider whether, in the light of the unreasonable conduct identified, it ought to make an order for costs. The third stage is what the terms of the order should be.

12. In *Lea v GP Ilfracombe Management Co Ltd* [2025] 1 WLR 371 at [14] Coulson LJ suggested that a good practical rule is for the tribunal to ask is "...would a reasonable person acting reasonably have acted this way? Is there a reasonable explanation for the conduct in issue?"

Stage 1 – Has there been unreasonable conduct by the Landlords?

13. We set out below the conduct that is alleged to have been unreasonable, and our decision on each issue.

<u>Issue 1 – the Structural Detachment Issue</u>

14. This issue was raised at para. 8.3 of Mr Bergbaum's report where he concluded that "for a significant length of the perimeter of Canary

Riverside..... there is a retaining wall which provides support to the ground outside the Premises". It was his evidence that without support from structures inside the Premises, certain areas outside the Premises would collapse. We rejected this argument in the Decision.

15. In his written submissions in support of a Rule 13 costs order Mr Upton KC asserts that it was unreasonable conduct for the Landlords to fail to specifically identify the Structural Detachment Issue in either their counter-notice or in their statement of case. He also contends that it was unreasonable for them to fail to notify the RTM Co, or Mr Ham, that the point was being taken before expert reports were exchanged.

16. The timetable for expert evidence in this case was a little unusual. The experts met on 22 August 2025. A joint statement of agreed issues and areas of disagreement was then prepared on 3 September 2025 **[HB 2709]**. Mr Ham produced his report and served it on 11 September 2025 **[HB 2711]**, with Mr Bergbaum's following on 6 October 2025 **[HB 2797]**. The experts did not meet or update their joint statement after exchange of reports.

17. At the hearing, when cross-examined by Mr Upton, Mr Bergbaum explained that he had not considered the Structural Detachment Issue until after preparation of the joint statement of experts, and after he had circulated an initial draft of his own report to the Respondents. This was because after he had provided his draft report he was asked by the Landlords' surveyor to consider the question of whether the retaining wall provided structural support for surrounding areas. Mr Bergbaum's evidence was that prior to that conversation he "hadn't considered the perimeter of the buildings in that manner." When asked by Mr Upton why he did not discuss the point with Mr Ham his response was that the Landlords' barrister (Mr Bates) advised him not to do so and said that the point "would be dealt with subsequently".

18. In Mr Upton's submission, the irresistible inference is that the Landlords improperly sought to ambush the RTM Co on this issue, which led to the RTM Co incurring costs of: additional conferences; a further site visit by Mr Ham; the production of Mr Ham's addendum report; and an application to the Tribunal for permission to rely on that addendum report.

19. In response, Mr Bates argues that in the Decision we accepted that the question of whether the Premises were structurally detached or not (by reason of the retaining wall) had been pleaded in the Landlords' Statement of Case. At [14] we said:

> "We accepted that the question had been put in issue by the Landlords at para 7 of their Statement of Case [85] when they said that what was claimed in the claim form was not a single, structurally detached building."

20. He also points out that in its Directions **[HB 78]** the Tribunal made it clear that the experts were to report on whether premises were a structurally detached building

21. In any event, it was, he says, for the RTM company to prove that the Premises met the qualification conditions in s.72. They were therefore obliged to lead evidence on this point irrespective of whether or not the point was taken by the Landlords.

22. We reject Mr Upton's submission that it was unreasonable conduct for the Landlords to fail to identify the Structural Detachment Issue in their counter-notice. It is not incumbent on the recipient of a claim notice given under section 79(6) of the 2002 Act to raise in its counternotice every challenge to the claim which it wants the Tribunal to consider (see *Fairhold (Yorkshire) Limited v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 0503 (LC) and *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC). As established in those authorities, the Tribunal's jurisdiction is not confined to the contents of a counter-notice

23. At [14] we accepted that Landlords had put in issue, in their Statement of Case, the question of whether the premises as claimed was a single structurally detached building, and that it was therefore incumbent on the RTM Co to establish that this was the case in order to satisfy the requirement in s.72 that the Premises were a self-contained building. However, as we said in that paragraph, the Landlords' argument on structural detachment in its counternotice and Statement of Case was focused on whether the Premises consisted of multiple buildings that were not self-contained. As we identified at [12] the assertion that the Premises is not structurally detached by reason of the presence of structural interactions between the retaining wall and surrounding structures was raised for the first time in Mr Bergbaum's report. It was not discussed in the experts joint meeting. Given Mr Bergbaum's evidence, we find the issue was only identified after he circulated his draft report and was contacted by the Landlord's surveyor. We therefore reject Mr Upton's contention that it was unreasonable conduct for the Structural Detachment Issue not to be raised in the Landlords' Statement of Case. When that Statement was served it was not part of the Landlords' case and therefore could not have been included.

24. Mr Bergbaum could, of course, have discussed his views on the Structural Detachment Issue with Mr Ham after the preparation of their joint report. We make no criticism of him for not doing so given that he was advised against this. However, we have been provided with no explanation as to why the Landlords' surveyor did not raise this issue with Mr Bergbaum prior to the meeting of the experts. If this had happened, Mr Bergbaum could have discussed the issue with Mr Ham. The late identification of the issue resulted in a significant section of Mr Bergbaum's report focusing on an issue that had not been advanced by the Landlords in their statement of case, and on which Mr Ham had not had the opportunity to comment in either the joint meeting or in his report.

25. It also meant that the RTM Co had to scramble to obtain an addendum report from Mr Ham, and its legal team had to prepare itself to address the issue at the final hearing, which was to take place in approximately two weeks' time. They were compelled to do so despite the Landlords making no application to amend their statement of case to rely on the revised argument because the Landlords' position, as is made clear in Mr Bates' submission to this application [19] was that they saw no need to do so, even though this was a new objection being raised for the first time via their expert's report. Their case was that it was for the RTM Co to prove all aspects of structural detachment, and this meant there was no need to give notice of a new point which the Landlords were raising with the support of expert evidence. We reject that submission and agree with Mr Upton that the legal burden on the RTM Co is to prove that it satisfies the statutory requirements only in respect of issues which have been put in dispute. Put simply, the RTM Co could not respond to an argument that had not been advanced.

26. Looking at the matter objectively, it is our determination that the late identification of this issue in Mr Bergbaum's report, and the Landlord's reliance upon it, without any explanation as to why the point was not taken earlier, constituted unreasonable litigation conduct that caused costs to be incurred by the Applicants that would not otherwise have been incurred if the issue had been raised prior to the meeting of the joint experts (or even after it but a reasonable time before reports were exchanged). We are satisfied that a reasonable person, acting reasonably, would not have acted in this way and that there is no reasonable explanation for the conduct in question.

<u>Issue 2 – the Exclusion Issue</u>

27. The RTM Co's position is that on 20 June 2025, a representative of the Landlords, Mr Stephen Jones, and their measurement surveyors, visited the Estate and inspected Circus Apartments, including at least two of the vacant flats, specifically for the purpose of these proceedings. In Mr Upton's submission it is very likely that the Landlords appreciated at around this date, if not before, that the exception in para 1 of Sch 6 did not apply.

28. He also points out that on 24 July 2025 the RTM Co informed the Landlords that they had appointed Mr Theakstone to act as their expert on this issue. The RTM Co then requested the Landlords to confirm the identify of their measurement expert on no less than 10 occasions. A log of email exchanges between the RTM Co and the Landlord's solicitors, Freeths LLP, appears at **[14]**. Then, by a letter dated 4 September 2025 **[302]**, said to have been sent to the RTM Co by email on 8 September 2025, the Landlords informed the RTM Co that they would "no longer be relying on expert evidence from a Measurement Surveyor".

29. Mr Upton says that despite that election, the Landlords did not, at that point, abandon the argument that the Premises were excluded by reason of the non-residential parts exception in para 1 of Sch 6. Instead, the issue was included in the revised list of issues for trial circulated by email by the Landlords' junior counsel, Ms Gibson, on 15 October 2025, three working

days before the start of the hearing. Mr Upton submits that the fact that the point was not abandoned until provision of the Note was unreasonable conduct which meant that the argument had to be addressed in full in the RTM Co's skeleton argument.

30. Finally, he also argues that it would have been clear from the measurements in Mr Theakstone's report, dated 15 September 2025, that the Landlords' argument on the Exclusion Issue had no realistic prospect of success.

31. CAL agrees with Mr Upton's submissions. It argues that the Landlords owned and insured the Estate for many years, holds plans, and have carried out a number of inspections of the Estate (including Circus Apartments) in the last few years, often together with various third parties and experts. One inspection, in January 2024, measured the gross floor areas of all parts of the Estate (including Circus Apartments) and, as Mr Upton pointed out, the Landlords' measurement surveyors visited to the Estate on 20 June 2025.

32. It is CAL's case that the Landlords should have known that:

(a) to seek to argue that Circus Apartments should be included in the "non-residential" element of the Estate for the purposes of the exclusion in Sch.6, para.1, 2002 Act, was untenable from the start in the light of authorities binding on the Tribunal such as *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch); and

(b) the non-residential element of the Estate, in any event, did not come close to exceeding 50% of the Estate, so as to have triggered the exclusion.

(c) Despite this, the Landlords chose to argue the point in their Statement of Case dated 7 July 2025, and, having notified the RTM Co on 8 September 2025 that they no longer intend to rely on a measuring surveyor, failed to abandon this issue until provision of the Note.

33. In response, Mr Bates contends that Freeths notified the RTM Co that the Landlords would not be relying on expert evidence from a measurement surveyor at the earliest opportunity. It was not done sooner because it was difficult to calculate what areas were non-residential given the complexities of the Estate

34. We reject the submission that pursuing this point from the outset constituted unreasonable conduct. The fact that there had been previous inspections of the Premises does not mean that it was certain that the non-residential exclusion did not apply. Mr Stevens, the solicitor at Norton Rose Fullbright LLP ("NRF"), with conduct of this case for CAL argues that it should have been obvious that the non-residential element of the Estate did not come close to exceeding 50%, but he has not taken us to any evidence in the bundle that was before us at the substantive hearing that establishes this. He refers to a draft report prepared by Ingleton Wood, following an inspection of the Premises in 2024, which he suggests indicates that even if the whole of Circus Apartments is added to the commercial space it would still have fallen a long way short of the area of the clearly residential space.

We make two points in respect of that submission. Firstly, limited weight can be attached to a *draft* report. Secondly, that report was not included in the hearing bundle before us and no reference was made to it in either the RTM Co's statement of case or its witness evidence.

35. If the ~~Respondents~~ Applicants genuinely considered that the argument was untenable from the start they could have, but did not, pursue an application to strike out that aspect of the Landlords' case. Instead, at the case management hearing on 16 June 2025 they agreed directions **[181]** for each party to have permission to rely on expert evidence from measurement surveyors and did not demur from Mr Bates' suggestion that it was likely that Circus Apartments would need to be measured from scratch in order to identify the correct internal floor area [9].

36. The Landlord's measurement surveyor attended Circus Apartments on 20 June 2025 and carried out an inspection. When the Landlords served their Statement of Case on 7 July 2025, they stated that *"the parties will be instructing experts to undertake the measuring exercise required by Sch.6, para.1, 2002 Act and the Directions make provision for the experts to meet and try to reach an agreed position. That will not conclude until September 2025 and there is no point pleading to the measuring exercise at this stage"*

37. No explanation has been given as to why in Freeths' letter of 4 September 2025 the Landlords informed the RTM Co that they would "no longer be relying on expert evidence from a Measurement Surveyor". It is possible, but not certain, that they must have realised at that point that the contention that the non-residential parts exception applied was no longer tenable. We nevertheless do not consider it to be unreasonable for them to await receipt of Mr Theakstone's report of 15 September 2025 before reaching a considered conclusion.

38. In our determination, what was unreasonable conduct by the Landlords was not conceding the point following receipt and consideration of Mr Theakstone's report. Allowing time for its contents to be reviewed, there is no apparent reason why the Landlords could not have notified the other parties by the end of September 2025 that the point was being abandoned. If they had done so, Mr Upton and Mr Rainey would not have needed to respond to the issue in their skeleton arguments, nor prepare to argue the issue at trial. Instead, it was not abandoned until provision of the Note. We recognise that the Landlords were preparing for both the hearing of the RTM application and a separate application regarding the Premises brought by the Secretary of State under the provisions of the Building Safety Act 2022. It was undoubtedly a busy time for their legal team, but the Landlords have demonstrated during the very long running litigation regarding the Estate that they are very well resourced. On balance, we are satisfied that a reasonable person, acting reasonably, would have conceded the issue by the end of September 2025.

<u>Issue 3 – the QT Issue</u>

39. What was said at paras. 13 and 14 of the Landlords' Statement of Case dated 7 July 2025 **[HB86]** was that: (a) CAL was a business tenant; and (b) it was put to strict proof that if Circus Apartments Ltd was removed from the list of QTs, the QT requirement was still satisfied.

40. Both the RTM Co and CAL contend that the argument that CAL is a business tenant rather than a residential tenant, and therefore not a QT, should never have been pursued. Mr Upton submits that in pursuit of this argument the Landlords relied heavily on the witness statement of Christopher Christou dated 7 July 2025, as well as his previous statement dated 24 November 2021, served in concurrent s.24 variation proceedings. In Mr Upton's submission the majority of the evidence relied on was irrelevant to the issue, or of no probative value.

41. Both the RTM Co and CAL also argue that the decision to abandon the s.72/s.79(5) point was made far too late. It was not until Mr Bates circulated the Note on the morning of the first day of the hearing that notice was given that the Landlords were no longer pursuing it. That, they argue, was unreasonable behaviour, as was refusing to then concede that CAL was a QT, meaning that the Tribunal had to decide the point.

42. In response, Mr Bates argues that the critical point is that shortly before the hearing, the RTM Co produced some late evidence which showed that the Landlords' objection that certain other leaseholders were not QTs could no longer succeed (the "Dubai evidence"). In light of that new evidence, which was served in response to the Landlords' skeleton argument, he recognised that was no longer any point in arguing about the status of CAL. He explained at the hearing that after receiving the Dubai Evidence it became clear that the Landlords could only get to 139 non-qualifying tenants but needed 140 for their argument to succeed. It was at that point that the Landlords decided to accept that the analysis at paras. 68, 89 and 90 of Mr Upton's skeleton argument was correct. On all possible scenarios (i.e. CAL not a QT, CAL is a QT of 1 flat, CAL is a QT of 45 flats), the Landlords could not defeat the RTM application, There was, according to Mr Bates, nothing unreasonable about the landlords dropping the point at that stage.

43. We reject the submission that it was unreasonable for the Landlords to take these points. Whether Circus Apartments are occupied, or intended to be occupied, for residential purposes is obviously a fact-sensitive question. We do not consider it unreasonable conduct for the Landlords to argue that the occupation of Circus Apartments was non-residential. Nor was it unreasonable for them to put the RTM Co to proof that the requirements of s.72 and/or s.79(5) were met. As Mr Upton acknowledged in respect of the Structural Detachment Issue, it is for the RTM Co to prove that it satisfies the statutory requirements for issues which have been put in dispute.

44. Again, if the RTM Co and CAL considered the question of CAL's residential status was obvious, and that the membership requirements of section 79(5) were self-evidently met, even if the 45 flats demised by CAL's Lease were disregarded, it could have pursued a strike out application. It did not do so

and, instead, the points were left as live issues until abandoned by the Landlords on the morning of the hearing.

45. When asked by the Tribunal why the QT Issue was not abandoned until provision of his Note, Mr Bates' response was that he had "spent the weekend number crunching" and realised that the analysis at paras. 68, 89 and 90 of RTM Co's skeleton argument was correct given the Dubai Evidence. We accept that explanation, as did Mr Rainey at the hearing. As Mr Bates points out, Mr Rainey said at the hearing that he understood why Mr Bates was dropping the point late, and that this was because the provision of the late evidence "knocked out one of his arguments on one of the other QTs".

46. In our determination, the late abandonment of this point did not constitute unreasonable conduct. The point having been raised legitimately by the Landlords, it was for the RTM Co to establish that the statutory requirements were met. It cannot, therefore, be said to be objectively unreasonable for the Landlords to drop the point after receipt of the Dubai Evidence, once Mr Bates realised he did not have the numbers to succeed in his argument, even if CAL were not a QT.

47. Nor do we consider the Landlords can be criticised for then adopting a neutral position on whether CAL was a QT, following the FTT's acceptance of Mr Rainey's invitation to decide the issue, even though the Landlords were no longer taking the point. The Landlords were fully entitled to do so, leaving it to Mr Rainey to argue that CAL's occupation was residential, and for the RTM Co to establish that the statutory requirements of s.72/79(5) were met.

48. As such, we do not regard either the pursuit by the Landlords of the QT issue to be objectively unreasonable, nor its decision to abandon the point on the morning of the hearing.

<u>Issue 4 – seeking to take new points which were not pleaded and which were identified for the first time in the Landlords' skeleton argument</u>

49. The RTM Co complains that the following points were raised for the first time in Mr Bates' skeleton argument:

(a) whether a notice inviting participation ("NIP") was given to the QT of flats 131 and 212 Berkley Tower;

(b) whether the NIPs were invalid because they were addressed to "The Qualifying Tenant" rather than the QT's name; and

(c) that the membership form for the tenant of Apartment 42, Hanover House had not been signed by a director, meaning that they were not a member of the RTM Co and that *if* CAL is not a QT there appear to be insufficient members of the RTM company.

50. We accept as correct Mr Bates' statement at the hearing that these points were identified by him, for the first time, during the preparation of his skeleton argument. We also agree with Mr Bates' submission [30] that it is common in litigation for an advocate to alight on an argument only during preparation for trial and that to fail to even try to take the point might amount to a disservice to your client.

51. In the event, the issue regarding Apartment 42 was easily answered by the RTM Co obtaining an email from the relevant leaseholder [362] and the other two points were addressed by the Tribunal in short order at the hearing when it decided [18], [23] that they had been raised too late. Seeking to raise a new point is not in itself unreasonable conduct, and we agree with Mr Bates that his raising the points when he did fell a long way short of the examples of "vexatious" or "harassing" behaviour identified in *Willow Court* at [24]).

Issue 5 – other issues

52. Mr Upton also contends that it was unreasonable for the Landlords to put the following issues in dispute only to abandon them without any prior warning before skeleton arguments were exchanged, namely whether:

(a) a NIP was given to the QT of 32a Belgrave Court, 46a Belgrave Court, 57a Belgrave Court, 24 Eaton House;

(b) Yianis Hotels 3 Ltd is a QT;

(c) the RTM Co had complied with s.74/that there had been unsuccessful membership applications.

53. We identify no unreasonable conduct in respect of any of these issues. As Mr Bates said in his Note, the first point was conceded following a review of the witness evidence provided by the RTM Co. Those statements had been prepared at the end of July. We accept that the Landlords could have conceded the point earlier but leaving it to Mr Bates to identify during the course of trial preparation falls short of rule 13 unreasonable conduct.

54. The second point, concerning Yianis Hotels 3 Ltd was parasitic on the argument about CAL not being a QT and as we have determined that it was not unreasonable for the Landlords to decide not to pursue the CAL issue, the same applies to their pursuit of this issue. As to the third point, Mr Bates confirmed in the Note that the only remaining s.74 challenge was in respect of 42 Hanover House and given the Dubai Evidence received a few days previously, was not being pursued. Given our determination above regarding Apartment 42, it follows that no unreasonable conduct is established.

Stage 2 – Should we make an Orders in favour of the RTM Co and CAL?

55. Mr Bates argues that the Landlords had to make difficult decisions to drop points once new evidence emerged and that making a costs order would be wrong. We do not accept that. There is no reasonable explanation for the conduct that we have determined above amounts to unreasonable conduct. The Landlord has been represented throughout by highly experienced specialist solicitors and counsel and the there is no good reason not to make a Rule 13 costs order in this case. In addition, the unreasonable conduct of the Landlords has caused the RTM Co (whose costs are met by leaseholders) to incur unnecessary expense. It is fair and just that the Landlords should contribute towards those costs.

56. Mr Bates also argues that although called an "interested party", CAL was, in substance, an intervenor in these proceedings and the usual rule with intervenors is that they should expect to intervene on a costs-neutral basis. We do not accept that submission. The Tribunal added CAL as a participant to these proceedings so it could respond to matters put in issue by the Landlords in their counternotice. Rule 13 permits us to make an order if a person has acted unreasonably in bringing, defending or conducting proceedings and sub-rule 13(4) refers to a "person" making an application for an order for costs, not a "party". We see no reason to adopt the limitation advanced by Mr Bates.

57. Mr Bates further suggests that every piece of evidence that CAL led and every argument that CAL made could– and should – have been made by the RTM company. We do not agree. CAL was added as an interested party by the Tribunal by directions dated 16 June 2025 (amended 29 August 2025) in order to respond to the Circus Issues. It was therefore required to respond to those directions.

Stage 3 – what costs orders to make?

58. We have found unreasonable conduct in respect of two matters:

(a) the late identification of the Structural Detachment Issue in Mr Bergbaum's report of 6 October 2025, and the Landlord's reliance upon it; and

(b) not conceding the Exclusion Issue by 30 September 2025.

59. The first issue led to unnecessary costs being incurred by the RTM Co. The second was an issue for CAL to address and led to it incurring unnecessary costs for the period between 30 September 2025 and the service of Mr Bates' Note.

<u>RTM Co</u>

60. We determine that the fees incurred in relation to the production of Mr Ham's addendum report (11.5 hours on 9, 10, 12 and 13 October as shown on the Time Sheet provided **[13]**) at £250 p/h, totalling £3,450 inclusive of VAT, were properly incurred, are proportionate in amount, and were necessitated by the Landlords unreasonable conduct. We order their payment in full.

61. We make no order for payment of the costs incurred in instructing Mr Theakstone (£3,564 inclusive of VAT) as we have determined that it was not unreasonable for the Landlords to wait until sight of his report before deciding whether to abandon its argument that the non-residential parts exemption applied.

62. We agree with Mr Upton that it is not practicable to assess counsel's fees by reference to the discrete issues. Having regard to our notes of the hearing and how much time was taken up with arguing the perimeter wall issue, we order that in addition to the costs of Mr Ham's addendum report, the Landlords must pay 20% of Mr Upton's fees arising on and after 17 September 2025 and up to and including the date of the hearing (20% of £36,000) amounting £7,200 plus VAT of £1,440, The total payable by the Landlords to the RTM Co is therefore £8,640 plus £3,450 = **£12,090 including VAT**.

CAL

63. What costs did CAL incur and what inconvenience was it put to as a result of the Landlords not conceding the Exclusion Issue following receipt and consideration of Mr Theakstone's report of 15 September 2025? As we say above, the Landlords would have needed time to review its contents. Freeths would have needed to seek instructions and probably liaise with Mr Bates. It is our determination that it was unreasonable for the Landlords not to have conceded the point by the end of September 2025.

64. Looking at the narratives of NRF's invoices for the period 30 September 2025 to the start of the hearing on 20 October 2025, we cannot identify any time spent on this issue. That is unsurprising because by this point CAL knew that although the Landlords had not conceded the point, they had elected not to instruct their own measurement surveyor. A minimal amount of time would have been spent in briefing Mr Rainey to argue the point, and the issue may have been addressed in conference with him. However, we cannot see what else the solicitors would need to do to advance CAL's position.

65. As Mr Bates' points out Mr Rainey has not split his brief or refresher fees in dealing with the Circus Issues, and it is therefore not possible to assess how much time was spent on either issue. His brief fee amounted to £85,000 plus VAT, with three refresher fees of £5,975 each. His total fees were therefore £102,925 plus VAT. Nor has Mr Stevens, the partner with conduct of this matter at CAL's solicitors, Norton Rose Fullbright LLP, provided a breakdown of solicitors' costs as between the two issues.

66. We make an order in respect of 10% of Mr Rainey's brief fee given that he would need to have addressed the issue in his skeleton argument and would need to have been prepared to argue it at trial (albeit that he must have known that it would not take up much time given the lack of measurement evidence obtained by the Landlords). We also order payment of five hours of Mr Stevens' time at his charging rate of £590 per hour to reflect time spent briefing Mr Rainey, addressing the issue in conference, and any other

miscellaneous work that may have been involved, such as checking that Mr Theakstone's report and relevant correspondence, was included in the hearing bundle.

67. The total payable by the Landlords to the CAL is therefore £8,500 plus VAT for Mr Rainey's fees (£10,200) and £2,950 plus VAT for NRF's fees (£3,540) = **£13,740 including VAT**.

Amran Vance
31 May 2026

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).