Neutral Citation Number: [2024] UKUT 253 (LC)

Case No: LC-2024-40

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: MAN/OOBY/LBC/2022/0024 and others listed in the schedule

10 September 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COSTS – CONDUCT - what amounts to "unreasonable conduct" for the purposes of rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – failure to send a letter before action – issue of proceedings in the knowledge that the FTT had no jurisdiction

BETWEEN:

ZAID ALOTHMAN HOLDINGS LIMITED AND 75 OTHERS

Appellants

-and-

BETTER INTELLIGENT MANAGEMENT LIMITED AND PHOENIX PLACE (LIVERPOOL) MANAGEMENT LIMITED

Respondents

Block A and Block B,
Phoenix Place,
5 Prince Edward Street,
Liverpool, L5 3AA

Upper Tribunal Judge Elizabeth Cooke
Decision on written representations

Mr Jonathan Upton for the appellants, instructed by Mishcon de Reya LLP
Mr David Gilchrist for the respondents, instructed by HM3 Legal

The following cases are referred to in this decision:

Goodrich v Paisner and others [1956) WLR 1053
JLK Ltd v Ezekwe [2017] UKUT 277 (LC)
Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No 6 Ltd [2020] UKUT 197 (LC)
Ridehalgh v Horsefield [1994] EWCA Civ 40
Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC)

Introduction

1. This is an appeal from the First-tier Tribunal's refusal to award costs in favour of the appellants, who are leaseholders in Phoenix Place, Liverpool. Their names are set out in the attached schedule. They applied for an order for costs against the respondents, the freeholder and managing agent of the block, or alternatively their legal representatives, after the FTT declared that it had no jurisdiction to hear an application made by the respondents.

2. The appeal has been determined under the Tribunal's written representations procedure. The appellants have been represented by Mr Jonathan Upton and the respondents by Mr David Gilchrist, and I am grateful to them both.

The legal background

3. The relevant legal background can be briefly stated.

4. Among the responses available to a landlord when a tenant is in breach of covenant (and perhaps the most dramatic of those responses) is to forfeit the lease. In most cases before forfeiture the landlord must serve on the tenant a notice under section 146 of the Law of Property Act 1925 setting out the breach and, where possible, the measures needed to put it right. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides some protection for residential tenants by preventing the service of a section 146 notice by a landlord "under a long lease of a dwelling" unless the breach of covenant is admitted, or a court has determined that the breach has occurred, or the FTT has determined on an application under section 168(4) that the breach has occurred. Section 168(4) says:

> " A landlord under a long lease of a dwelling may make an application to [the FTT] for a determination that a breach of covenant or condition in the lease has occurred."

5. So the FTT has jurisdiction to make such a determination only if the leasehold property is a "dwelling" – that term being defined as having "the same meaning as in the 1985 Act" (section 169(5) of the 2002 Act).

6. The "1985 Act" is the Landlord and Tenant Act 1985 where section 38 provides:

> "*"dwelling"* means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it."

7. A number of cases have explored that definition, which also arises in the context of the Rent Acts, and it is clear that where the tenant shares living accommodation, such as a kitchen, with others then the leased property is not "occupied or intended to be occupied as a separate dwelling". In *JLK Ltd v Ezekwe* [2017] UKUT 277 (LC) the Tribunal had to decide the status of "cluster rooms" let to students, where the letting was of a room with en suite bathroom and the student also had the use of a shared kitchen and lounge and showers along with other student tenants. The Tribunal (the Deputy President, Martin Rodger QC) considered the authorities and concluded:

> "The tenant of each of the units has the right to share a kitchen, lounge, shower and w.c. with every other tenant on the same floor. Can it then be said that the tenant is the tenant of a part of the building which is occupied or intended to be

> occupied as a separate dwelling? I do not think it can … The bed-sitting room plus the right to use the communal space will not satisfy the requirement because the tenant is not tenant of the whole of that accommodation, but only of part of it; the bed-sitting room itself will not do, because that is not occupied as the tenant's dwelling, but only as part of it."

8. The term "dwelling" is defined in the 1985 Act because it makes provision in section 18 and following about service charges, defined in section 18(1) as "an amount payable by a tenant of a dwelling…". So the FTT has jurisdiction under section 27A of the 1985 Act to determine whether service charges are payable, and under section 20ZA to grant a dispensation from consultation requirements of section 20 for major works, only in respect of a building or part of a building "occupied or intended to be occupied as a separate dwelling".

9. Further legal background relates to the power of the FTT to award costs, but it will be convenient to look at that in context later.

The factual background

10. Phoenix Place comprises 348 units of purpose-built accommodation in two blocks, completed in 2018. There are two types of unit: 74 self-contained studios with a bedroom, bathroom and kitchenette, and 274 ensuite bedrooms grouped into clusters with shared kitchen and common room facilities. All the units (studios and cluster units) are held on long leases as income-producing investments, and let out to students by agents; many of the long-leaseholders live abroad. The leases contain unsurprising covenants to keep the demised premises in good repair and condition, and to pay a service charge. The issues in this appeal are such that I need not go into any detail about what exactly the leaseholders were required to do or to pay.

11. The first respondent, Better Intelligent Management Limited, acquired the freehold of Phoenix Place in April 2020; the second respondent, Phoenix Place (Liverpool) Management Limited, has been responsible for day-to-day management of the property since March 2019.

12. In January 2022 the respondents issued interim service charge invoices to all the leaseholders to cover the cost of replacing the windows in Phoenix House, which they claimed was needed as a matter of urgency. The sums demanded ranged from £7,459 to £21,717 depending on the number of windows in the relevant unit. The appellants did not pay those invoices. On 1 June 2022 the respondents served notices on the leaseholders asserting that they were in breach of the covenants in their leases and requiring them to replace the windows in their units within 56 days. On 16 June the respondents wrote to the leaseholders offering to replace their windows as part of a large-scale project, with associated costs savings; they said that the offer could be accepted only if the leaseholder admitted to being in breach of covenant as stated in the letter of 1 June 2022. On 20 June 2022 the respondents served consultation notices under section 20 of the Landlord and Tenant Act 1985 in relation to the replacement of the windows.

13. In mid-July the first appellant, Zaid Alothman Holdings Limited (leaseholder of 30 units in Phoenix Place) instructed Mishcon de Reya, and in the weeks that followed the rest of the appellants joined in that instruction and entered into a retainer agreement with the firm. On 22 July Mishcon de Reya wrote to the respondents explaining that they were instructed, acknowledging the communications sent by the respondents and asserting that

they were acting in breach of the leases, unreasonably and in bad faith. No response was received.

14. On 28 July 2022 the respondents' solicitors wrote to the leaseholders asserting that as they had not carried out the work as required within 56 days of 1 June, the respondents were entitled to enter the unit, execute the works and recover the cost as a debt; and furthermore that for the leaseholder to attempt repairs would now be a trespass that could be restrained by injunction.

15. Mishcon de Reya wrote to the respondents' solicitors on 29 July seeking confirmation that no injunction would be sought, and "that no attempt will be made to forfeit any lease on the basis of non-payment of service charge or breach of repair obligations without (a) service a s.146 notice (having first sought a determination from the FTT (where appropriate)); and (b) other than by proceedings". On 3 August 2022 the respondents' solicitors replied, refusing to give the confirmations requested. Mishcon de Reya wrote to the respondents' solicitors providing a list of those whom they represented and suggesting a meeting between the respondents' surveyors and the appellants' surveying team to try to agree what work was needed. No response was received.

16. On 3 November 2022 Mishcon de Reya wrote to the respondents' solicitors again, chasing for a response, and repeating the requests for confirmation contained in the letter of 29 July 2022. No response was received.

17. Meanwhile on 16 August 2022 the respondents had made two joint applications to the First-tier Tribunal, each against all 348 leaseholders. One was for a determination under section 168 of the Commonhold and Leasehold Reform Act 2002 that the leaseholders were in breach of covenant, because they had failed to repair their windows. The second was for a dispensation from consultation requirements, under section 20ZA of the 1985 Act in respect of the replacement of all the windows, on the basis that it was urgently required to be done during the summer vacation while the students were away. The appellants knew nothing about those two applications until they were served on all the leaseholders on 4 November 2022.

The proceedings in the FTT

18. The respondents made their two applications to the FTT on 16 August 2022. On 28 October 2022 (prior to service of the applications on the appellants) the FTT issued a "Case Management Note and Directions" and said:

> "Following a preliminary review of the applications a procedural judge is concerned that the Tribunal may not have the jurisdiction to determine either all or part of the applications because all or some of the individual student units may not constitute dwellings within the meaning of the Landlord and Tenant act 1985…
>
> The parties and their representatives are specifically referred to the Upper Tribunal decision in [*JLK Ltd v Ezekwe*] a copy of which is enclosed, and are invited to make written representations in respect of this jurisdictional matter in line with the directions set out below."

19. The directions required the respondents to serve on the appellants their applications, and a copy of the directions, within 7 days, and both parties to make representations with 28

days of the date of directions. As we saw above the applications and the directions were served on 4 November 2022.

20. Counsel for the respondents filed written representations on 24 November 2022, describing the properties and explaining the need to replace the windows. He then said:

> "14. The Applications have been made adopting an abundance of caution and so as to avoid any failure on the part of the Applicant to comply with its obligations pursuant to: a. Section 168(4) of the Act 2002; and/or b. Section 20 of the Act 1985.
>
> 15. Shortly put, the Applicant avers that **neither the Units nor the Studios are a 'dwelling' for the purposes of the Act 2002**. As such the Applicant avers that it is permitted to serve a s.146 Notice without reference to s.168(4) of the Act 2002." (emphasis added)

21. That averment is surprising given that there was no hint of it in the applications made to the FTT on 16 August 2022. Both included, on the Tribunal's form, an explanation as to why orders (under section 20ZA of the 1985 Act, and under section 168 of the 2002 Act) were necessary. Both relied upon a detailed witness statement made by Adam Long about the condition of the properties and the dealings between the parties and referring to a surveyor's report about the windows. There is no mention of any doubt about jurisdiction, let alone to the applications being made out of an "abundance of caution" and in the belief that there was no jurisdiction at all. There was no invitation to the FTT to decline jurisdiction. Indeed Mr Long made a further witness statement on 25 November 2022 emphasising the urgency of the works.

22. The statements at paragraphs 14 and 15 of the respondents' representations are even more surprising when one reads on. There is a discussion of *JKL Ltd v Ezekwe* and the question whether the cluster units were "dwellings", and no further mention of the studios until the final two paragraphs of the submissions which read:

> "26. Accordingly, and applying the decision in *JLK Limited*, it is the Applicant's contention that:
>
> i. the Units within the Clusters are not "dwellings" for the purposes of the Act 1985 or the Act 2002; and
>
> ii. **each of the Studios are "separate dwellings**" for the purposes of the Act 1985 of the Act 2002.
>
> 27. In the premises, the Tribunal is respectively invited to decline jurisdiction in relation to the Units and to grant the Application in relation to the Studios." (emphasis added)

23. It is possible, perhaps likely, that what was said at paragraph 15 of those representations about the studios was an error, perhaps arising from a failure to amend early draft text. Perhaps what the respondents said about the studios at paragraph 26ii was what they meant. Even so, the respondents' stated position about the cluster units at paragraph 26i is at odds with the form of their applications, made against studios and cluster units alike, with no hint of doubt about the cluster units and no indication that the application is made "out of abundance of caution" as regards the cluster units.

24. On 9 December 2022 counsel for the appellants submitted written representations. He discussed a number of cases including *Ezekwe*, as well as referring to the terms of the leases, and considered the cluster units and the studios in turn. He concluded:

> "37. It follows that the studios are each "occupied as a separate dwelling" but … the cluster rooms are not: nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling. The cluster room plus the right to use the communal space does not satisfy the requirement because the tenant is not tenant of the whole of that accommodation, but only of part of it; the cluster room itself will not do, because that is not occupied as the tenant's dwelling, but only as part of it.
>
> 38. In summary:
>
> a. the FTT does have jurisdiction to determine the Applications in respect of any of the studios.
>
> b. the FTT does not have jurisdiction to determine either of the Applications in respect of any of the cluster rooms."

25. At that point therefore the parties to the appeal were both saying that the clusters were not dwellings, and that the FTT had no jurisdiction. And if one looks at the conclusion of the respondents' representations and ignores paragraphs 14 and 15 then both parties were saying that the studios were dwellings and the FTT did have jurisdiction.

26. However, another group of leaseholders (to whom I refer as the "Second Group of leaseholders") also made written submissions (which I have not seen) in response to the FTT's directions arguing that the FTT did not have jurisdiction over any of the units – neither cluster units nor studios. Accordingly there was a dispute about jurisdiction, although not between the parties to this appeal once the submissions of November and December 2022 had been exchanged (again taking the respondents' position to be that stated at the conclusion to their representations).

27. There was a hearing for directions on 16 December 2022. One wonders why the FTT did not at that point strike out the applications as against the cluster units, which was obviously going to happen at some point since all the parties agreed with the FTT that it did not have jurisdiction in respect of them. Perhaps the parties were content to wait for jurisdiction to be dealt with in a single order once the dispute about the studios had been resolved. But at any rate it was clear that there was no need for any further argument about the cluster rooms.

28. In fact no further argument was made in respect of the studio rooms either; the FTT made its decision of 27 April 2023 in reliance on the written submissions made in response to its initial directions. In that decision the FTT went through the relevant case law at length. It decided in a brief paragraph without any discussion that the cluster rooms were not dwellings and that it had no jurisdiction in respect of those rooms. It devoted 24 paragraphs to discussion of the studio rooms in light of *Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No 6 Ltd* [2020] UKUT 197 (LC), and also referred to *Goodrich v Paisner and others* [1956) WLR 1053; it concluded that the facts were on all fours with those considered in *Q* Studios and that the studios were indeed separate dwellings.

29. The Second Group of leaseholders, represented by Mr Yell, made an application to the FTT in its statement of case for costs under rule 13(1) of the FTT's rules, and the FTT

refused that application in its decision of 27 April 2023. The present appellants made an application for costs on 19 June 2023; the FTT refused that application on 1 November 2023 and this appeal is against that decision.

The FTT's power to award costs

30. The FTT's power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007 which provides:

> "(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.
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–
> (a) disallow, or
> (b) (as the case may be) order the legal or other representative concerned to meet,
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
> (5) In subsection (4) *"wasted costs"* means any costs incurred by a party–
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

31. Despite the breadth of that provision, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 have the effect that the FTT is for the most part a no-costs jurisdiction. The relevant parts of rule 13 provide as follows:

> "(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;
> (c) in a land registration case , or
> (d) in proceedings under Schedule 3A to the Communications Act 2003 (the Electronic Communications Code) including proceedings that have been transferred from the Upper Tribunal."

32. Accordingly, there is power to order costs in land registration and electronic communications proceedings, which in practice is exercised on the usual basis that costs follow the event, but aside from that the only possibilities are the power to make a wasted costs order against a legal representative (section 29(4) of the 2007 Act), the power to order costs under rule 13(1)(b) where a person has acted unreasonably in bringing, defending or conducting proceedings. There is also a power to order one party to reimburse the fees the other has paid to the tribunal, which is not relevant here.

33. There is authority about the basis on which the power to order a legal representative to pay wasted costs under rule 13(1)(a), or to make on order against a party who has behaved unreasonably under rule 1391)(a), should be exercised.

34. As to wasted costs, the leading authority is *Ridehalgh v Horsefield* [1994] EWCA Civ 40 where Sir Thomas Bingham considered the meaning of the statutory requirement for "improper, unreasonable or negligent act or omission" on the part of a legal representative.

35. As to rule 13(1)(b) the Tribunal (the Deputy Chamber President, Martin Rodger QC, and the President of the Property Chamber of the First-tier Tribunal, Siobhan McGrath) in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC) gave the following guidance on the meaning of "unreasonable conduct":

> "24. … An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?
>
> 25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context … For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable."

36. The Tribunal went on to suggest a three-stage approach to applications:

> "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."

37. It is worth emphasising that the decision at the first stage is not a discretionary one; the question whether a party has behaved unreasonably is to be assessed against an objective standard of conduct.

38. Bearing all that in mind I turn to the application made to the FTT and the FTT's decision.

The application for costs and the FTT's decision

39. The appellants' application for costs set out the basis of the FTT's ability to award costs and said at paragraph 18:

> "It is submitted that the Applicants acted unreasonably in bringing proceedings against persons (ie the owners of the cluster units) which (as the Applicants later admitted and averred) the FTT had no jurisdiction to determine."

40. The principal argument was that the respondents' conduct in bringing the proceedings was unreasonable because they knew that there was no jurisdiction as against the cluster units and that therefore the proceedings against them were pointless. The appellants pointed out that had the respondents sent a letter before action the parties could have agreed the position as to jurisdiction and there would have been no need for any of them to incur costs in dealing with it.

41. In the alternative, if the respondents did not know the law about the cluster units, their legal advisers were "negligent (in an untechnical sense) and/or unreasonable in failing to advise the applicants that the FTT had no jurisdiction in respect of the cluster units."

42. The costs sought by the appellants were the whole of the costs incurred by the owners of the cluster units, and the costs incurred by the owners of the studios in respect only of the issue about jurisdiction.

43. In response, counsel for the respondents pointed out that neither party had considered the decisions in *Q Studios (Stoke)* or in *Goodrich v Paisner*, which the FTT had considered informative, and argued that unfamiliarity with the law was not sufficient to warrant the making of a costs order.

44. The FTT set out the law and the parties' arguments, and dismissed the application for the following reasons (paragraph 40):

> "a. Whilst the case law is now straightforward and settled, none of the parties in the case had referred to the case law that the Tribunal considered to be of most assistance in determining the matter, including *Q Studios* and *Goodrich*.
>
> b. There is no clear correspondence provided by either party which would lead the Tribunal to consider that the substantive application either should not have been issued or should have been withdrawn or compromised.
>
> c. The Tribunal does not consider the conduct of the Applicant in this matter to be "vexatious" or "designed to harass the other side" (*Willow Court*). It seems clear to this Tribunal that the conduct of the Applicant in issuing the proceedings was to seek confirmation of whether the Tribunal did have jurisdiction.
>
> d. The Applicants' reasons for issuing the substantive application were unusual. However, the Tribunal does not consider it to be unreasonable conduct for a party to issue proceedings in order to achieve certainty in circumstances where the legal position as it is known to them is uncertain.
>
> e. It is not appropriate for the Applicants or their representatives to be penalised for not being familiar with the full extent of existing case law in circumstances where it would appear that the position was not known to the other parties in the

case either. To do so would be contrary to the principles of fairness as set out in Rule 3.

f. It is not considered that the issuing of the substantive application led to the Respondents incurring significant costs. If the Respondents' are correct in their submission that the position was so obvious that the substantive application should not have been made, then there would have been very little work for the Respondents to do. They could have simply responded by referring the Tribunal to the case law without incurring significant costs.

g. The Tribunal does not find that the position on behalf of the present Respondents to be different to that of the Second Group of Respondents for the following reasons:

> i. Lack of familiarity with the law in a complex area and in circumstances where neither party had referred to the pertinent case law is not sufficient to warrant the making of a costs order in the present circumstances.
>
> ii. No unreasonable conduct by the Applicants has been identified.

h. Any order for costs based on it being unreasonable for a party to pursue an application before a tribunal where they have a reasonable belief that the application might fail would seem to be close to making a finding that it was unreasonable for a party to bring a case which has simply not succeeded in any case where the merits are dubious.

i. The following words from *Ridehalgh* are noted:

> "… 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."

j. It is not considered that the conduct of the Applicants' representatives amounts to improper, unreasonable or negligent conduct.

k. The Tribunal has not seen any clear correspondence, by way of an offer to resolve the substantive application between the parties, and certainly not from the First Group of Respondents to the Applicants which would have provided the Applicants with the certainty required and beyond which the Applicants should not have proceeded."

The appeal from the costs decision

45. The appellants have permission (granted by this Tribunal) to appeal that decision. The grounds of appeal go through the above points in turn and say – among other things - that the failure of both parties to refer to *Q Studios* (paragraph a above) is irrelevant, since their argument is that it was objectively unreasonable for a party represented by solicitors and counsel to issue proceedings which it did not believe the FTT had any jurisdiction to determine; that the proceedings were not issued "in order to achieve certainty" (paragraph d above) since it was at all times common ground that there was no jurisdiction in respect of the cluster units and indeed that the law was in no way uncertain on that point; and that contrary to paragraph f the appellants did incur significant costs in arguing the jurisdiction issue which could have been avoided if a letter before action had been sent so as to

establish an agreed position. The appellants say that there is a considerable distance between issuing proceedings knowing that they might fail and issuing proceedings when a party does not believe that the FTT has jurisdiction.

46. In response, the respondents say that they did not act unreasonably in failing to send a letter before action. The problem was that there are so many leaseholders, including many based abroad, which meant that it was highly unlikely that common ground would be established with all of them; that the need for a dispensation under section 20ZA would have remained, whatever the stance of any of the leaseholders; and that a principal purpose of the application was to establish whether the FTT had jurisdiction.

47. The respondent's arguments do not address what seems to me to be a fundamental problem with the FTT's decision, which is that it failed to understand the basis of the application for costs.

48. I set out the FTT's paragraph 40 in full (paragraph 44 above) because it is obvious on reading those reasons that the FTT focused on the arguments about jurisdiction in relation to the studios. Hence its starting point, that the important decisions were *Q Studios* and *Goodrich* (paragraph a), and its observation in paragraph e that neither party was familiar with those cases - which may well have been fair since neither party had referred to either of those cases, but the point is that they are relevant to jurisdiction in relation to the studios, not to the cluster units. Hence also the FTT's reference at paragraphs 40 b and c to an uncertain legal position, its suggestion (by implication) at paragraph h that the law was not so obvious as the appellants said, and its reference at paragraph g to "the law in a complex area"; again, those comments make sense in relation to the disagreement between the respondents and the Second Group of leaseholders about the studios (to which the FTT devoted 24 paragraphs in its decision) but not in relation to the cluster units.

49. The appellants' application, by contrast, was focused on the obviousness of the law as set out in *Ezekwe*; they were not arguing that the applications should not have been brought in respect of the studios, but only in respect of the cluster units, as to which of course they did refer to *Ezekwe* and as to which the law was, since *Ezekwe*, perfectly clear and indeed was not in dispute at all between any of the groups of parties in the FTT.

50. Once it is clear that the application for costs was based on the proposition that the respondents should not have issued proceedings in relation to the cluster units, because the law was clear and was not in dispute (as the respondents would have been able to establish if they had sent a letter before action), it can be seen that the FTT missed the point of the application and did not explain why it failed.

51. The FTT's decision is therefore set aside because it did not explain why the application for costs failed.

The Tribunal's own decision on the appellants' application for costs.

52. I am able to substitute the Tribunal's own decision on the appellants' application for costs since I have all the parties' arguments before me.

53. I bear in mind that the appellants' application for a costs order was made on two alternative bases. They say first that the respondents acted unreasonably in issuing proceedings "out of abundance of caution" (as the respondents put it in their representations of 24 November 2022, paragraph 20 above) when they knew that the FTT had no jurisdiction in relation to the cluster rooms; they could not possibly be dwellings in

the face of *JLK Ltd v Ezekwe*. And if they really thought there could be any argument about that they could have resolved the point by sending a letter before action. Alternatively, if the respondents were unaware of *Ezekwe*, their solicitors should have advised them about it and should be liable for wasted costs.

54. The two alternatives are mutually exclusive; either the respondents knew the legal position and took an unreasonable decision to issue proceedings without checking whether the appellants agreed with them about the cluster rooms, or the respondents were unaware of it because their solicitors had failed to advise them in which case the application is against the legal representatives. So I cannot decide the application on the first basis, and then decide it on the second on the usual "in case I am wrong about that" basis, first because the two alternatives lead to orders against two different parties, and second because any consideration of the second alternative basis could not proceed without giving the respondents' legal representatives the opportunity to make representations.

55. In my judgment, however, that difficulty is resolved on examination of the respondents' own stated position. The respondents told the Tribunal, in their representations of 24 November 2022 drafted by Mr Philip Byrne of counsel, that they had issued proceedings "out of abundance of caution". In a second response to the appeal dated 31 May 2024 counsel for the respondents (this time Mr David Gilchrist) again argued that the application was made out of caution and that its purpose was to establish the legal position with certainty. The clear implication is that the respondents were aware of the law but wanted to check, and that is not consistent with the respondents' solicitors having failed to advise them about *Ezekwe*.

56. I therefore proceed to determine the application for costs on its first basis, which is that the respondents were aware that the FTT had no jurisdiction in relation to the cluster rooms, because to do otherwise would be inconsistent with the position expressed by counsel for the respondents in argument to the FTT and to this Tribunal. That gives rise to a further inexplicable oddity which I have already noted (paragraph 21 above): in their application to the FTT the respondents gave no indication that they believed the FTT had no jurisdiction in relation to the cluster units, nor that they were aware of *Ezekwe*, nor that they made their applications only "out of abundance of caution". But I accept what counsel has said in response to the application for costs and to the appeal.

57. Applying the three-stage enquiry set out in *Willow Court*, I have first to decide whether the respondents acted unreasonably in bringing the proceedings against "the owners of cluster units" in that circumstance. I quote those words from paragraph 18 of the costs application to the FTT in order to deal with a potential ambiguity. The appellants themselves are only some of the cluster unit holders; 77 of those whom Mishcon de Reya represented held cluster units (out of a total of 274), and 22 of them held studios (out of a total of 74). The appellants are a sub-set of those 99 and I do not know how many of them hold cluster units. The question arises whether the argument was that the respondents should not have brought proceedings against the 77 cluster unit holders whom Mishcon de Reya represented, or that they should not have brought proceedings against any cluster unit holders at all.

58. The answer to that question seems to me to be in the words I quoted: "the owners of cluster units". The appellants did not say "those of us who hold cluster units", but referred to all the cluster units, and so I take it that their argument was that proceedings should not have been brought against any cluster units at all.

(1) Did the respondents act unreasonably in bringing proceedings against the owners of cluster units?

59. Going back to the events of August 2022, it is worth recalling that the appellants' solicitors' wrote to the respondents' solicitors on 29 July 2022 (paragraph 15 above) seeking confirmation "that no attempt will be made to forfeit any lease on the basis of non-payment of service charge or breach of repair obligations without (a) service a s.146 notice (having first sought a determination from the FTT (where appropriate)); and (b) other than by proceedings". On reading that letter the respondents and their representatives were not only reminded of the need for a determination under section 168 of the Commonhold and Leasehold Reform Act 2002 before service of a section 146 notice. They were also shown that the appellants' solicitors were aware that such a determination would or might not be appropriate in all cases.

60. If therefore the respondents' solicitors knew about the *Ezekwe* decision and had advised the respondents that there was no jurisdiction in respect of the cluster rooms (and as I said, I am deciding the costs application on this basis), the obviously prudent (as well as courteous) course of action in response to that letter would have been to write back and seek confirmation that the appellants agreed that there was no jurisdiction in relation to the cluster rooms. Why the respondents did not do so is unfathomable.

61. However, there were other leaseholders not represented by the same solicitors. As the respondents say, it might have been difficult to reach agreement about jurisdiction with all the leaseholders. That was not a reason not to send a letter before action, since to do so would be no less practicable than to serve service charge demands, for example, or indeed the FTT proceedings themselves. But I accept that correspondence before action might not have resulted in agreement with all the leaseholders.

62. Even if it had, the respondents might well have wanted to have the point confirmed by the FTT so as to make sure that the point could not be raised against them later. If all the leaseholders had agreed there was no jurisdiction in relation to the cluster units the respondents could have made their applications against all the leaseholders but could with the agreement of the leaseholders have asked the FTT to strike out the application in relation to the cluster units. That would have saved costs for everyone.

63. As it is, we do not know what would have happened if all the leaseholders had been asked to confirm that they did not regard the cluster units as dwellings. What we do know is that the respondents did not check with the very people who were in fact trying hard to communicate with them, and who had pointed out to them the necessity to make a section 168 application, namely the solicitors for these appellants. Had they done so the appellants would have agreed that the cluster units are not dwellings. If the respondents still felt the need to apply to the FTT, either because other leaseholders had not agreed the point, or even "out of abundance of caution" despite everyone's agreement, then in that event the appellants who hold cluster units would not have experienced the stress of the application made in the form that it was, with no hint that there was actually no jurisdiction against them. Nor would they have needed to incur any costs in relation to jurisdiction; the respondents would have been asking the FTT to strike out the application with their consent.

64. Accordingly I agree in part with the appellants' argument; I cannot go so far as to say that the respondents acted unreasonably in bringing proceedings against all 274 cluster units holders. But they did behave unreasonably in bring the proceedings in the form they did,

without telling the FTT that they were aware of *Ezekwe* and knew that the cluster units could not be dwellings, and without first seeking to agree the position on jurisdiction of which their solicitors were aware. Had they done so, they would have been able to agree either not to bring proceedings at all, or to bring them on an "out of caution" basis and accompanied by an application, with the appellants' agreement, to strike out the application as against the cluster units. Their behaviour was objectively unreasonable; it failed to meet the standard expected of parties who have taken legal advice.

Should an order for costs be made?

65. I now turn to the first of the two discretionary decisions. Should an order for costs be made? In this case proceedings have been brought either when they should not have been brought at all or when they could have been made in a form that was not hostile to the appellants who hold cluster units and that did not require them to make arguments about jurisdiction.

66. I disagree with what the FTT said at its paragraph 40 f (paragraph 44 above); faced with proceedings served by the FTT, relating both to the cluster units and the studios, and faced with contradictory written representations by the respondents about jurisdiction (paragraph 22 above) it is entirely unsurprising that the appellants who hold cluster units responded in relation to both types of unit. For the same reason I reject the respondents' suggestion that the appellants themselves should have tried to resolve the jurisdiction point in correspondence after the FTT's initial directions; the form of the respondents' applications, and the content of their representations in November 2022, were such that it was entirely understandable that the appellants responded in full.

67. The course of action taken by the respondents caused unnecessary stress and expense and I take the view that an order for costs should be made.

What order should be made?

68. This is the second discretionary decision.

69. Relevant to this decision is the extent of the order sought, which is an order that the respondents pay all the costs incurred by the holders of the cluster units, and the costs incurred in relation to jurisdiction by the holders of the studios.

70. The first part of that is easy. Either the applications should not have been made against the appellants who hold cluster units, or they should have been brought in a very different form resulting in their incurring no or minimal costs. Therefore I take the view that a costs order should be made against the respondents in favour of the appellants who hold cluster units. I order that the respondents should pay 90% of those costs, summarily assessed on the standard basis (see below).

71. More difficult is the proposition that the respondents should pay the costs incurred in relation to jurisdiction by those of the appellants who hold studio rooms. The appellants argue that if the respondents had not issued proceedings against the cluster units the respondents would not have had to make any arguments about jurisdiction.

72. I do not think that is correct. The FTT sought representations about jurisdiction in relation to the studios as well as the cluster units (see paragraph 18 above; the FTT was concerned about jurisdiction in relation to "some or all of the student units"); even had there been no proceedings against the cluster units the appellants who hold studios would still have been

directed by the FTT to respond in relation to jurisdiction. There was then a real dispute, because of the position adopted by the Second Group of leaseholders, which gave rise to a directions hearing in December 2022 and then to a decision by the FTT on the written representations without any further argument.

73. Accordingly I do not think that it would right to require the respondents to pay the costs incurred in relation to jurisdiction in relation to the appellants who hold studios; they were bound to incur costs in argument about jurisdiction in any event.

Summary assessment

74. So I turn to the amount sought by the appellants. Their application was accompanied by a Bill of Costs in the sum of £27,578.69, including solicitors' fees, counsel's fee for written submissions and for the directions hearing in December 2022, and VAT payable by 13 out of the leaseholders represented by Mishcon de Reya. The appellants between them own 77 cluster units and 22 studios, and therefore the bill, divided by 99, equates to £278.57 for each unit. 90% of £278.57 is £250.71, say £251.

75. In terms of the quantum of costs, the respondents have provided no assistance to the Tribunal beyond a generalised assertion that they are too high and that they involve duplication. The appellants point out that had they each instructed separate solicitors the total costs would have been far higher. Overall I regard the costs as reasonable; on the information available to me any reduction would be arbitrary and I decline to make one.

76. Accordingly the respondents to pay to the appellants who hold cluster units the sum of £19,327 (being £251 x 77), pursuant to rule 13(1)(b) of the FTT's rules.

Upper Tribunal Judge Elizabeth Cooke

10 September 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.

SCHEDULE OF APPELLANTS

Unit number(s)	Respondent's Name	FTT Case Number(s)	Type of room
B54	Ser Seng Lau	MAN/00BY/LBC/2022/0267	Studio
B53	Ah Cheng Gan	MAN/00BY/LBC/2022/0266	Studio
A118	Behroze Jimmy Tantra	MAN/00BY/LBC/2022/0142	Cluster room
A35	Mei Yuen Chee Siew Soon Chee	MAN/00BY/LBC/2022/0098	Cluster room
A12	Chen Sook Lee	MAN/00BY/LBC/2022/0057	Cluster room
A90	Chooi Kin Tan	MAN/00BY/LBC/2022/0110	Studio
A74	Connie Yoke Kim Tan Samantha Yen Li Ng	MAN/00BY/LBC/2022/0085	Cluster room
B135	David Leslie Allan	MAN/00BY/LBC/2022/0349	Cluster room
B94	David Baruchi	MAN/00BY/LBC/2022/0307	Cluster room
A36	Doreen Ming Ai Tang	MAN/00BY/LBC/2022/0101	Cluster room
A150	Sivamalar K Rudra A/L Thiyagarajah	MAN/00BY/LBC/2022/0175	Studio
B147	EbunOluwa Andrew Adeola Taiwo Andrew	MAN/00BY/LBC/2022/0361	Cluster room
A25	Eno Omini	MAN/00BY/LBC/2022/0043	Cluster room
A18	Ganesh Kumar Kumarasamy	MAN/00BY/LBC/2022/0073	Cluster room
A65	Gorcaran Singh	MAN/00BY/LBC/2022/0068	Cluster room
A47	Harris Jivaraj Possible Sew Choon Wong	MAN/00BY/LBC/2022/0032	Cluster room
A78	Ilhana Desai	MAN/00BY/LBC/2022/0090	Cluster room
B52 & B81	Imran Patel Salim Patel	MAN/00BY/LBC/2022/0265 MAN/00BY/LBC/2022/0294	Studio Studio
A95 & A122	Joachim Karl Trell	MAN/00BY/LBC/2022/0116 MAN/00BY/LBC/2022/0146	Cluster room Studio
B14	Dr Karrar Talib Abdulameer Albadosh	MAN/00BY/LBC/2022/0227	Studio
A10	Kim Lin Chua	MAN/00BY/LBC/2022/0052	Cluster room
A32	Kim Yan Tan	MAN/00BY/LBC/2022/0091	Studio
A59	Pey Ling Kow	MAN/00BY/LBC/2022/0059	Studio
A27	Wai Kuan Law	MAN/00BY/LBC/2022/0071	Cluster room
A82	Wei Heong Law	MAN/00BY/LBC/2022/0097	Cluster room
B133	Weng Yew Lee Ean Nee Tan	MAN/00BY/LBC/2022/0347	Cluster room
B144 & B146	Damien-Pierre Lesot Brigitte Francoise Begasse	MAN/00BY/LBC/2022/0358 MAN/00BY/LBC/2022/0360	Cluster room Cluster room
B160	Liow Bee Lian	MAN/00BY/LBC/2022/0374	Studio
A52	Mageswarey Perumal	MAN/00BY/LBC/2022/0041	Cluster room
B70	Quek Meng Kwee Lim Beng Kin	MAN/00BY/LBC/2022/0283	Studio
B141	Meng Yee Chong	MAN/00BY/LBC/2022/0355	Studio
A89 & A92	Mohammed Jamal Al-Ammari	MAN/00BY/L8C/2022/0108	Studio

		MAN/00BY/LBC/2022/0112	Studio
A9	Ahmad Fareez Farhan Bin Mohd Ridzwan Jaswant Naaimah Abdullah	MAN/00BY/LBC/2022/0051	Cluster room
B25	Noriza Binti Ibak	MAN/00BY/LBC/2022/0238	Studio
A34	Ling Pang	MAN/00BY/LBC/2022/0096	Cluster room
B110	Pooi Shun Loh Pooi Kwan Loh Chee Wai Loh	MAN/00BY/LBC/2022/0323	Studio
A17	S C Shailendra S S Chandran	MAN/00BY/LBC/2022/0070	Cluster room
B98	Sarfraz Bashir Patel	MAN/00BY/LBC/2022/0311	Studio
A22	Tai Fong Siew	MAN/00BY/LBC/2022/0035	Cluster room
A66	Su Li	MAN/00BY/LBC/2022/0072	Cluster room
A19	Phang Hau Thew	MAN/00BY/LBC/2022/0074	Cluster room
A30	Wee Yoong Lim Tze Siou Lee	MAN/00BY/LBC/2022/0084	Studio
A68	Nyook Ngor Wong	MAN/00BY/LBC/2022/0077	Cluster room
A48	Siew Yean Yap Hong Le Lee	MAN/00BY/LBC/2022/0033	Cluster room
A62	Yun Siong Chow	MAN/00BY/LBC/2022/0063	Studio
B95	Yuval Ragoler	MAN/00BY/LBC/2022/0308	Cluster room
A20	Shyh Min Liew	MAN/00BY/LBC/2022/0076	Cluster room
A15, A16, A39, A40, A41, A42, A43 & A44	Bei Zong	MAN/00BY/LBC/2022/0066 MAN/00BY/LBC/2022/0069 MAN/00BY/LBC/2022/0109 MAN/00BY/LBC/2022/0114 MAN/00BY/LBC/2022/0117 MAN/00BY/LBC/2022/0119 MAN/00BY/LBC/2022/0120 MAN/00BY/LBC/2022/0028	Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room
A11 & A38	Yau Kim Foo/Ewe Kim Foo Yong Yoke Kheng	MAN/00BY/LBC/2022/0053 MAN/00BY/LBC/2022/0105	Cluster room Cluster room
A3, A4, A5, A6, A7, A8, B3, B4, B5, B6, B7, B8, B9, B10, B11, B12, B13, B28, B29, B33, B35, B36, B37, B38, B62, B63, B64, B65, B66 & B67	Zaid Alothman Holding Ltd	MAN/00BY/LBC/2022/0038 MAN/00BY/LBC/2022/0042 MAN/00BY/LBC/2022/0045 MAN/00BY/LBC/2022/0047 MAN/00BY/LBC/2022/0048 MAN/00BY/LBC/2022/0050 MAN/00BY/LBC/2022/0216 MAN/00BY/LBC/2022/0217 MAN/00BY/LBC/2022/0218 MAN/00BY/LBC/2022/0219 MAN/00BY/LBC/2022/0220 MAN/00BY/LBC/2022/0221 MAN/00BY/LBC/2022/0222 MAN/00BY/LBC/2022/0223	Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room

		MAN/00BY/LBC/2022/0224 MAN/00BY/LBC/2022/0225 MAN/00BY/LBC/2022/0226 MAN/00BY/LBC/2022/0241 MAN/00BY/LBC/2022/0242 MAN/00BY/LBC/2022/0246 MAN/00BY/LBC/2022/0248 MAN/00BY/LBC/2022/0249 MAN/00BY/LBC/2022/0250 MAN/00BY/LBC/2022/0251 MAN/00BY/LBC/2022/0275 MAN/00BY/LBC/2022/0276 MAN/00BY/LBC/2022/0277 MAN/00BY/LBC/2022/0278 MAN/00BY/LBC/2022/0279 MAN/00BY/LBC/2022/0280	Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room Cluster room
A81	Melissa Teoh Yi Ying Michelle Teoh Suet Er	MAN/00BY/LBC/2022/0095	Cluster room
B115	Melek Cepli	MAN/00BY/LBC/2022/0328	Cluster room
B56	Fang Hong	MAN/00BY/LBC/2022/0269	Cluster room
A23	Zhao Chongyang	MAN/00BY/LBC/2022/0037	Cluster room
B39	Yuehua Qin	MAN/00BY/LBC/2022/0252	Studio
B41	Ryfat Yusubov Samira Yusubova	MAN/00BY/LBC/2022/0254	Studio
A63	Nayanbhai Nanavati Roopande Nanavati	MAN/00BY/LBC/2022/0065	Cluster room
B109	Pascal Varanfrain	MAN/00BY/LBC/2022/0322	Cluster room