UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 135 (LC)

UTLC No. LC-2022-627

Royal Courts of Justice,
Strand, London WC2A

14 June 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

LANDLORD AND TENANT – FTT procedure – costs – application for recognition of a tenants' association signed by association's secretary – application subsequently withdrawn – whether secretary a person bringing or conducting proceedings against whom an order for costs could be made – rule 13(1)(b), Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

BETWEEN

MICHAEL CONNELL

Appellant

-and-

BEAL DEVELOPMENTS LTD (1)
EASTMAN SECURITIES LTD (2)
YORKSHIRE AND LINCOLNSHIRE DEVELOPMENTS LTD

Respondents

Re: 10 The Moorings,
Burton Waters, Lincoln

Martin Rodger KC, Deputy Chamber President

31 May 2023

Kerry Bretherton KC, instructed directly, for the appellant
Jeff Hardman, instructed by Wilkin Chapman, for the respondents

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The following cases are referred to in this decision:

Conservative and Unionist Central Office v Burrell [1982] 1 WLR 522

London Association for the Protection of Trade v Greenlands Ltd [1916] 2 AC 15

Rosslyn Mansions Tenants Association v Winstonworth Ltd [2015] UKUT 11 (LC)

Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC)

Introduction

1. This is an appeal by Mr Michael Connell, the secretary of a tenants' association, against an order of the First-tier Tribunal (Property Chamber) (the FTT) requiring him personally to pay costs incurred by the respondents in the association's unsuccessful application for a certificate of recognition under section 29, Landlord and Tenant Act 1985 (the 1985 Act). The application was withdrawn before it was determined, and the order was made on the basis that the secretary had acted unreasonably in bringing and conducting the proceedings.

2. Section 29 of the Tribunals, Courts and Enforcement Act 2007 gives the FTT power to make orders for costs, subject to Tribunal Procedure Rules. The relevant rule is rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the FTT Rules) which limits the circumstances in which such an order may be made. By rule 13(1)(a) the FTT may make an order against a legal or other representative in respect of costs incurred by a party as a result of any improper, unreasonable, or negligent act or omission on the part of that representative. By rule 13(1)(b) it may also make an order in a residential property case "if a person has acted unreasonably in bringing, defending or conducting proceedings".

3. The respondents, in whose favour the FTT's order for costs was made, do not now seek to uphold the decision on the grounds relied on by the FTT itself. They nevertheless submit that additional material which was not relied on by the FTT should be taken into account and justifies the making of the order.

4. At the hearing of the appeal the appellant was represented by Ms Kerry Bretherton KC who had not been involved in the proceedings before the FTT. The respondent continued to be represented by Mr Jeff Hardman as it had been before the FTT.

The statutory scheme

5. A recognised tenants' association is an association of qualifying tenants (i.e. tenants required to pay a service charge) which is recognised for the purposes of the provisions of the 1985 Act relating to service charges.

6. There are two routes by which an association may be "recognised". Under section 29(1)(a), 1985 Act an association may be recognised by notice in writing given by the landlord to the secretary of the association, or by section 29(1)(b) it may be recognised by a certificate given by the FTT.

7. A landlord's notice and a tribunal's certificate recognising an association may be withdrawn or cancelled (section 29(2)-(3), 1985 Act).

8. The 1985 Act says nothing about the grounds on which the FTT may give or cancel a certificate, but by section 29(5) the Secretary of State is given power to make regulations which, amongst other things, may specify the matters to which regard is to be had. This power was not used until the Tenants' Associations (Provisions Relating to Recognition

and Provision of Information) (England) Regulations 2018 (the 2018 Regulations) came into force on 1 November 2018.

9. Before the 2018 Regulations there were no statutory criteria for the recognition of tenants' associations. Instead, an informal document issued by the Department of Communities and Local Government and entitled "Residential Long Leaseholders – a guide to your rights and responsibilities" provided relevant guidance. This document suggested that "as a general guide, an association should represent at least 60% of the flats in the block in respect of which variable service charges are payable."

10. In 2015 the effect of these informal sources of guidance was considered by the Tribunal (HHJ Huskinson) in *Rosslyn Mansions Tenants Association v Winstonworth Ltd* [2015] UKUT 11 (LC). The Tribunal held that the FTT had a wide discretion under section 29 and that decisions about recognition should be taken having regard to all relevant circumstances, including the proportion of tenants who were members of the association but without any presumption that a particular threshold had to be reached before a certificate could be issued.

11. The 2018 Regulations adopted a different approach. Regulation 3 identifies a number of factors (generally concerned with good governance) which are to be taken into account when the FTT considers whether to grant a certificate. Regulation 4 then specifies that the FTT must not give a certificate to a tenants' association representing fewer than 50% of the qualifying tenants in the premises. Nor may a certificate be given to an association if one has previously been given in relation to the premises and remains in force.

12. There is one exception to the regulation 4 prohibition on recognising a second association or one representing fewer than 50% of qualifying tenants. By regulation 4(5) they do not apply where the association represents a substantial number of qualifying tenants, and the landlord has failed to comply with an order made by the FTT requiring it to satisfy a tenant's request for information about the number and identity of qualifying tenants who are not already members of the association.

Background to the Association's application

13. The Burton Waters Estate is a mixed residential and commercial estate in Lincoln which includes 361 houses and flats let on long leases. The residential leases make provision for each leaseholder to have one share in a leaseholders' company, but that company was dissolved in 2014.

14. The three respondent companies are landlords of different parts of the Estate.

15. In 2016 a Burton Waters Residents' Group (the Residents' Group) was established by leaseholders and appears to have adopted a non-confrontational approach to the landlords. In February 2019 the officers and management committee of the Residents' Group resigned, apparently in response to criticism of their handling of a dispute over service charges, but a new committee was elected on 15 July 2019.

16. While the Residents' Group was dormant an alternative association emerged. The Burton Waters Independent Tenants Association (the Association) held its inaugural general meeting on 24 August 2019. It appointed officers and a management committee, including the appellant Mr Michael Connell as Secretary. It adopted a constitution, one of whose objects was to seek formal recognition under the 1985 Act; the constitution provided that the members would indemnify the officers against all liabilities incurred by them acting in good faith in the name of the Association and within their authority.

17. The Residents' Group had never previously sought recognition by the landlords, but immediately after its resurrection the landlords notified its secretary by a document dated 18 July 2019 that they recognised it for the purposes of the 1985 Act.

18. Despite having been recognised by the landlords, the Residents' Group also applied to the FTT for recognition, but no certificate was issued; the FTT pointed out, correctly, that none was required as the Group had already been notified of recognition by the landlords. In its application to the FTT the Residents' Group stated that it had 264 members, representing 68% of the residential leaseholders.

The Association's application

19. On 8 December 2019 the appellant, in his capacity as Secretary of the Association and with the authority of its committee, sent a request notice to the landlords. Service of a request notice is a procedure provided by the 2018 Regulations by which a tenants' association may seek information from the landlord about qualifying tenants of the block or estate who are not already its members. The appellant included a list of the Association's members with the request notice. He also questioned the circumstances in which the Residents' Group had been recognised and formally requested that the landlords recognise the Association.

20. On the same date, 8 December 2019, the appellant, again acting with the authority of the committee, signed and submitted to the FTT an application for a certificate of recognition under section 29(1)(b), 1985 Act.

21. Before submitting the application, the Association's committee had considered relevant guidance published by HM Courts & Tribunals Service (leaflet T545, which is available on the FTT's website). That material explained that the FTT may not give a certificate of recognition if a certificate is already in force or if the tenants' association represents fewer than 50% of the qualifying tenants. But it also described the circumstances in which those prohibitions do not apply (where the landlord has failed to comply with a tribunal order to provide information and an association represents a substantial number of qualifying tenants), and the circumstances in which an existing certificate may be cancelled (including where the certificate was obtained "by deception or fraud"). It is also relevant in this case that the leaflet states that once an application had been received "it will be checked by a case officer for completeness".

22. The application filed by the appellant was in the FTT's approved form for that purpose. He provided the name and address of the Association and his own name and address as its Secretary; he did not identify himself as the Association's representative. The form

requires the provision of a list of the members of the association, signed by each member, but the list provided by the appellant was not signed. It contained 111 names, many of whom were couples or resident at the same address. Elsewhere on the form it was stated that there were 361 houses and flats on the estate.

23. Although the standard form includes a statement of truth confirming that the maker of that statement believes the facts stated are true it does not contain any statement identifying the maker of the application. Neither the association for which recognition is sought, nor its secretary, are designated as the "applicant" and the person who signs the statement of truth is not additionally required to use any form of words such as "I apply on behalf of the members of the association" or "the members of the association apply" or "the association applies" for recognition.

24. The form submitted by the appellant included a narrative explanation expressed in the first-person plural ("we seek recognition …") and he signed the statement of truth.

25. The same narrative referred to the landlords' recognition of the Residents' Group and suggested that it was not "an arm's length or independent organisation" nor had it acted in the best interests of leaseholders, before explaining:

> "For this reason we seek recognition from the court, or if the court determines otherwise, that the court consider, within this application, revoking the recognition granted by the landlord to [the Residents' Group]. We can affirm that in all aspects of recognition criteria we meet such, bar percentage of membership, though we have now written to the landlord seeking disclosure of qualifying tenants other than our present membership base. We invite the court to consider the case of Rosslyn Mansions Tenants' Association v Winstonworth Ltd (2015), in which it has been ruled that the court can look at all factors pertaining to the application, including the relationship and integrity of the landlord."

26. Having received the application on 11 December 2019 the FTT gave directions on 4 February 2020. It did not suggest that the application was incomplete.

27. The FTT's directions referred to the Association as the applicant and Mr Connell as its representative. They stated that the matter should be determined at a hearing and required the applicant to file a statement of case setting out the grounds of the application and specifying the total number of flats at the subject property and the proportion of tenants who were its members. Some of that information had already been supplied in the original application, in which the Association did not claim to represent 50% or more of the qualifying leaseholders.

28. The Association submitted a statement of case, as directed, on 25 February 2020. It was signed by the appellant expressly in his capacity as Secretary. It ran to 20 pages with more than 400 pages of supporting documents. The statement itself included a great deal of background information about the dissatisfaction of the members of the Association with how the estate was being run and about the circumstances in which it was suggested

the Residents' Group had come into existence. It also referred to the request notice served on the landlord on 8 December 2019 and recorded that no answer had yet been received.

29. In a section headed "the basis for recognition" it was stated that the Association had 77 members who were qualifying tenants representing 77 of the 361 dwellings on the estate. It again referred to the *Rosslyn Mansion* decision and to the Tribunal's explanation that the FTT had a wide discretion and did not require a minimum percentage. Attention was drawn to the Tribunal's indication in that case that a history of complaints or apparent breakdown in relations would also be relevant to an application. It argued that special circumstances existed which justified granting the Association recognition. Those circumstances included the landlord's failure to reply to the communications addressed to them (which I take to be another reference to the request notice).

30. The respondents' statement of case was another lengthy document filed with a bundle of additional material running to 179 pages. Despite being professionally prepared, rather than confining itself to the proposition that the application could not succeed because the Association did not have the support of 50% of the qualifying leaseholders, a requirement which could not be overridden because the landlords were not in default of a direction to comply with a request notice, the statement of case took issue, point by point, with the Association's statement. It referred to the 2018 Regulations and pointed out that the FTT had no power to recognise the Association, but rather than stopping there, it proceeded to explain in great detail why, if the FTT did have jurisdiction, it should not be exercised. Demonstrating a notable lack of self-awareness, the drafter described the Association's statement as "20 pages of largely irrelevant prolixity" (on page 14 of their own 18-page document).

31. The respondents asserted in their statement that the "primary purpose" of the formation of the Association was to enable it to be used to assist one leaseholder, Mr Fernie, to pursue disproportionate, damaging and vexatious allegations against them. In support of that proposition minutes of the Association which have neither been referred to in the application nor appended to the applicant's statement of case were exhibited by the respondents who then proceeded to refute them line by line. They did the same with one of the Association's newsletters which again had not been referred to in the application.

32. When the FTT next considered the case on 16 July 2020 it imposed a stay pending the determination of other proceedings involving the respondents and Mr Fernie concerning disputed service charges. In the event, the service charge proceedings were delayed and on 15 April 2021, nine months after the stay was imposed, the respondents' solicitor Mr Holt filed a witness statement asking that it be lifted. He suggested that determination of the Association's application should be on paper without an oral hearing, describing it as "simply a procedural matter".

33. Following an objection to a paper determination by the appellant, writing on behalf of the Association, the FTT conducted a case management hearing by telephone on 7 May 2021. Before the hearing Mr Connell informed the FTT that the Association would be represented by Mr Fernie. At the hearing the FTT lifted the stay and listed a further hearing on 22 July 2021 at which it would consider whether the application for a certificate of recognition should be struck out.

34. The hearing on 7 May 2021 was the first time that the Association received judicial guidance on the application. According to its application for permission to appeal, the Judge explained that if the 50% threshold for membership could not be demonstrated the Association ought to consider withdrawing the application.

35. The hearing on 22 July 2021 was preceded by a second witness statement from Mr Holt. In it he explained that the respondents wished to pursue an application for costs against the appellant on the basis that he had behaved unreasonably, by pursuing an application without the support of the requisite number of leaseholders, and because the application was disproportionate and relied on irrelevant material. Mr Holt also suggested that if, as the respondents believed, the application was being pursued to further the interests of Mr Fernie, that was a further example of unreasonable conduct by the appellant.

36. It was said by Mr Connell in his application for permission to appeal that the Association withdrew the application at the hearing on 22 July 2021. In its decision the FTT stated that the withdrawal did not occur until 28 July. Whatever was said on 22 July, written confirmation of withdrawal was not given until 27 July. It appears from directions given on 22 July that, on that date, the FTT received an application from the respondents confirming that they intended to submit an application for costs against "the applicant", not mentioning Mr Connell personally. Thereafter, the respondents submitted a bill of costs which the FTT treated as their costs application. The parties exchanged submissions and on 12 September 2022 the FTT issued its decision, having considered the application on paper.

The FTT's original decision

37. By a decision issued on 12 September 2022, the FTT ordered both the Association and the appellant to pay the respondents' costs of the application and directed that they make a payment of £8,000 on account. The order was made under rule 13(1)(b) on the grounds that both had behaved unreasonably in bringing and conducting the application.

38. In its decision the FTT followed the three-stage approach suggested by the Tribunal in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC). Having given an account of the proceedings it said that the first issue was whether the Association or the appellant acting on its behalf had acted unreasonably. It gave four reasons for its conclusion that both had done so.

39. First, it was absolutely clear that the Association had never had the support of a sufficient number of qualifying tenants to satisfy regulation 4.

40. Secondly, the requirement to provide a list of the qualifying tenants who were members of the Association, signed by each of them, had not been complied with, and the only person to have provided a signature was the appellant.

41. Thirdly, the Association's statement of case filed on 25 February 2020 had acknowledged that only 77 of 361 qualifying tenants were members. It was unreasonable to ask that a certificate be granted "exceptionally" and instead the application ought to have been withdrawn.

42. Finally, on 22 July 2021 "in the face of an application to strike out this case", it had been unreasonable for the Association and the applicant to apply to adjourn the hearing.

43. The second issue was whether an order should be made at all. The FTT suggested that the deficiency in numbers supporting the Association should have been identified by the judge who issued the original directions. It did not consider that it would be fair in those circumstances to make an order for costs simply because the application had not commanded the necessary support. However, by the time the Association's statement of case was submitted "Mr Connell on behalf of [the Association] was fully aware that the application was being made in breach of the Regulations that are mandatory. The tribunal could not make an exception so as to grant this application." The FTT appeared to suggest that costs should therefore be awarded from the date the appellant had signed the Association's statement of case, 25 February 2020, but that qualification was not reflected in the order itself.

44. Finally the FTT considered the amount that should be paid and decided that the Association "and/or Mr Connell" should pay £8,000 on account and that "the full costs" should then be agreed or assessed by the County Court.

The application for permission to appeal and the FTT's reviewed decision

45. Both the appellant and the Association applied for permission to appeal and the FTT invited the respondents' comments. Somewhat surprisingly, the respondents supported the Association's application and claimed that they had never asked for an order for the payment of their costs by it. Reference was made to Mr Holt's second witness statement which had anticipated the making of an application against Mr Connell alone, although it is apparent from the order recording what had occurred on 22 July and from the submissions made to the FTT by the respondents' solicitors and counsel that the FTT had not been mistaken in its understanding the application was pursued both against the Association and against its Secretary.

46. Faced with the respondents' change of position, the FTT decided to review its original decision and on 7 November 2022 it issued a new decision setting aside the order against the Association and dismissing the appellant's application for permission to appeal. At paragraph 7 of that decision it paraphrased its reasons for making a costs order, as follows:

> "The application for recognition supported by Mr Connell alone, or possibly by 77 qualifying tenants could not succeed. It was unreasonable to bring the application. It was unreasonable to fail to withdraw the application in the face of an application to strike out. It was unreasonable to serve a statement of case acknowledging the failure to have support of at least 50% of the qualifying tenants at the site and ask the Tribunal to exercise discretion that it does not have to overlook this failure. It was unreasonable to require that there be two hearings in the face of that application for it to be struck out, when it should have been withdrawn."

47. The FTT then recognised that it may be difficult to enforce a costs order against the Association because none of its members other than Mr Connell had signed the

application, and because the Association itself would not have the funds to pay the costs. It said that the Association's appeal was "not resisted" and that there was "a reasonable prospect of a successful appeal" and that it would therefore review its decision and determine that the costs should not be paid by the Association. (I should point out that the FTT was here asking itself the wrong question; before reviewing its decision it should have considered whether the proposed appeal was "likely to be successful", a higher standard than the reasonable prospect of success test for permission to appeal – see rule 55(1)(b) of the FTT Rules).

48. In response to Mr Connell's application for permission to appeal the FTT considered his position independently of the Association for the first time (previously all of the conduct relied on had been attributed to both Mr Connell and the Association without distinguishing between them). It was satisfied that an order could properly be made against Mr Connell because he was the Secretary of the Association, "an unincorporated applicant", he had signed the application form, he was responsible for the statement of case, he had signed all pleadings and submissions, including the application for permission to appeal, and he had served documents and attended the hearings.

49. The FTT then considered the grounds of appeal and acknowledged that it had been mistaken as to the facts in suggesting that Mr Connell and the Association had asked for the hearings on 5 May and 22 July to be adjourned. Instead it said that representations made "by [the Association] and Mr Connell caused those hearings to be adjourned". I understand that to be referring to a submission by Mr Fernie that the request notice had not been complied with. The FTT concluded that there was no realistic prospect of a successful appeal by Mr Connell.

50. The FTT then referred to a request made by the respondents that it review its original decision to deal with submissions they had made but which it had not mentioned. This was a reference to the respondents' complaint that the application was a front for Mr Fernie to pursue a vendetta against them. The FTT said that it was well aware of those allegations but had determined that "this is a very straightforward case" and that it was not necessary "to consider matters which would be hotly contested".

The appeal

51. Permission to appeal was given by the Tribunal on the following two grounds:

    (1) That there were insufficient reasons for the FTT to make an order against Mr Connell personally, who was not a party to the proceedings before the FTT;

    (2) That the FTT erred in finding that the conduct of the applicant in failing to withdraw the Association's application in February 2020 was unreasonable.

52. Having set out the background to the appeal at some length, I can deal with the argument more concisely, because well into his oral submissions Mr Hardman made another surprising concession when he informed the Tribunal that the respondents did not seek to uphold the FTT's decision on the grounds it had given. In particular he suggested that the three reasons given in the original decision which had survived the application for

permission to appeal were insufficient to justify an order for costs. It was not unreasonable without more for an unrepresented applicant to pursue an application for recognition without the support of at least 50% of the qualifying tenants. Nor was it a sufficient reason to award costs that the application had not been signed by all the members of the Association. Nor was it unreasonable, without more, that the application had not been withdrawn earlier than it was.

53. Mr Hardman's concession was subject to an important rider, to which I will return, but in principle each of the points he made was realistic. As they involve the FTT's core reasoning, and as Mr Hardman did not concede that the appeal should be allowed, it is necessary for me to explain in a little more detail why I agree that the reasons given by the FTT did not justify the making of the order for costs it eventually made against Mr Connell alone.

54. It is important to begin by addressing Mr Connell's role in the proceedings. There is no power in the FTT Rules to make a third-party costs order (unless it is an order for wasted costs against a representative). The FTT has the power to make an order for costs under rule 13(1)(b) only against a person "bringing, defending or conducting proceedings". The FTT did not address the question whether Mr Connell had done any of those things in its original decision, in which it did not distinguish between things done by the Association and things done by Mr Connell. It was not until it refused him permission to appeal that it considered Mr Connell's position separately from that of the Association. At that point it concluded that an order could properly be made against him because he was the Secretary of the Association and had signed the application form and other documents and attended the hearings. Although it did not say so, the FTT's decision is only explicable on the basis that it took Mr Connell to be the person bringing and conducting the proceedings.

55. A tenants' association will not usually have a legal personality in its own right. It will be an "unincorporated association", meaning a group of individuals who join together on agreed terms to further a joint purpose (in *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522, 525, Lawton LJ described an unincorporated association as "two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules …"). Except where a statute permits it to do so, an unincorporated association cannot sue or be sued: *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15.

56. By rule 26(1) of the FTT's Rules proceedings are brought by "an applicant" sending an application to the tribunal. By rule 1(3) an "applicant" means "the person who commences tribunal proceedings". Although those provisions are a little circular, they make it clear that only "a person" may bring proceedings in the FTT.

57. By section 5 and Schedule 1 of the Interpretation Act 1978, except where there is a contrary indication in the context, the word 'person' includes 'a body of persons corporate or unincorporated', and so includes an unincorporated association.

58. Mr Hardman argued that an unincorporated association could not make an application for recognition under section 29 in its own name, but he did not refer to the Interpretation Act

and having regard to its terms it does not seem to me that his argument is correct. An unincorporated association can be a "person" for the purpose of a statutory provision unless the context otherwise requires. I In my judgment there is nothing in the context to require a more restricted meaning to be given to that word where it is used in the FTT Rules. An unincorporated Association can therefore make an application in its own name.

59. Of course, the Interpretation Act does not change the nature of an unincorporated association and does not confer on it a separate legal personality, distinct from that of its members. The Association is simply a shorthand or collective term for the members of the Association when they act in connection with their common purpose within their rules.

60. Whether that means that proceedings brought in the name of the Association are to be treated as having been brought by the whole of its membership, although not named individually and perhaps not even aware of what is being done on their behalf, is a point on which I did not receive submissions. There is no procedure in the FTT Rules akin to rule 19.8 of the Civil Procedure Rules, which permits a claim to be brought by one person as representative of a group of persons with the same interest, but where a tenants' association brings an application in its own name it might reasonably be understood as doing so on behalf of its members. The application in this case appears to have been made in the Association's name on that basis (the application expressly stated that "we seek recognition").

61. Fortunately, it is not necessary for me to decide the consequences of an application made in the name of the Association because the respondents made it clear in their response to the application for permission to appeal that they did not want an order for costs against the Association or its members.

62. Where does that leave Mr Connell? In my judgment he cannot be said to have brought the application. It is true that he signed the application form, but he did so expressly in his capacity as Secretary of the Association and therefore as its agent. It was in that capacity that he signed documents and corresponded with the FTT, and in each case the party taking those steps was the Association itself. Mr Connell did not purport to make any application of his own, nor did he claim to do so as a representative of the Association (the part of the application form identifying a representative was left blank). Nor did the procedural judge who gave the original directions consider that Mr Connell was the applicant; he correctly identified the Association in that capacity. Nor even did the FTT when it made its decision consider that Mr Connell was the applicant, since it identified him on the front page of its decision as a "Third Party", although no order appears ever to have been sought or made joining him as a party to the proceedings.

63. There was therefore no basis on which it could be said that Mr Connell personally was responsible for "bringing" the proceedings. Nor did he "conduct" them. The proceedings were conducted by the Association, making decisions through its management committee and giving effect to those decisions through Mr Connell, its agent and Secretary.

64. The FTT seem to have considered that Mr Connell's attendance at hearings was a ground for making him personally liable for the costs of the proceedings, but it did not suggest

that he misconducted himself, or explain why his attendance should make him any more an appropriate subject for an order than any other member of the association.

65. The Association did nominate a representative, who attended the two telephone hearings and spoke on its behalf. That representative was Mr Fernie. No application for the costs of these proceedings has been made by the respondents against Mr Fernie, despite their suggestion that the application was simply a cover for him to pursue a vendetta against them. By representing the Association at hearings Mr Fernie could be said to have conducted the proceedings, and if he truly was acting for an improper purpose, as suggested, then a wasted costs order could also have been sought against him under rule 13(1)(a).

66. In my judgment there was therefore no basis on which an order for costs could properly have been made against Mr Connell personally. In short, he did not bring or conduct the proceedings and did not fall within the scope of the rule.

67. Even if I am wrong and Mr Connell should be regarded as the person bringing and conducting the application, I agree with Mr Hardman that, without more, taking the steps identified by the FTT was not sufficient to amount to unreasonable conduct. It is apparent from the original application, and from the statement of case, that the Association proceeded under a misconception of which it was not disabused by the FTT until the hearing on 7 May 2021. They had read the Tribunal's decision in *Rosslyn Mansions* and appear to have understood that the FTT had a residual discretion to grant recognition even where an association did not command majority support (as indeed it had before the making of the 2018 Regulations, and even after that if the regulation 4(5) conditions are met). Whether they were in fact aware of, or understood, the 2018 Regulations, and whether they understood that the usual threshold was 50% or believed that it was still 60%, as it had been in practice before *Rosslyn Mansions*, they clearly believed that the Tribunal could overlook that requirement in an appropriate case. They may have been encouraged in that view by what was said in the HMCTS information leaflet about the FTT's power to recognise an association without majority support where a landlord had failed to comply with a direction to supply details of qualifying tenants. They had made such a request and later asked the FTT to make such a direction.

68. Putting oneself in the position of a lay person having that flawed understanding of the FTT's powers, the material included in the Association's statement of case explaining its members' view that the estate had been mismanaged and that there was collusion between the landlords and the Residents' Group, would all have been highly relevant to the exercise the Tribunal had described in *Rosslyn Mansions.* The FTT does not appear to have undertaken that exercise or to have tried to understand for itself why the application was being advanced in the way it was. Had it done so it would have identified the basis of the mistake.

69. For a lay person to misunderstand the law is not unreasonable. I therefore agree with Mr Hardman that the first example of conduct relied on by the FTT did not fall below the objective standard of unreasonableness.

70. It is not clear to what extent, in the end, the FTT relied on the absence of signatures from the list of the qualifying tenants supplied with the application. That was the second of the two matters referred to in the original decision, but it was qualified by the suggestion that the deficiencies in the original document should have been identified by the judge who issued directions. The point did not then feature in the summary contained in the reviewing decision, nor was it listed as one of the defaults held against Mr Connell. To the extent that it was relied on I am satisfied that it ought not to have been.

71. Neither section 29 itself, nor the 2018 Regulations, nor the FTT Rules, nor any practice direction, requires an applicant for a certificate of recognition to supply a list of qualifying tenants signed by each of them when the application is submitted. The application form asks for such a list, but I am inclined to think that is concerned with the provision of evidence; if the applicant was able to prove sufficient support by some other means the FTT would not be entitled to refuse a certificate because no signed list had been provided. Neither the staff who checked the application nor the procedural judge who gave directions suggested that the failure to comply with that request was unreasonable or required to be rectified. Rule 8(2) of the FTT Rules provides that a failure to comply with the Rules, a practice direction or a direction does not of itself render the proceedings or any step taken in them void. Once again, I agree with Mr Hardman that failing to supply the signed list was not unreasonable conduct.

72. Finally, the FTT relied on the fact that the application was not withdrawn until 28 July 2022 as unreasonable. There is no record of the hearing on 7 May 2022, at which the Association was represented by Mr Fearnie, and it is not clear why the application was not struck out on that occasion. Neither of the panel which dealt with the costs application had participated in that hearing and the FTT accepted in its review decision that no request for an adjournment was made. Mr Connell believes that the application was withdrawn at the hearing on 22 July but again there is no record of those proceedings. It cannot be unreasonable to withdraw an application which is under threat of being struck out, and the only question is whether it ought to have been withdrawn sooner. If, as Mr Hardman acknowledges, it was not unreasonable to commence and continue an application which lacked sufficient support, the precise circumstances in which it was withdrawn are unlikely to amount to unreasonable conduct. In any event, those circumstances are obscure, and I agree with Mr Hardman that they do not provide a justification for making a costs order.

73. That would be sufficient to dispose of the appeal in Mr Connell's favour were it not for the qualification applied by Mr Hardman to his concession that, without more, the grounds relied on by the FTT did not justify making an order for costs against him. Mr Hardman suggested that there was more, and that seen in the light of matters which the FTT had not touched upon in its decision, the order ought to be upheld. That submission was made to the FTT in response to the Association and Mr Connell's application for permission to appeal, when it received the treatment recorded at paragraph 50 above. It now forms the basis of a respondent's notice and an application for permission to cross appeal.

The respondent's notice or cross appeal

74. Despite his acceptance that the decision of the FTT could not be supported in its own terms, Mr Hardman submitted that its decision should be confirmed. The FTT should, he

suggested, have found that Mr Connell had behaved unreasonably in the following additional respects:

(1) He had conducted the application in a wholly disproportionate manner. The sheer volume of material summitted was oppressive and designed to harass the respondents.

(2) He repeated dozens of unsubstantiated and debunked allegations made by Darren and Joshua Fernie in other proceedings. The FTT was invited to cross reference a multitude of allegations in the Association's statements against those contained in its own decision on Mr Fernie's service charge case.

(3) The recognition application was part of a vexatious campaign by Mr Fernie to rid the estate of the respondents. In that context, Mr Connell was a "cat's paw" for Mr Fernie to harass the respondents and promote his conspiracy theory that the respondents were defrauding the service charge and lessees.

75. I doubt that it was necessary for these propositions to be included in an application for permission to appeal. They are points which support the FTT's decision on different grounds, rather than seeking to reverse or vary it. They are not changed in character by adding a submission that the FTT was wrong to decline to determine them.

76. In my judgment, whether the FTT should have addressed these points or not, they provide no support for an order for costs against Mr Connell. Once it is appreciated that the application for recognition was the Association's, and not Mr Connell's, and that Mr Connell did not bring or conduct it, there is no basis on which an order could be made against Mr Connell personally. Heaping up yet more allegations of unreasonable conduct cannot lead to a different outcome.

77. In any event, none of the allegations made about the suggested motivation for bringing the original application are laid at Mr Connell's door. They are directed much more generally at the Association and at Mr Fernie. Without them, the respondents were awarded their costs against the Association, but they chose to abandon that award; there is no merit in them now seeking to fix Mr Connell with responsibility on the basis of things done by others.

78. I make no criticism of the FTT for declining to adjudicate on the respondents' conspiracy theory. The matters relied on in support of it were irrelevant to the disposal of the original recognition application, which ought to have been struck out by the FTT in 2020 without the need for any response from the respondents. It was clear on the face of the application that it was not supported by 50% of the qualifying tenants and as no order had been made by the FTT requiring the respondents to provide details of the other qualifying tenants it simply had no jurisdiction to issue a recognition certificate. The respondents could have made that point in a single paragraph but chose instead to inflate the proceedings by their own wholly disproportionate statement of case. They may have believed there was some good reason for that course of action but is difficult to avoid the suspicion that it was done simply in order to set up an application for costs.

79. The FTT did not need to deal with the extraneous allegations in the context of the application itself, and it would have been scandalous to devote further days of tribunal time to investigating them in order to determine the application for costs. I take this opportunity to repeat what was said by the Tribunal in *Willow Court* at [43], that applications for costs under rule 13(1)(b):

> "… should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions."

Disposal

80. For these reasons I allow the appeal and set aside the order for costs made against Mr Connell.

Martin Rodger KC,

Deputy Chamber President

14 June 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.