FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/22UG/LRM/2022/0003**
HMCTS code (audio, video, paper)	**:**	**P:PAPERREMOTE**
Property	**:**	**21-25 Eaglegate, East Hill Colchester, Essex CO1 2PR**
Applicant	**:**	**21-25 Eaglegate RTM Company Limited**
Representative	**:**	**Ellisons Solicitors**
Respondent	**:**	**Assethold Limited**
Representative	**:**	**Scott Cohen Solicitors Limited**
Type of application	**:**	**Costs** - rules 13(2) and 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Rules**")
Tribunal	**:**	**Judge David Wyatt**
Date of decision	**:**	**20 October 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote decision on the papers. The parties are deemed to have consented to this matter being determined without a hearing, as explained below. A hearing was not held because it was not necessary; all issues could be determined on paper. The documents I was referred to are described in paragraph 3 below. I have noted the contents.

Decision

The Tribunal:

(1) orders the Respondent to pay £100 to the Applicant to reimburse the tribunal application fee paid by the Applicant; and

(2) makes no other order in respect of costs.

Reasons

The substantive proceedings

1. The Applicant RTM company applied to the tribunal under section 84(3) of the Commonhold and Leasehold Reform Act 2002 (the "**Act**") for a determination that, on the relevant date, it was entitled to acquire the right to manage the Property. Their claim notice had been dated 10 January 2022 and was apparently received on 11 January 2022.

2. For the reasons given in the decision dated 2 September 2022 (the "**Decision**"), the tribunal determined that the Applicant had been so entitled. Please read this decision with the Decision. Unless otherwise indicated, references in square brackets are to the paragraphs in the Decision.

Procedural history

3. During the proceedings, the Applicant's representatives had applied under Rule 13(2) for reimbursement of tribunal fees and under Rule 13(1)(b) for their costs. In the Decision, I directed the Applicant to produce a statement and any other documents in support of their costs applications, the Respondent to produce their statement and any other documents in response and the Applicant to produce a bundle for this determination. The Applicant's documents include a statement of costs totalling £10,259.20 including VAT and disbursements.

4. I also directed in the Decision that the costs applications would be determined on or after 12 October 2022 without a hearing, based on the written submissions, unless the tribunal decided a hearing was necessary or either party requested a hearing. Neither party did so. Accordingly, by Rule 31(3), the parties are taken to have consented to this matter being decided without a hearing. I am satisfied that a hearing is not necessary to decide the issues in this matter.

The basic law

5. Rule 13(2) gives the tribunal discretion to order a party to reimburse to any other party the whole or part of any tribunal fee paid by the other party.

6. Under Rule 13(1)(b), the tribunal may make an order in respect of costs only "*…if a person has acted unreasonably in bringing, defending or conducting proceedings…*" in this type of case. When considering whether a party has acted unreasonably in this context, the Upper Tribunal in Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 0290 cited with approval the judgment of Sir Thomas Bingham MR in Ridehalgh v Horsefield [1994] Ch 2005. It did so at paragraph [24] of its decision:

> ""*Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?*".

Did the Respondent act unreasonably?

7. The Applicant said the Respondent had acted unreasonably in defending the proceedings. First, they said the counter-notice had been invalid because it simply alleged non-compliance with sections 79(3), 80(3) and 80(4), as summarised at [2], failing to particularise the matters which were subsequently set out in the Respondent's statement of case. Essentially, that statement of case questioned only whether the qualifying tenants had been validly registered as members of the Applicant under article 26 of its articles of association.

8. Section 79(3) requires that the claim notice be given by a RTM company which complies with s.79(4) or (5). Section 79(5) provides that the membership of the RTM company must on the relevant date (the date the claim notice is given) include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained. The Applicant relied on the decision in Assethold Ltd v 14 Stansfield Road RTM Company Ltd [2012] UKUT 262 (LC) at [19-21]. In those proceedings, the Respondent had (amongst other things) questioned membership of the relevant RTM company. The Upper Tribunal observed at [21] that the Respondent had failed even in the proceedings to identify the relevant defect said to have invalidated the claim to the right to manage, concluding: "*…In any event a defect in the register would not be sufficient to show that section 79(5) was not complied with, and indeed it could be insufficient even to raise a doubt as to compliance*."

9. The Applicant said that, despite knowing of this decision, the Respondent had failed to identify the alleged defect in its counter-notice, so the counter-notice was invalid. They said giving that notice and then withdrawing it after the Applicant had expended costs making the application was unreasonable conduct. They observed that if the alleged defect had been identified in the counter-notice, the relevant information

could have been provided and the need for proceedings (and the costs of the proceedings) avoided entirely. The Applicant also included a copy of their pre-action letter of 22 February 2022, which in response to the counter-notice had (amongst other things) asserted that the Applicant's members were the owners of all the flats in the block and warned that if the Applicant had to apply to the tribunal it would seek costs from the Respondent. It appears the Respondent did not answer that letter and the Applicant had to apply to the tribunal on 6 April 2022.

Review

10. The Respondent has put itself at risk of an order for costs, generally for the reasons argued by the Applicant and in particular for failing even to give a brief explanation in response to the pre-action letter. The Respondent argues that the counter-notice is a prescribed form and there is no saving provision for inaccuracies, but the prescribed form is only that. It does not limit the explanation which can be provided of each ground on which it is alleged the RTM company was not entitled to acquire the right to manage. That view is consistent with the brief wording used by the Respondent in their counter-notice, which supplemented the prescribed wording in each case by adding respectively: (re s.79(3)): "*…as the claim notice was not given by an RTM company which complied with section 79(5)…*", (re s.80(3)): "*…because the claim notice did not correctly provide the information required…*" and (re s.80(4)): "*…because the claim notice does not contain the necessary particulars…*".

11. In my view, the counter-notice was rather gnomic, giving no indication of why or how it was being alleged the specified provisions had not been complied with. The Applicant may already have been taking an excessive approach by attempting to go behind the register of members and demand further evidence of membership, so should in the counter-notice have explained in what way it was said section 79(5) had not been complied with. At the very least, it should have responded to the Applicant's pre-action letter to give this simple explanation.

12. However, the Applicant did not make a cogent case that the counter-notice was invalid or refer to any other authority on the point. Section 84(2) and the prescribed form regulations set out what is required of a counter-notice. Although 14 Stansfield Road is cited elsewhere on the subject of the validity of counter-notices (in Tanfield at 25-24, subject to the cautionary note in that paragraph), it seems to me that the Upper Tribunal decision was about the validity of claim notices and the Respondent's failure even in those proceedings to say why the claim notice was invalid, whether or not a first-instance decision had found invalidity of the counter notice. The extract quoted by the Applicant, as set out above, is to be read in the context of the relevant challenge in that case. That was not really that the RTM company did not comply with s.79(5). The Respondent had simply been attempting to argue that the register of members was invalid (claiming it did not contain information prescribed by the Companies Act 2006) and had repeatedly failed to say

what was missing from the register, let alone to make any real case about membership. The Upper Tribunal observed at [23] in relation to a different challenge that there is no presumption of non-compliance, saying that the tribunal: "*…will be as much concerned to understand why the landlord says that a particular requirement has not been complied with as to see why the RTM company claims that it has been satisfied*."

13. On the case made by the Applicant, I am not satisfied that the counter-notice was invalid. I also doubt that all the alleged matters relate to the defence or conduct of the proceedings (as opposed to matters which might be taken into account in deciding whether to make a costs order if a tribunal was satisfied that there had been unreasonable conduct in the defence or conduct of the proceedings), bearing in mind the guidance in Willow Court at [95], but the parties do not seem to have engaged with that point. Even if the alleged matters do relate to the defence or conduct of the proceedings, I am not satisfied that they were unreasonable for the purposes of Rule 13(1)(b) for the following reasons.

14. It appears the Respondent wrote to the Applicant on 25 January 2022 to ask for information, including copies of any applications for membership of the Applicant. The Applicant must have provided a copy of the register of members, because the Respondent's subsequent statement of case acknowledged that the register is prima facie evidence of membership. As noted at [4], the Respondent said that on 2 February 2022 the Applicant had replied to the request for copies of applications for membership saying: "*not applicable*". The Applicant gave no explanation for this and it was relied upon again in the Respondent's response to the costs applications.

15. Noting the contents of the counter-notice and apparent failure to respond to the pre-action letter, the tribunal directed the Respondent to produce a statement of case explaining precisely how it was said the specified requirements had not been complied with. As noted above, the statement of case then produced by the Respondent questioned only whether the qualifying tenants had been validly registered as members of the Applicant under article 26 of its articles of association. Article 26 provides for registration of members by entry as subscribers or by application to the company. In response, the Applicant promptly produced their "supplementary statement" dated 4 August 2022, which explained when and how article 26 had been complied with in relation to each of the qualifying tenants of the five flats. It enclosed copies of the applications for membership and other supporting documents and explained the sequence of events, demonstrating that: "*…by 7 January 2022 at the latest…*" the applications had been made and approved by the directors in accordance with article 26.

16. In the circumstances of this case, the "*not applicable*" response to the request for copies of applications for membership gave the Respondent a reasonable explanation for their conduct. Again, the Respondent's request may have been excessive, but the Applicant's response did not take that line or say that all necessary applications had been made. It

suggested no such applications had been made, when strictly speaking they should have been (whether or not written applications were required) because none of the qualifying tenants had been members on incorporation of the Applicant. Following production of the statement showing such applications had been made and approved in accordance with the articles before the claim notice was served, the Respondent sought (albeit at the last minute) to withdraw their counter-notice and agreed the Applicant had been entitled to claim the right to manage.

Should the tribunal make an order for costs?

17. In view of the fact that the Applicant was successful and the other findings made above, I am satisfied that it is appropriate to under Rule 13(2) order the Respondent to reimburse the whole of the tribunal application fee of £100 paid by the Applicant.

18. Because I am not satisfied that the Respondent acted unreasonably in defending or conducting the proceedings, I cannot make any other order in respect of costs under Rule 13(1)(b).

Name: Judge David Wyatt **Date:** 20 October 2022

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).