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Case No: LC-2024-547

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: LON/OOAG/LRM/2023/0047

9 December 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COSTS – RIGHT TO MANAGE – whether late withdrawal of objection to claim was objectively unreasonable – rule 13(1)(b), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

BETWEEN:

ASSETHOLD LIMITED

Appellant

-and-

PIANO WORKS BUILDING RTM COMPANY LIMITED

Respondent

Piano Works, 28-34 Fortess Road,
London NW5

Martin Rodger KC,
Deputy Chamber President

Determination on written representations

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The following cases are referred to in this decision:

Lea v GP Ilfracombe Management Company Ltd [2024] EWCA Civ 1241

Ridehalgh v Horsefield [1994] Ch 205

Willow Court Management Co (1985) Limited v Alexander [2016] UKUT 290 (LC); [2016] L.&T.R.34

Introduction

1. Can a landlord which concedes an RTM Company's entitlement to acquire the right to manage only a day or two before the hearing of the application be ordered to pay the Company's costs of the proceedings on the grounds that its conduct of the proceedings has been unreasonable? That is the question posed in this appeal from a decision of the First-tier Tribunal, Property Chamber (the FTT).

2. The appeal arises out of a claim to acquire the right to manage under Part 2 of the Commonhold and Leasehold Reform Act 2002 (the Act) by the respondent, Piano Works Building RTM Co Ltd, which was initially disputed by the appellant, Assethold Ltd. An application was made by the respondent to the FTT to resolve the dispute, and a hearing date was fixed. Eleven days before the hearing the respondent sent additional evidence to the appellant's managing agent (which was not instructed in the appeal) and a week later, on the second working day before the hearing, the appellant withdrew its final objection to the claim.

3. At the hearing before the FTT, which only the respondent attended, it applied for an order for the payment of its costs under rule 13(1)(b) of the FTT's Rules; after receiving submissions in writing from both parties the FTT ordered the appellant to pay all of the respondent's costs of the proceedings, which totalled £9,120. The FTT made that order because it considered that the appellant's "failure to engage in any dialogue or communication" with the respondent amounted to unreasonable conduct of the proceedings.

4. Permission to appeal was granted by this Tribunal on the single ground of whether the conduct found by the FTT to have been unreasonable (failure to engage in the period before the hearing) met the objective standard of unreasonable behaviour capable of justifying an order under rule 13(1)(b).

The FTT's power to award costs

5. Section 29 of the Tribunals, Courts and Enforcement Act 2007 is the source of the FTT's power to award costs. So far as relevant, it provides:

> "**29 Costs or expenses**
>
> (1) The costs of and incidental to–
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

6. Tribunal Procedure Rules have been made which significantly restrict the "full power" conferred by section 29(2). Specifically, rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 limits the power to certain specific types of case

(not including residential property cases) and otherwise allows costs to be awarded only as a sanction for what might loosely be called "bad behaviour". Thus, rule 13(1)(a)-(b) provide:

> "13. **Orders for costs, reimbursement of fees and interest on costs**
>
> (1) The Tribunal may make an order in respect of costs only—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
>
> (i) an agricultural land and drainage case
>
> (ii) a residential property case, or
>
> (iii) a leasehold case; …"

7. In its recent decision in *Lea v GP Ilfracombe Management Company Ltd* [2024] EWCA Civ 1241, the Court of Appeal considered rule 13(1)(b) and this Tribunal's decision in *Willow Court Management Co (1985) Limited v Alexander* [2016] UKUT 290 (LC) and confirmed that deciding whether or not there has been unreasonable conduct, and if so, whether an adverse order for costs should be made, is a fact-specific exercise. The test of what is unreasonable is the test laid down by Sir Thomas Bingham MR (as he then was) in *Ridehalgh v Horsefield* [1994] Ch 205, at 232 E-G, where he explained:

> ""Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

8. The leading judgment in *Lea* was given by Coulson LJ who quoted, at [8], the three stage approach to applications under rule 13(1)(b) suggested by the Tribunal in *Willow Court*:

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

> is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be."

The Court of Appeal did not discourage tribunals from following that guidance but said that because of the fact-specific nature of the test, "general guidance as to what does or does not constitute unreasonable behaviour" could not be given.

9. Importantly, Coulson LJ emphasised, at [9], that conduct which is vexatious or designed to harass is one type of unreasonable conduct, but it is not the only possible type:

> "It is important to note that neither *Ridehalgh* nor *Willow Court* decide that unreasonable conduct *must* involve vexatious conduct or harassment. On the contrary, the UT make clear in *Willow Court* that unreasonable conduct can *include* conduct which is vexatious or designed to harass, but it does not *require* such conduct; that is just one way in which unreasonable conduct may be established."

10. The conduct with which this appeal is concerned could not be described as vexatious or designed to harass. The FTT made its order because it considered that the appellant's "failure to engage in any dialogue or communication" with the respondent amounted to unreasonable conduct of the proceedings. Before considering whether that assessment was realistic it is necessary to record the relevant facts in a little more detail.

The facts in more detail

11. The premises which are subject of the RTM application is a building known as the Piano Works, at Nos. 28-34 Fortess Road, London NW5 (the Premises). The Premises are part of a longer terrace of early nineteenth century buildings and were formerly in commercial use but in 2013 they were converted to create nine flats on four floors. The Premises sit on the corner of Fortess Road and Fortess Grove and are connected on one side to the adjoining terrace in Fortess Road and, at the rear, to mews style buildings in Fortess Grove.

12. A claim notice was given to the appellant by the respondent in September 2023 and at the same time copies were sent to the appellant's managing agent, Eagerstates Ltd, and to its solicitors, Scott Cohen. Scott Cohen responded on the appellant's behalf by serving a counternotice disputing the acquisition on three grounds. Two of these grounds raised essentially the same point concerning the service on the owner of one of the flats of a notice inviting participation. The third ground challenged the whole basis of the application by disputing that the Premises were premises to which Part 2 of the Act applied. When the respondent's solicitors asked for further details of that contention, they were told by the appellant's solicitors on 23 November 2023 that "the building appeared to include a self-contained part which was in different freehold ownership" so that it was excluded from the right to manage by section 72(6) and paragraph 2 of Schedule 6 to the Act. Section 72(6) gives effect to Schedule 6, which excludes buildings with self-contained parts in different ownership from the right to manage.

13. An application was then made by the respondent to the FTT seeking a determination that the right to manage had been acquired. Directions were given in that application and,

pursuant to those direction, Scott Cohen filed a statement of case on 14 February 2024. In it the original three grounds of objection were reduced to the single objection that the premises were not premises to which the right to manage provisions of the Act applied. That was because Nos. 20 and 22 Fortess Road were in different ownership and "from inspection it appears that the buildings are structurally connected". The single issue was said to be "whether 20, 22 and 28-34 are all self-contained parts by reason of which the exclusion in section 72(6) would apply".

14. The right to manage applies only to a self-contained building or part of a building (section 72(1)). A building is only self-contained if it is structurally detached (section 72(2)), and part of a building is only a self-contained part if it constitutes a vertical division of the building which could be redeveloped independently of the rest of the building and has services (water, electricity etc) which are either independent of the rest of the building or could be made independent without significant interruption (section 72(3)-(4)).

15. The appellant's statement of case identified Nos. 20 and 22 Fortess Road as the buildings to which the premises were thought to be structurally connected. Scott Cohen supported the proposition that those buildings were in different ownership by exhibiting copies of the register of title applicable to each of them which did indeed show that Nos. 20 and 22 Fortess Road were not owned by the appellant. But it is apparent that Scott Cohen were acting at this stage under a misconception. The entries from the register of title did not include the title plans for the two properties, but the statement of case referred to and attached an annotated aerial photograph of the Premises on which had been marked the two properties which were said to give rise to the self-containment issue. The buildings marked were Nos. 21 and 22 Fortess Grove (not Road), the two mews style properties at the rear of the Premises.

16. One mistake often begets another and when the respondent's solicitors responded to the appellant's statement of case with a statement in reply on 6 March, they too referred incorrectly to the mews properties as Nos. 21 and 22 Fortess Road. But they did exhibit the registers of title for Nos. 20 and 21 Fortess Grove (neither of which is owned by the appellant) together with the title plans. Despite the confusion on the pleadings over addresses, the aerial photograph and title plans which the parties each relied on demonstrate a clear consensus that the only issue was whether or not the Premises were connected to the mews houses in Fortess Grove in such a way as to render them a self-contained building or a self-contained part of a building.

17. When it filed its statement of case the appellant asked the FTT for permission to rely on expert evidence to deal with the extent of the structural connection between the adjoining buildings to ascertain whether the necessary test of self-containment was satisfied. The respondent objected to that application and the FTT refused the request on 19 March. It took the view that the issue depended on findings of fact rather than expert evidence.

18. The FTT's procedural directions allowed (but did not require) the appellant to answer the respondent's statement of case in reply by 27 March, but Scott Cohen did not take up that opportunity and the dispute remained as framed by the documents already filed.

19. The FTT's directions did not provide for the service of witness statements and the appellant had been refused permission to rely on the evidence of a surveyor. As yet no evidence had been filed by either party dealing in any detail with the issue of self-

containment, although the respondent's reply of 6 March asserted that the Premises were vertically divided and could be separately redeveloped from its neighbours in Fortess Road. A lengthy design and access statement from the 2013 redevelopment of the Premises was supplied to support that assertion including plans of the mews houses.

20. No further exchanges then took place between the parties after the service of the respondent's reply on 6 March until 17 April. The directions required the respondent to send a hearing bundle to the FTT and to the appellant by 17 April but on that date, instead of doing so, the respondent's solicitors sent the FTT a short witness statement from a Chartered Surveyor, Mr Weill. For some reason, which I will assume was inadvertent, the witness statement was not sent to Scott Cohen, the appellant's solicitors, but only to its managing agent, Eagerstates Ltd, which did not have conduct of the proceedings. It went to them at 4pm on 17 April when they were copied in to an email addressed to the FTT informing it, incorrectly, that the copy addressee was the appellant's solicitor.

21. Mr Weill's witness statement dealt with the issue of self-containment and supported the respondent's case that the Premises were vertically divided from the mews houses and could be separately developed. No reference was made in it to the documents which had been exhibited to the respondent's reply of 6 March, but a plan showing the ground floor layout of the mews properties was annexed, together with historic plans showing that the various buildings had been constructed at different times.

22. 17 April was a Wednesday; the following Monday, 22 April, was the first day of the Jewish Passover, a Jewish religious holiday kept by the appellant's directors and which lasts for seven days.

23. At some point Mr Weill's witness statement was forwarded by the appellant's managing agents to its solicitors, Scott Cohen. On Thursday 25 April, shortly after midday, Scott Cohen sent an email to the FTT and to the respondent's solicitors informing them that they had received instructions that the counter-notice of 18 October 2023 was withdrawn. They invited the respondent to consent to the withdrawal of the application.

24. The respondent's solicitors answered that request after 5pm on 25 April. They did not agree to withdraw the application, but instead sought confirmation that the appellant accepted the respondent's entitlement to acquire the right to manage. Not having had an immediate response to that request, the respondent's solicitors informed the FTT that they still required the hearing to go ahead on the following Monday, 29 April. At 4.58pm on Friday, 26 April, the respondent's solicitor notified Scott Cohen by email that they would seek a determination from the FTT and that they intended to seek their costs of the proceedings "due to the unreasonable approach taken by your client". At 5.40pm Scott Cohen confirmed, for the avoidance of doubt, that the appellant agreed the respondent was entitled to acquire the right to manage. This acknowledgement was subsequently taken by the FTT as the date from which the three month period prescribed by section 90(5), 2002 Act began to run, so that the acquisition date for the respondent's right to manage became 27 July 2024.

The hearing and the FTT's decision

25. In its decision published on 12 June 2024 the FTT explained what happened at the hearing on 29 April. Only the respondent's representatives had attended. Its counsel made what

was described as "an oral application (on written/email notice to the respondent)" for costs pursuant to rule 13(1)(b) and an application without notice for a direction under section 20C, Landlord and Tenant Act 1985 that costs incurred in the proceedings could be added to a service charge payable to the appellant. The FTT heard oral submissions on both applications and directed the appellant to respond to them in writing, with the respondent then being given a right of reply. The FTT later said in its decision that it had had regard to the respondent's oral and written submissions.

26. The appellant's subsequent written submissions reminded the FTT of the limits of its costs jurisdiction and argued that it had been fully entitled to put the respondent to proof of its entitlement to acquire the right to manage. It had withdrawn its counter-notice following receipt of the evidence of Mr Weill, consideration of which by Scott Cohen had been delayed by its having been sent only to Eagerstates. The observance of Passover by the appellant' directors had then impacted the timing of their instructions. The case had been re-evaluated on 25 April 2024 in light of Mr Weill's statement, and on the same day the counter-notice had been withdrawn.

27. The respondent's reply to those submissions began by criticising them as "generic" and as having been "made without any real thought to this particular case". That observation cannot be allowed to pass without noting the obvious disadvantage and consequent unfairness to the appellant of being required to respond to an application made orally in its absence. That unfairness was not cured by the respondent having warned right at the end of the previous working day that it intended to make the application. Parties are entitled to proper notice of applications and of the grounds on which they are made, and a proper opportunity to respond, which the appellant did not have in this case.

28. In its decision the FTT recorded six separate allegations of unreasonable conduct made by the respondent against the appellant. Only two of these featured in the FTT's own reasons for considering that the condition in rule 13(1)(b) was satisfied which were as follows:

> "24. The tribunal considers the respondent's failure to engage in any dialogue or communication with the applicant after 6 March 2024 to be unreasonable and not what would reasonably be expected from a respondent or its legal representative. The tribunal finds that although action on the applicant's communication of 17 April 2024 may have been delayed for religious reasons, the tribunal finds is difficult to accept the respondent could not have found means by which to alert the applicant of this delay or arrange for communications to be either forwarded or dealt with in its agent's absence.
>
> 25. The tribunal accepts the respondent had a right to put the applicant to proof of its claim but finds it unreasonable for the respondent not to engage with the applicant, particularly when a hearing date approaches. The tribunal finds the respondent's last minute and equivocal email concerning its withdrawal of its objection to the claim, necessitated the applicant to attend the hearing in order to ensure (i) the respondent unequivocally withdrew its objections and admitted the applicant's right to acquire the right to manage and (ii) ascertain the date on which the applicant acquired the right to manage. Both of those matters could have been dealt with in correspondence before the hearing."

29. The FTT also rejected points made by the appellant about the quantum of the respondent's costs and decided that the appropriate order was for payment of the full amount of the respondent's costs incurred in the proceedings.

The appeal

30. The sole ground of appeal for which permission has been granted is whether the conduct found by the FTT to have been unreasonable met the objective standard of unreasonable behaviour capable of justifying an order for costs under rule 13(1)(b). The ground is couched in terms which reflect the Tribunal's guidance in *Willow Park*, at [28], that the first matter to be determined on an application under the rule is whether a party had acted unreasonably. That determination does not involve an exercise of discretion "but rather the application of an objective standard of conduct to the facts of the case".

31. As the Tribunal acknowledged in *Willow Park*, at [24], "an assessment of whether behaviour is unreasonable requires a value judgment on which views might differ". For an appellate tribunal to interfere with that assessment, it must be satisfied that it was not an assessment which a tribunal, properly directing itself in law, could have reached.

32. The appellant challenged the FTT's assessment and contended that it was not possible to characterise its conduct of the proceedings as unreasonable. It emphasised that the "lack of engagement" after 6 March was mutual, and that the appellant had withdrawn the counter-notice as soon as the respondent had filed its evidence and the appellant had had an opportunity to consider it. It had explained why it had taken a week for that assessment to be made, partly because the material had been sent to the managing agent rather than to Scott Cohen and partly because of the religious holiday.

33. In response, the respondent accepted that the appellant had been entitled to put it to proof that it satisfied the qualifying conditions for acquisition of the right to manage. It nevertheless complained that the appellant had gone further than put it to proof and had made a positive assertion that the Premises did not qualify. It also maintained that the appellant's point had been answered by the respondent on 6 March in its statement of case in reply, which had included planning documents. It was said to be unreasonable for the appellant not to have responded to this material when it could have done on 27 March, and unreasonable for it to have persisted in the self-containment point after it was refused permission to adduce expert evidence, which refusal was said to have left it "without any evidence to rebut the assertions made by the RTM company". The point should have been conceded shortly after 6 March and no new information had been provided after that date.

Discussion and conclusion

34. The appeal is against the FTT's decision, which mentioned only some of the points on which the respondent now relies.

35. Both the FTT and the respondent accept that the appellant was entitled to put the respondent to proof. In other words, it was not suggested that there was anything unreasonable in the respondent waiting for the RTM company to demonstrate that it was entitled to acquire the right to manage. That is clearly correct. The 2002 Act lays down a procedure which, if it applies and is followed by an RTM company, will have the

consequence that the right to manage is acquired and rights, which may be valuable, will be transferred to the company without compensation. It is for the RTM company to show that the procedure applies and that it has been followed. The landlord or other party which receives a claim notice is not required to volunteer its agreement in order to hasten the process. Nor is it required to rebut the RTM company's case, it is entitled to see if the RTM company manages to prove it. It is not unreasonable for the recipient of the claim notice to allow the statutory process of acquisition to play out according to the timetable set by Parliament and by the FTT.

36. But the appellant did not require the respondent to prove its whole case. It limited its grounds of opposition and then conceded all issues except that the Premises were self-contained. That was not unreasonable and the FTT did not suggest that it was. The Premises and the buildings in Fortess Grove were physically connected and it was not self-evident that the division between them was vertical. The appellant had acquired the freehold in September 2019 and was not and had never been in occupation. Putting the respondent to proof, meant putting it to proof that the property was a self-contained building or a self-contained part of a building.

37. The FTT's first criticism of the appellant was of its "failure to engage in any dialogue or communication" with the respondent after 6 March. The FTT did not say what dialogue it had in mind and why it considered it unreasonable not to engage in it. It is necessary to consider this criticism in two parts, the first relating to the period of six weeks between 6 March and 17 April, and the second to the period of eight days from 17 April to 25 April.

38. The appellant had made its position clear in its counter-notice and in the further particulars of its original ground of objection supplied before the commencement of the proceedings. It had refined that case in its statement of case on 14 February. Although there was some confusion over which property was being referred to, it was made clear enough, so that it was understood by the respondent's advisers, that the sole issue concerned the degree of connection between the Premises and the mews houses at the rear. There was no reason for the appellant to file a further response to the respondent's statement of case in reply, although the FTT's directions had given it the opportunity to do so if it chose. The appellant cannot reasonably be criticised for not making its formal position clear.

39. The FTT's directions did not require the parties to engage in informal dialogue with each other and the respondent's solicitors did not initiate any dialogue after 6 March. The FTT suggested that a lack of communication during this period was "not what would reasonably be expected from a respondent or its legal representative". That statement is not true of litigation generally, when there are often lengthy periods when directions have been complied with when nothing passes between the parties. It is even less true of RTM proceedings, where one party has nothing to gain by dialogue except to incur expense and hasten its loss of control.

40. The FTT did not say that it considered the appellant had acted unreasonably by not conceding the right to manage after it received the respondent's statement of case in reply on 6 March. A conclusion to that effect would be inconsistent with the FTT's acceptance that the appellant had the right to put the RTM company to proof of its claim (the time for which was at the hearing on 29 April). But in any event, the material supplied by the respondent on 6 March was equivocal. The statement of case in reply included an assertion by the company's solicitor that the statutory conditions were satisfied, but it

referred to the wrong building. The documents it exhibited (a 2013 design and access statement, a planning permission for 22 Fortess Grove, and land registry entries) were all produced for different purposes and did not address the degree of connection between the buildings.

41. It was not until 17 April that the respondent filed evidence in support of its claim. Mr Weill was a surveyor and gave factual evidence about the constructions of the building and its relationship to its neighbours. Although his statement was not described as expert evidence it was just the sort of evidence the appellant had sought the FTT's permission to rely on and had been refused. Two things are noticeable about Mr Weill's evidence, namely, that he was the first professional on either side to say that he had inspected the Premises and that he did not mention or rely on the documents which had been supplied on 6 March with the respondent's statement of case in reply. It can only be assumed that the respondent's solicitors considered that it was necessary to support the claim with evidence of that sort and that the documents which had already been filed, and the explanation given of them, might not be sufficient to demonstrate that the Premises were premises to which the Act applied. If it was not unreasonable for the appellant to put the respondent to proof, it is very difficult to see how it could have been unreasonable for it to maintain that position at the very least until the respondent had supported its own affirmative case with evidence and a coherent explanation.

42. Applying Sir Thomas Bingham MR's acid test to the period between 6 March and 17 April, the absence of dialogue is readily explicable on both sides. The FTT had not required the parties to take any formal steps; the respondent's solicitors had not initiated any communications; the appellant was entitled to put the respondent to proof of the entitlement to the right to manage, and there was no incentive for the appellant's solicitors to initiate communication, at least until some evidence had been supplied. In my judgment nothing which happened between 6 March and 17 April amounted to unreasonable conduct on the part of the appellant.

43. The period between 17 April, when the respondent's evidence was filed, and 25 April, when the counter-notice was withdrawn, was very short and, as the FTT accepted, was a period of religious holiday. Despite appearing to accept that the witness statement had been directed to the appellant's agent, which was not instructed, and that action on it had been delayed for religious reasons, the FTT did not accept that these provided a good reason for the respondent not deciding to withdraw the counter-notice until 25 April.

44. The FTT appears to have misunderstood the relevance of the facts relied on to explain the short period of delay. It referred to difficulty it had in accepting that the appellant could not have "found means by which to alert the respondent" or arranged for communications to be forwarded "or dealt with in its agent's absence". There are two difficulties with this reasoning. First, the appellant's explanation had nothing to do with any absence of its agent but was because of the observance of the Passover period by the appellant's directors. The relevance of the agent's involvement was that the witness statement was addressed to it, notwithstanding that it was not instructed in the proceedings, which delayed the information reaching the directors. The second is the assumption that it was consistent with the relevant religious observance for the appellant's directors to take business decisions during the holiday period or for others acting on their behalf to do so, or to communicate decisions on their behalf.

45. I do not accept that the FTT was entitled to conclude that there was no reasonable explanation for the appellant not withdrawing its opposition to the right to manage until 25 April. The explanation given was a perfectly reasonable one. The respondent's sent the witness statement to the wrong person, which delayed its consideration, and the period of religious observance caused a further delay. Since the period in question was one of only eight days, during which the appellant's directors needed to receive, consider and be advised on the consequences of the new evidence, before making a decision and communicating their instructions, I do not think it is possible to say that they were guilty of unreasonable delay.

46. The FTT's third criticism of the appellant was directed at its "last minute and equivocal email concerning its withdrawal of its objection to the claim" which was said to have necessitated the respondent's attendance at the hearing. But the timing of the withdrawal was the result of the respondent supplying its evidence so late. If, as I have found, it was not unreasonable in the circumstances for the appellant to take eight days to decide how to respond to the new evidence, it was not unreasonable to communicate its decision at the end of that period whether or not it was at the "last minute".

47. The FTT's finding that the withdrawal of the objection to the claim was "equivocal" suggests that it considered the email of 25 April was capable of more than one interpretation. What alternative meaning the communication might have been capable of bearing is not explained either by the FTT or by the respondent and in my judgment the email was clear. It communicated the appellant's instructions to its solicitor that the counter-notice was withdrawn, and it invited the respondent to withdraw its own application. It did not say, in terms, that the appellant agreed that the respondent was entitled to acquire the right to manage, but in a communication between solicitors who understood perfectly well what they were doing, that was the information which it undoubtedly conveyed. The withdrawal of the counter-notice in writing can only have meant that the appellant was agreeing that the respondent was entitled to acquire the right to manage. Similarly, the invitation to withdraw the application was only explicable if the application was no longer necessary because the right to manage would now be acquired without a determination.

48. In short, looked at objectively, none of the conduct on the part of the appellant or its solicitors relied on by the FTT was unreasonable. It follows that the FTT did not have discretion to order the payment of the respondent's costs and its decision to do so must be set aside.

Martin Rodger KC,

Deputy Chamber President

9 December 2024

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.