UPPER TRIBUNAL (LANDS CHAMBER)

LC-2021-301

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

BETWEEN:

RIVERSIDE CREM 3 LIMITED

Appellant

-and-

SOL UNSDORFER (1)
CIRCUS APARTMENTS LIMITED (2)
LEASEHOLDERS REPRESENTED BY THE RESIDENTS ASSOCIATION OF CANARY RIVERSIDE (3)
and others

Respondents

On 4 April 2022 the Tribunal dismissed the appellant's appeal against the decision of the First-tier Tribunal, Property Chamber dated 28 April 2021 by which he varied the terms of appointment of the first respondent as manager of parts of the Canary Riverside estate

By applications received on 15 and 19 April the first, second and third respondents each applied for an order for the payment of their costs of the appeal under rule 10(3)(b) of the Tribunal's Rules

The appellant responded to the applications for costs on 19 May 2022

The Tribunal having considered the applications and response, and being satisfied that the conduct of the appeal by the appellant was unreasonable

IT IS ORDERED THAT:

1. The appellant pay £30,000 as a contribution to the costs of the first respondent

2. The appellant pay £20,000 as a contribution to the costs of the second respondent

3. The appellant pay £17,000 as a contribution to the costs of the third respondents

Reasons

1. The only basis on which the Tribunal has power to award costs in an appeal against a decision of the FTT in a residential management case is where it is satisfied that a party has acted unreasonably in bringing, defending or conducting the proceedings (rule 10(3)(b)). The Tribunal's approach to these exceptional cases is explained in *Kingsbridge Pension Fund Trust v Downs* and *Willow Court*, to which I have been referred.

2. I am satisfied that the appellant's conduct in bringing the appeal was unreasonable. The suggestion that the appellant was not bound by the management order contradicted the assurances given by the appellant's solicitors on its behalf, details of which are contained in the decision. The appellant cannot have failed to appreciate that in bringing the appeal it was resiling from unequivocal representations which it had made with the intention of reassuring the respondents and the FTT that further steps to bind it to the original management order were unnecessary. The decision to resile from those assurances was unreasonable and the appeal, which was the product of that decision was also unreasonable.

3. I am also satisfied that the manner in which the appeal was conducted was unreasonable. The appellant chose to offer no explanation for its conduct in seeking to raise a new point for the first time on an appeal. The appellant would have been aware of Court of Appeal authority (*Prudential v HMRC*) that "before an appeal court permits a new point to be taken, it will require a cogent explanation of the omission to take the point below" at the latest by the time the parties exchange skeleton arguments. The possibility that the appellant had considered the point and decided not to argue it before the FTT had been raised much earlier, in the third respondents' representations of 19 July 2021 filed at the permission stage. The appellant chose not to provide an explanation and must have appreciated that, as a consequence of that decision, the prospects of it being permitted to take the point would evaporate. Whatever litigation there is between these parties, and whatever the entitlement of the appellant to rely on its legal advice privilege, to continue to pursue the appeal without being prepared to provide the essential information without which it had no prospect of success was unreasonable. The decision to do so can only have been taken with a view to impressing on the respondents the appellant's determination not to back down, whatever the cost and thereby to harass and intimidate some or all of them.

4. The fact that permission to appeal was granted provides no justification for the appellant's conduct. The appellant presented its grounds of appeal on the basis that the jurisdiction of the FTT to make the order was in issue, and it was not until that suggestion was examined in detail that it was found to be misconceived.

5. The fact that the appeal raised a serious point similarly provides no justification for bringing it and pursuing it in the circumstances referred to in paragraphs 2 and 3 above. The appeal was always unreasonable because it involved going back on assurances which had been intended to have permanent effect, and it became unarguable when the appellant decided not to offer an explanation for its conduct.

6. The fact that the assurances themselves were given before the Tribunal's decision in *Urwick* is irrelevant. The appellant has not suggested that it was unaware of *Urwick* when

it decided what points to take before the FTT and it was its subsequent change of position which was unreasonable.

7. I am therefore satisfied that the first of the *Willow Court* considerations is satisfied and that the appellant's conduct was objectively unreasonable.

8. I am also satisfied that this is an appropriate case in which to exercise the Tribunal's discretion and to make an order. This litigation is being conducted with the intensity and expense and in the style of commercial litigation. The Tribunal's costs rules are designed to promote access to justice and to encourage proportionality, but in this case the appellant has full access to the FTT and to the Tribunal and appears to be prepared to spend whatever it takes to promote its interests through litigation. The proposed order is not required to punish the appellant but to protect the respondents from its unreasonable conduct.

9. There is more substance in the appellant's point that the respondents did not need to incur the costs which they have and could have been jointly represented. I bear that in mind when determining the amount to be paid, but the appellant is not in a strong position to criticise others for taking the same full throttle approach to the appeal as it has done.

10. The determination of an award of costs under rule 10(3)(b) should not involve a detailed assessment. The sum which ought to be paid by the appellant is influenced by the seriousness of the conduct which justifies the making of the order but whether to award costs on the standard or indemnity basis is not a question which need be considered. I bear in mind that the costs in question are only those of the appeal (which I take to include applications for permission to appeal).

11. I bear I mind that any costs reasonably incurred by the manager which are not recovered from the appellant will fall to be paid by the leaseholders on the estate through the service charge.

12. The first respondent has incurred costs in excess of £45,000. The appellant should pay £30,000 as a contribution towards those costs.

13. The second respondent also incurred costs in excess of £45,000. It chose to be represented by leading counsel and its interest in the proceedings is commercial, rather than the result of a tribunal appointment. The appellant should pay £20,000 as a contribution towards its costs.

14. The third respondents are private individuals who have incurred costs of about £17,300 in being represented by direct access counsel. They are also likely to be liable for part of the manager's costs in addition to their own. They have adopted the most proportionate approach to the litigation. The appellant should pay £17,000 towards their costs.

Martin Rodger QC,

Deputy Chamber President

23 August 2022