

UPPER TRIBUNAL (LANDS CHAMBER)



**UT Neutral citation number: [2021] UKUT 295 (LC)
UTLC Case Number: LC-2021-352**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

*LANDLORD AND TENANT – RIGHT TO MANAGE – landlord’s entitlement to costs
arising from claim notice and in proceedings under section 84(3) of the Commonhold and
Leasehold Reform Act 2002*

BETWEEN:

ASSETHOLD LIMITED

Appellant

-and-

36 DUNSMURE ROAD RTM COMPANY LIMITED

Respondent

**Re: 36 Dunsmure Road,
London,
N16 5PW**

Upper Tribunal Judge Elizabeth Cooke

Determination by written representations

Scott Cohen Solicitors Limited for the appellant
Dean Wilson LLP for the respondent

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (“the FTT”) about the costs payable to a landlord in connection with the acquisition by its tenants of the statutory right to manage the building. In a nutshell, the FTT refused to award costs claimed by the landlord on the basis that an earlier decision of the FTT in 2020 had already dealt with those costs. The appellants say that it had not.
2. There is, of course, no question now of any appeal from the 2020 decision. The question before the tribunal now is: what did the 2020 decision decide?
3. This appeal is a review of the decision of the FTT and is determined under the Tribunal’s written representations procedure. There is no dispute about the law, nor about the facts except as to the content of the 2020 decision.

The legal and procedural background

4. Part 2 of the Commonhold and Leasehold Reform Act 2002 makes provision for the acquisition of the right to manage a building containing flats, by a company – known as an RTM company – whose shareholders are qualifying tenants. The right to manage is acquired by compliance with the procedure set out in the statute, including the service on the landlord of a claim notice complying with sections 79 and following of the 2002 Act. There is provision for service of a counter-notice admitting or denying the claim to entitlement to acquire the right to manage, and section 84(3) gives the FTT jurisdiction to decide any dispute about that entitlement.
5. Section 88 of the 2002 Act provides that the RTM company is liable for the reasonable costs incurred by a landlord:
 - a. in consequence of a claim notice (section 88(1)) and
 - b. in tribunal proceedings but only if the FTT dismisses the RTM company’s application for a determination that it is entitled to acquire the right to manage the premises (section 88(3)),and section 88(4) gives the FTT jurisdiction to determine any question arising about the amount of costs payable by the RTM company.
6. The respondent to this appeal is an RTM company set up to acquire the right to manage 36 Dunsmore Road pursuant to the provisions of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”). Its members are qualifying tenants and the appellant is their landlord.
7. On 9 May 2019 the RTM company served a claim notice on the landlord. On 11 June 2019 the landlord served a counter-notice stating that the notice was invalid.

8. On 8 July 2019 the RTM company served a second claim notice, and on 9 August 2019 the landlord served a counternotice stating that it was invalid.
9. On 20 September 2019 the RTM company made a section 84(3) application to the FTT, seeking a determination that it was entitled to acquire the right to manage.
10. On 26 September 2019 the landlord sent to the RTM company a request for costs in relation to the claim notice dated 9 May 2019 in the sum of £1,476.84. The RTM company made an application to the FTT for a determination about costs under section 88(4); the FTT directed that the application be determined along with the section 84(3) application.
11. In a decision dated 9 March 2020 (“the 2020 decision”) the FTT determined that the RTM company had not acquired the right to manage, and it decided that £1,245.84 was payable by the RTM company to the landlord by way of costs.
12. Further claim notices were served by the RTM company on 31 March 2020, 3 July 2020 and 11 September 2020, and the last one was uncontested so, finally, the right to manage was acquired.
13. The landlord then applied to the FTT for its costs under section 88(1) in relation to the notice of 8 July 2019 and to the three in 2020, and under section 88(3) in relation to the proceedings which led to the 2020 decision. The FTT in its decision of 4 May 2021, the decision now appealed, assessed the costs in relation to the latter three notices but said that the costs of the notice of 8 July 2019 and the costs of the section 84(3) proceedings “would appear to have been dealt with [in the 2020 decision]”.
14. The appellant says that is not the case, and that is the ground of appeal.

Determination

The costs of the section 84(3) proceedings

15. These were not dealt with in the 2020 decision. There was no application for the costs of those proceedings before the judge on that occasion, and there could not have been until it was known whether the RTM company was successful on the basis of its second notice of claim – only if the FTT determined that it had not acquired the right to manage would the landlord’s costs be payable by the RTM company.
16. The RTM company in its statement of case in this appeal say that “The respondent does not suggest that [the 2020 decision] dealt with the costs of the section 84(3) application.” Nor did it suggest that in its Statement of Case in the FT. It is disappointing that it did not concede the point when permission to appeal was sought.
17. The appeal succeeds so far as the costs of the section 84(3) proceedings are concerned; the FTT did not deal with them in the 2020 decision and should have assessed them in its 2021 decision.

18. It remains to assess those costs under section 88(4); it is open to the Tribunal to substitute its own decision rather than to remit the matter to the FTT and there is no point in sending the parties round the houses again. The RTM company made representations about the litigation costs in its Statement of Case in the FTT, and the landlord responded in accordance with the FTT's directions, so there would be no scope for any further representations to be made to the FTT and there is no reason why I should not assess the costs now.
19. The costs include charges both by the landlord's managing agents and the solicitor's charges. At the hearing in the section 84(3) proceedings the landlord was represented by Mr Gurvits of the managing agents; their charge was £1,200 including VAT which I regard as entirely reasonable. In addition the solicitors charged £1,419 including VAT for their own work, representing 4 hours and 18 minutes charged at the rate of £275 plus VAT per hour. I share the FTT's view (expressed in the 2020 decision in the assessment of the costs relating to the notices, and also in the 2021 decision now appealed) that the rate was appropriate in light of the solicitor's qualifications and experience. There is very little correspondence within the time charged for; most of it was spent perusing the FTT application, directions and pleadings and giving advice throughout. On any reckoning the total is a modest charge for the conduct of litigation and I allow it in full.

The costs arising from the claim notice of 8 July 2019.

20. The question about the costs arising from the notice of 8 July 2019 is more difficult.
21. The assessment of costs in the 2020 decision arose from an application made by the RTM company under section 88(4) in October 2019, after the landlord sent it a request for its costs arising from the notice of 9 May 2019 on 26 September 2019. The application form shows a box ticked to indicate that a decision under section 88(4) is sought, but nothing in the form indicates the scope of the application.
22. The FTT directed that the section 88(4) application be heard together with the section 84(3) application in which it was to determine the validity of the notices given in May and July 2019. Pausing there, one would have expected therefore that the costs to be determined in the section 88(4) application would be the ones relating to both notices. The FTT's directions went on to require the landlord to file a schedule of costs with supporting invoices, and permitted the RTM company to file a statement of case and the landlord to file a response.
23. The schedule of costs filed by the landlord was headed "Costs in relation to the claim notice dated 9 May 2019". It referred to work done in connection with "the notice" and "a notice". On its second page there is a heading "Engaged on the preparation of counter-notices", and under that heading there is reference to "completion of a counter notices (sic) including some four grounds" and a statement that "Copies of the counter-notices have been provided". There is then a charge of £13.20 for postage of "the counter notices." So although there is reference only to one notice, there is reference to counter-notices in the plural. However, the copy of the solicitor's bill to the client which accompanies the schedule refers clearly to work done in response to a notice and to the preparation of a counter notice. The total claimed was £1,476.84 to include the solicitor's charges plus VAT and the landlord's agent's charges at £200 plus VAT.

24. It is apparent from the correspondence provided with the schedule and invoice that two copies of the counter-notice were sent to the RTM company, one by first-class post and one by next day delivery. Postage receipts indicate a charge of £6.60 per item, which explains the £13.20 charge made by the landlord's solicitors and, I think, the reference to counter notices in the plural in the schedule of costs.
25. I conclude that the schedule of costs and the accompanying invoice related to the claim notice dated 9 May 2019 and to the counter-notice served in response to that notice, and was not intended by the landlord to include costs arising from the July notice and the August counter-notice.
26. The RTM company in its Statement of Case in the FTT at paragraphs 2 to 6 made reference to the notice of 9 May and to the notice of 8 July. It is not clear whether it was asserting that costs relating to both notices were in issue. The landlord in its pleading in response stated at paragraph 5a "The respondent confirms the costs subject to this application relate to the first notice". Whether that point was raised in argument before the FTT is not known.
27. The 2020 decision begins with two paragraphs headed "Decisions", stating:
 - 1) That the RTM company had not acquired the right to manage and
 - 2) That "the amount of the section 88 costs payable by the applicant" was £1,245.84.
28. There is then a heading "The application", under which the FTT stated at paragraph 1 that the RTM company had applied for a determination under section 84(3), and at paragraph 2:

"The Applicant also seeks a determination pursuant to section 88(4) of the Act as to the amount of costs payable by it to the Respondent in consequence of the claim notices given to it in respect of the Property".
29. The FTT went on in paragraphs 3 and 4 to specify the dates of the two notices and counter-notices given in the summer of 2019.
30. The RTM company relies upon paragraphs 2 to 4 to argue that the FTT determined the costs arising from both notices. I agree that that is clearly what the members of the FTT said they were deciding.
31. The landlord argues that the only costs that before the FTT on that occasion were the costs associated with the claim notice dated 9 May 2019 and that it remained free to ask in 2021 for its costs arising from the July 2019 notice to be assessed. Had the proceedings commenced with an application by the landlord for the assessment of the costs arising from the May 2019 notice, then that application would probably have defined the scope of the FTT's decision and the reference to two notices and counter-notices in paragraphs 2 to 4 would have to be regarded as a slip. But the proceedings arose from the RTM company's application in circumstances where it obviously needed to have an assessment of the costs arising from both notices; and the application was joined with the section 84(3) proceedings which related to both notices. It would have been a nonsense for the RTM company at that

stage to seek the assessment of the costs arising from the May notice only. The obvious scope of the RTM company's application and of the determination that the FTT was going to make in response was the costs arising from both notices. It was open to the landlord, in response to the FTT's directions, to file a schedule of the costs arising from both notices, and it is difficult to understand why the landlord did not do so if it wanted to recover further charges in response to the second notice. It is no answer to say, as the landlord seeks to argue, that the costs of the July notice could not yet be determined; the work done in response to that notice was completed before the section 84(3) proceedings commenced.

32. It is possible that the FTT either overlooked the statement in the landlord's pleading that its costs related only to the May notice. It is more likely that the FTT understood that statement to mean that no further costs would be claimed in relation to the later notice, or took the view that in any event no further costs were recoverable in response to the second notice. That would not have been surprising. The only difference between the May and July notice was that the later notice got the RTM company's name right, and it is difficult to see what extra work would have been required in response to it.
33. I accept that the landlord thought that the FTT was going to assess only the costs relating to the May notice. Indeed, the RTM company's solicitors may at one stage have thought that that was what had happened; the landlord refers to a letter of 20 May 2020 from the RTM company's solicitors to the landlord's which appears to be based on that assumption. But what the FTT in fact assessed were the costs relating to both notices, on the basis of the schedule submitted by the landlord in response to its direction. The FTT's decision makes that clear in paragraphs 2 to 4 and the only way past that would have been to appeal the decision.
34. I find that the FTT in its 2020 decision did determine the costs arising from the notice dated 8 July 2019. The appeal fails on this point.

Conclusion

35. The decision of the FTT on 4 May 2021 that the landlord's costs of the section 84(3) proceedings had already been dealt with in the FTT's decision of 9 March 2020 was made in error and was irrational, and the decision is set aside. The Tribunal substitutes its own decision that £2,619 is payable by the respondent to the appellant in respect of costs those costs. The appeal succeeds to that extent. It fails on the other point: the FTT's 2020 decision did deal with the costs arising from the claim notice of 8 July 2019 and there is nothing left to assess in respect of that notice.

Upper Tribunal Judge Elizabeth Cooke

23 November 2021

Right of appeal

Any party to this case 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.