UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/35/2018

LANDLORD AND TENANT – RIGHT TO MANAGE – tribunal procedure – RTM application form failing to identify matter to be determined – whether an application for the purpose of s.84(3), Commonhold and Leasehold Reform Act 2002 – whether an irregularity to which rule 8, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 capable of applying – costs consequences of respondent conceding appeal - appeal allowed

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

BETWEEN: THE LOUGH'S PROPERTY MANAGEMENT LIMITED

Appellant

and

ROBERT COURT RTM COMPANY LIMITED

Respondent

Re: Robert Court,
1, 2 & 3 Sternhall Lane,
London SE15 4BE

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

26 February 2019

Margarita Madjirska-Mossop, of Mayfield Law, Solicitors, for the appellant
James Castle, instructed by TWM Solicitors LLP, for the respondent

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The following cases are referred to in this decision:

Aldford House Freehold Limited v (1) Grosvenor (Mayfair) Estate (2) K Group Holdings Inc [2018] EWHC 3430 (Ch)

Benedictus v Jalaram Ltd [1989] 1 EGLR 251

Plintal v 36-48 Edgewood Drive RTM Co Ltd LRX/16/2007, [2008] EWLands LRX_16_2007

Salehabady v Trustees of the Eyre Estate [2017] UKUT 60 (LC)

Introduction

1. This appeal is about the acquisition of the statutory right to manage under Chapter 1 of Part 2, Commonhold and Leasehold Reform Act 2002. Until shortly before the hearing it had appeared to raise quite an important question of principle concerning the time when an application to the appropriate tribunal for a determination of entitlement to acquire the right to manage is made for the purpose of section 84(3) of the Act. By the day of the hearing, however, the respondent had decided to concede the appeal, and the only live issue between the parties was whether, in the circumstances, the appellant would be entitled to recover its costs of the proceedings from the respondent under section 88 of the 2002 Act.

2. The proceedings arose because the solicitors for the respondent RTM company submitted an application form in the First-tier Tribunal (Property Chamber)'s standard form *RTM: Application relating to (No Fault) Right to Manage* without indicating on the form what sort of application was intended to be made and without including copies of the relevant claim notice and counter-notice as required by the relevant FTT Practice Direction. When the necessary information and documents were eventually supplied the time within which an application to acquire the right to manage must be made had expired.

3. On 28 February 2018 the FTT decided that although the form submitted was defective it was nevertheless an application made within the statutory time limit; the absence of information and supporting documents was an irregularity which the FTT could correct by applying rule 8 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

4. The FTT gave permission to appeal its decision because of the general importance of that issue.

5. By the time the appeal came on for hearing the respondent agreed with the appellant that the appeal ought to be allowed and the decision of the FTT set aside. Despite that consensus both parties attended the hearing. Although no application has yet been made to the FTT for a determination concerning the costs of the proceedings before it or on appeal the parties agreed that in addition to dismissing the appeal the Tribunal should consider the costs consequences of such a dismissal.

6. The appellant landlord was represented at the hearing of the appeal by its solicitor-advocate, Ms Margarita Madjirska-Mossop, of Mayfield Law, Solicitors. The respondent RTM company was represented by counsel, Mr James Castle.

The relevant statutory provisions

7. Where an RTM company has made a claim to acquire the right to manage by giving notice under section 79 of the 2002 Act to the landlord of the premises to which Chapter 1 applies, and where the landlord has exercised its right to give a counter-notice under section 84(1)-(2) disputing the claim, section 84(3)-(4) provide as follows:

> “(3) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to the appropriate tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.
>
> (4) An application under subsection (3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given.”

In England the appropriate tribunal referred to in section 84(3) is the FTT.

8. A claim notice may be withdrawn under section 86(1) by the RTM company giving notice to those affected. Additionally, by section 87(1)(a), if an application under section 84(3) is not made to the FTT within the period of two months specified in section 84(4) the claim notice is deemed to have been withdrawn. The same deemed withdrawal of the claim notice occurs if such an application is made but is subsequently withdrawn (section 87(1)(b)).

9. Section 88 deals with costs. By section 88(1) an RTM company is liable for reasonable costs incurred by, amongst others, a landlord, “in consequence of a claim notice given by the company in relation to the premises”. The liability to pay costs incurred in proceedings is restricted by section 88(3), as follows:

> “88(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.”

10. Section 88 is supplemented by section 89 which deals with costs where a claim to acquire the right to manage ceases, as follows:

> “89. **Costs where claim ceases**
>
> (1) This section applies where a claim notice given by a RTM company-
>
> > (a) is at any time withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or
> > (b) at any time ceases to have effect by reason of any other provision of this Chapter.
>
> (2) The liability of the RTM company under section 88 for costs incurred by any person is a liability for costs incurred by him down to that time.”

The relevant procedural rules and practice directions

11. Rule 26 of the 2013 Rules makes provision for starting proceedings. An applicant must start proceedings before the Tribunal by sending or delivering a notice of application to the Tribunal (rule 26(1)). Such an application must be signed and dated and, unless a practice direction makes different provision, it must include details of the applicant, the respondent and

the nature of the claim as well as the matters listed in rule 26(2). Included in that list are, at sub-paragraph (h) “the result the applicant is seeking”, at (j) “the applicant’s reasons for making the application”, and at (n) “all further information or documents required by a practice direction”.

12. To the same effect as rule 26(2)(n) is rule 26(3) which requires that an application to the FTT must be accompanied by the particulars and documents specified in an applicable practice direction. The FTT’s practice direction includes a requirement that an application made under section 84(3) of the 2002 Act must be accompanied by a copy of the claim notice and a copy of the counter-notice received (PD, para.6 and para.4(4), Sch.6).

13. The saving provision on which the FTT relied in this case was rule 8 of the 2013 Rules, which gives it power to deal with any procedural irregularity:

> **“Failure to comply with rules, practice directions or Tribunal directions**
>
> **8.**—(1) An irregularity resulting from a failure to comply with any provision of these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.
>
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as the Tribunal considers just, which may include—
>
> (a) waiving the requirement;
> (b) requiring the failure to be remedied;
> (c) exercising its power under rule 9 (striking out a party’s case);
> (d) exercising its power under paragraph (5); or
> (e) barring or restricting a party’s participation in the proceedings.”

The relevant facts

14. The respondent is an RTM company established to claim the right to manage Robert Court, a building in Peckham in south-east London. On 10 March 2017 it gave notice of its claim to the respondent, the owner of the freehold of the building, which served a counter-notice disputing the entitlement on 10 April. It is agreed that the last date for the respondent to make an application to the FTT under section 84(3) for a determination that it was entitled to acquire the right to manage Robert Court was therefore 9 June.

15. On 31 May 2017 the respondent’s solicitors sent a letter and a partially completed copy of the FTT’s standard form *RTM: Application relating to (No Fault) Right to Manage.* These were received by the FTT on 1 June, well within the time allowed by section 84(3). The subject line of the letter referred to the respondent and continued “Application under Chapter 1 of the Commonhold and Leasehold Reform Act 2002” but the substance of the letter was very short stating simply that an “application form for determination” was enclosed together with copies of the Certificate of Incorporation and Articles of Association of the RTM Company and a cheque for the issue fee.

16. Notes on the first page of the FTT's standard application form inform the reader that:

> "This is the correct form to use if you want to ask the Tribunal for a determination that on the relevant date the Right to Manage company was entitled to acquire the Right to Manage the subject premises under the Commonhold and Leasehold Reform Act 2002 ("the Act"). It is also the correct form to use in order to make one of the other types of application listed in Annex 1 to this form."

The notes continue with a direction to send the completed application form and the required fee "together with the documents listed in section 9 of this form to the appropriate regional Tribunal". Section 9 contains a checklist of the documents which must be submitted with the form and warns that the FTT will not process the application until the form has been fully completed and returned with the fee and documents referred to in the checklist "together with, where relevant, any other documents specified in Annex 1 to this form".

17. Annex 1 is a single page on which are listed six different types of application under Chapter 1 of Part 1 of the 2002 Act. A column adjacent to the list is headed "tick here" and contains one tick-box for each type of application. For each type the relevant section of the Act is specified, the nature of the application is described and the additional documents required to be filed are identified. The first entry in the list refers to section 84(3), which it explains is "an application for a determination that on the relevant date the RTM Company was entitled to acquire the Right to Manage"; the additional documents required with such an application are identified as a copy of the claim notice and a copy of any counter-notice received.

18. The other types of application listed in Annex 1 concern: missing or absent landlords; costs; service charges; approvals under long leases; and determinations under paragraph 5(3) of Schedule 6 to the 2002 Act that the right applies where it would otherwise be excluded by paragraph 5(1)(b). In some cases the Annex requires specific documents to be provided, while in others the requirement is for additional information.

19. In the application form sent to the FTT by the respondent's solicitors on 31 May 2017 Annex 1 was not completed at all. It was therefore impossible to tell what sort of application was being made; apart from the practical difficulty that presented to the FTT the omission was also a failure to comply with rules 26(2)(h) and (i) which require that an application should include both the result the applicant is seeking and the applicant's reasons for making the application.

20. To compound the omission, no copies of the claim notice or the counter-notice were included with the form, so it was not possible for the FTT to infer what sort of application was intended. Nor was there any clue in the covering letter. The description of the enclosed form as an "Application Form for Determination" did not take the matter any further since there are several different matters which can be the subject of a determination. In short, it was impossible for the FTT to know what relief the respondent was asking it to grant.

21. On 8 June 2017, one day before the expiry of time for making an application, the FTT's staff returned the form, and asked the respondent's solicitors to tick one of the boxes in Annex 1 and resubmit it with any relevant notices.

22. The form was resubmitted by the respondent's solicitors on 12 June. This time the first option in Annex 1 had been ticked, indicating that the application was for a determination that the respondent was entitled to acquire the right to manage. Unfortunately, once again, neither the claim notice nor the counter-notice was sent with the form. On 13 June the form was returned by the FTT for a second time as it was unable to proceed without the missing documents.

23. Finally, on 15 June 2017, the respondent's solicitors submitted a properly completed application form, having ticked the first entry in Annex 1, together with copies of the claim notice and the counter-notice. The FTT notified the appellant that it had been received. In due course the appellant disputed the jurisdiction of the FTT to make any determination on the basis that the application had been made after the expiry of the period of two months beginning with the day on which the counter-notice had been given.

The FTT's decision

24. Before the FTT Mr Castle accepted that the omission to tick one of the boxes in Annex 1 of the form submitted on 31 May meant that there had been a failure to comply with rules 26(2)(h) and (i). He submitted that the application had nevertheless been made on 31 May, relying on the decision of this Tribunal (HHJ Behrens) in *Salehabady v Trustees of the Eyre Estate* [2017] UKUT 60 LC in which it had been held that an application was made for the purpose of section 48(2), Leasehold Reform, Housing and Urban Development Act 1993, "by the posting of a correctly addressed (and sufficiently stamped) notice of application to the FTT". The application was flawed, but rule 8(1) prevented it from being treated as void, and the omissions had all subsequently been corrected.

25. On behalf of the appellant Ms Madjirska-Mossop had argued that the first time a proper application was received by the FTT was on 15 June 2017, which was too late to be valid. The claim notice had therefore been deemed to have been withdrawn on 9 June when the two-month period for making an application expired.

26. Having first resolved the only factual issue in the proceedings (finding that the claim form and counter-notice had not been included when the application form was sent on 31 May) the FTT next addressed the question whether, in view of the omission to tick any of the boxes in Annex 1, the form was "an application to the tribunal sufficient to stop the two-month time limit before a withdrawal is deemed". Referring to the 26(1) the FTT first directed itself that proceedings are started by sending or delivering a notice of application" and then went on:

> "56. At the point of receiving the first application, the tribunal knows that it is receiving an application regarding the Right to Manage pursuant to Chapter 1 of the 2002 Act and knows that it is an application regarding one of six possible applications in respect of which it has jurisdiction.

> 57. The fact that the application is incomplete and does not identify exactly what it relates to is not fatal.
>
> 58. Rule 26 deals with what the application must include. That rule of course adds a gloss on the basic statutory provisions. However, that rule has to be read in conjunction with the other rules, in particular rule 8, which at sub-paragraph (1) makes it clear that failures to comply with the rules does not of itself render void the proceedings or any step in the proceedings.
>
> 59. Rule 8 goes on to provide the tribunal with a menu of options that it may take upon their being a failure, those options include requiring the failure to be made good and striking out. It is perfectly possible therefore for the tribunal to receive an application and then require information to clarify that application."

27. The FTT then explained that a refusal by staff to process an application because insufficient information had been provided could not affect the date on which the application was made which was a matter for judicial decision. There had been no previous judicial determination of that issue.

28. The FTT concluded, for the reasons given in the paragraphs quoted above, that the application delivered to it on 1 June "was an effective application made within the relevant time limit despite its deficiencies". As those deficiencies had been cured by 15 June the FTT considered there was no need to take any of the courses of action permitted by rule 8(2) and it proceeded to give directions for the determination of the substantive issues.

The appeal

29. The issue for which permission to appeal was given was whether an application under section 84(3) was made by the respondent before the period of two months allowed by section 84(4) expired on 9 June 2017.

30. For the appellant Ms Madjirska-Mossop submitted in writing that the FTT had been wrong to rely on rule 8 of the 2013 Rules to cure the deficiency in the purported application under section 84(3). The Rules could not alter the requirements of the 2002 Act. The minimum requirement of section 84(3) was that the RTM company must communicate to the FTT that it was making an application under that section. An unspecified application which did not tick one of the boxes in Annex 1 was not an "application" within the meaning of sections 84 and 87 at all.

31. In support of that submission Ms Madjirska-Mossop relied on the recent decision of the High Court in *Aldford House Freehold Limited v (1) Grosvenor (Mayfair) Estate (2) K Group Holdings Inc* [2018] EWHC 3430 (Ch) which concerned a claim by a nominee purchaser to acquire the freehold of premises in Mayfair under Part I of the Leasehold Reform, Housing and Urban Development Act 1993. Two notices claiming the right to acquire the freehold had been given by the nominee on the same day, but only one application referring to only one of the notices had been made to the Court. After the Court had determined the correct number of flats in the building it became clear that the notice referred to in the proceedings had been invalid. Counsel for the claimant nominee purchaser initially sought to avoid the problem by amendment

of the claim form to plead reliance on the valid notice, but that suggestion was short lived, as Fancourt J recorded at paragraph 39:

> "The Claimant's riposte was, at first, to apply to seek to amend the claim form to plead reliance on the Second Notice. On reflection, however, Mr Johnson accepted that if the claim form as issued was not the "application" required by the 1993 Act then it would be too late to rectify the position by amending the claim form now."

32. The respondent's statement of case for the appeal repeated the submissions which had succeeded before the FTT. The form received by the FTT on 1 June 2017 had been an application and had started the proceedings, albeit the required information and supporting documents had been omitted. The omissions had not been fatal to the validity of the application but were an irregularity to which rule 8(1) applied, and had subsequently been cured.

33. In his skeleton argument submitted shortly before the appeal Mr Castle changed tack completely. The respondent now agreed with the appellant that the application had not met the requirements of section 84(3). He suggested that a distinction should be made between validity for the purpose of the 2013 Rules and validity for the purpose of section 84(3), and submitted that even if the application could be saved by rule 8 for the former purpose it could not be saved for the purpose of the statute itself.

34. Mr Castle's written argument did not explain why the respondent considered it appropriate to incur the expense of his attendance and the preparation of full submissions when the conclusion of those submissions was a concession that the appeal should be allowed. It was left to Ms Madjirska-Mossop to fathom the unspoken purpose of the last-minute *volte face* and the contrived distinction sought to be made between validity for the purpose of the Act and validity within the 2013 Rules. In a supplemental skeleton argument she suggested that the respondent's purpose was to avoid having to pay the appellant's costs. At the hearing Mr Castle acknowledged that that was at least part of the explanation.

35. The issue for which the Tribunal gave permission to appeal remains an important one. Before dealing with the issue of costs I will explain why I agree with the parties that the FTT's decision was wrong and that the appeal must be allowed.

36. Section 84(3) enables an RTM company which has given a claim notice and received a negative counter-notice to "apply to the appropriate tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises". If it does not do so within two months of receiving the counter-notice the claim notice is deemed to have been withdrawn by section 87(1)(a).

37. The application received by the FTT on 1 June did not ask the tribunal to determine anything. Because none of the menu of options in Annex 1 had been selected it was impossible to tell what sort of application was contemplated. It was obvious that the respondent wanted to apply for something, and for that reason it might be possible to accept that the document was an application, but I do not believe it could be described as an application *for* anything; in particular,

it was not an application for a determination that the respondent was entitled to acquire the right to manage the premises.

38. The FTT said that it knew when it received the application form on 1 June that it was an application regarding one of six possible matters in respect of which it has jurisdiction under Chapter 1 of the 2002 Act. That was a reasonable inference, strengthened by the subject line of the covering letter which referred to such an application. Even that inference, however, depends on the assumption that the mistake made by the intended applicant was in failing to tick one of the options in Annex 1, rather than some other error such as using the wrong standard form or seeking to make an application of a type for which the FTT has no jurisdiction.

39. I nevertheless agree with Ms Madjirska-Mossop's submission that rule 8 cannot be used to cure a defect in compliance with the minimum requirements of section 84(3). Those requirements are substantive and they had either been satisfied by 9 June by the making of an application for the relevant determination or they had not. If they had not been satisfied by that date, because no request had yet been made for a determination of entitlement, the consequence of deemed withdrawal provided for by section 87(1)(a) would befall the claim notice. That consequence is specified in the statute and cannot not be avoided by reliance on rule 8 or any other procedural tool.

40. Rule 8 could of course be relied on to preserve an application under section 84(3) from any adverse consequences of a failure to supply the documents required by the FTT's own practice direction (the claim notice and counter-notice). Compliance with the practice direction is a requirement of the Rules, and the consequence of non-compliance can therefore be provided for by the Rules. But the Rules cannot modify the requirements of the 2002 Act itself.

41. I agree that in this respect the appeal is analogous to the situation in the *Aldford House* case, where it was eventually acknowledged by leading counsel and accepted by the Judge that a failure to take the substantive step required by the Act (making an application based on a valid notice) could not be remedied by the procedural device of amending the claim form out of time to refer to a different notice.

42. The application required by section 84(3) need not be in any particular form but in my judgment, as a minimum, it must ask for a determination of entitlement to acquire the right to manage. If it does not do so it will not be possible to describe it as an application under section 84(3) for the purpose of meeting the deadline imposed by section 84(4).

43. The 2002 Act contains no saving provision of its own which protects an intended application from invalidity if it is affected by some inaccuracy or irregularity. In that regard an application under section 84(3) is different from a notice of invitation to participate under section 78 or a claim notice under section 80, both of which are protected by a specific provision that an inaccuracy will not invalidate the document (see sections 78(7) and 81(1) respectively). That is not surprising given the nature of the requirement, but it does emphasise the necessity of taking steps within time which can be recognised as amounting to an application for a determination of entitlement.

44. For these reasons I consider the FTT ought not to have found that an effective application had been made to it within the two-month time limit. It ought instead to have dismissed the application as having been made too late. I would hold that an application was not made until 12 June 2017 when the form was first returned to the FTT with option (a) in Annex 1 having been ticked. The omission of the required supporting documents was not fatal to the validity of that attempt because they could be cured by reliance on rule 8.

45. I therefore allow the appeal, as I was invited to by both parties, and dismiss the respondent's application to acquire the right to manage.

Costs consequences

46. Mr Castle was content to leave the issue of costs to be determined at a later date but Ms Madjirska-Mossop asked the Tribunal to provide guidance on the issue of costs and to indicate that the respondent was liable to pay the costs of the appellant incurred after the date of deemed withdrawal of the claim notice, including in particular the costs of the proceedings before the FTT and before this Tribunal. No application for the determination of the amount of any costs payable by the respondent has yet been made to the FTT under section 88(4) (which is the appropriate forum even in relation to costs incurred in the appeal). I therefore have no jurisdiction to make a determination in relation to costs. Both parties nevertheless agreed that it would beneficial for the Tribunal to express a view on the costs consequences of the appeal being allowed in the circumstances which I have described. Since both parties had prepared submissions and agreed that I should express a view on the question which divides them, I will do so in the hope that it will allow them to reach agreement without the need for an application under section 88(4).

47. Mr Castle pointed out that the consequence of failing to make an application to the FTT under section 84(3) within the time specified by section 84(4) was prescribed by section 87(1)(a), and was the deemed withdrawal of the claim notice. By section 87(2) that withdrawal was deemed to occur at the end of the period of two months specified by section 84(4).

48. The next step in Mr Castle's argument was section 89 which, as sub-section (1) explains, applies where a claim notice given by an RTM company is at any time withdrawn or deemed to be withdrawn. He relied on section 89(2) which stipulates that the liability of the RTM company under section 88 for costs incurred by any person is a liability for costs incurred by him down to that time. I agree with Mr Castle that the reference to "that time" is a reference to the time at which the withdrawal or deemed withdrawal occurs.

49. Mr Castle therefore submitted that where there has been an omission to make an application under section 84(3) within the two months allowed by section 84(4), the RTM company's liability for costs under section 88 ceases at the date the claim notice is deemed to have been withdraw i.e. at the end of the same two-month period, which in this case was 9 June 2017.

50. On behalf of the appellant Ms Madjirska-Mossop reminded me that the Tribunal held in *Post Box Ground Rents Ltd. v The Post Box RTM Co. Ltd.* [2015] UKUT 0230 (LC), at paragraph 42, that the unilateral withdrawal of an application for a determination under section 84 does not, without more, bring that application to an end. The application ends only when the FTT formally dismisses it. The correct legal position on the facts, she submitted, was that on 1 June 2017 the respondent made an application, albeit not a valid application, before the limitation period expired. The application continued to have effect and would not be deemed withdrawn until it was dismissed in these proceedings. Furthermore, the FTT had had jurisdiction in relation to that application.

51. After the hearing the Tribunal invited the parties to make further submissions in writing on two decisions which it appeared might be relevant. *Benedictus v Jalaram Ltd* [1989] 1 EGLR 251 is a decision of the Court of Appeal under the Landlord and Tenant Act 1954 while *Plintal v 36-48 Edgewood Drive RTM Co Ltd* LRX/16/2007 is a decision of the Lands Tribunal under Chapter 1 of Part 1 of the 2002 Act.

52. In *Benedictus* the tenant of premises to which Part II of the 1954 Act applied served notice of its intention to seek a new tenancy and subsequently applied to the court for such a tenancy. The landlord applied for an interim rent for the period of statutory continuance of the tenancy but the tenant changed its position and asserted that it had not been in occupation of the premises at the expiry of the tenancy or subsequently and was not liable to pay an interim rent. The application for a new tenancy was dismissed as a result of the tenant's admission that it had not been in occupation which left the tenant's liability to pay an interim rent as the only remaining issue. The tenant denied it was liable on the basis that it had not been in occupation and the tenancy had not been continued. It was argued by the landlord that an estoppel had arisen which prevented the tenant from disputing the convention under which both parties had proceeded, namely that the tenant was in occupation and the tenancy was being continued by the 1954 Act. Alternatively it was said that the tenant could not take inconsistent positions in the same proceedings (it could not "approbate" the continuation of the tenancy in the proceedings, but subsequently "reprobate" that continuation to avoid the consequences).

53. The argument that there was an estoppel by convention was accepted by Stocker LJ in the Court of Appeal. Both parties had proceeded on the basis of a common underlying assumption that the tenancy was continuing, since that was the position asserted by the tenant in its pleadings and accepted by the landlord. He also held that it would be an abuse of process for the tenant to abandon its previous course of conduct and to assert that it had never had a tenancy continuing under the act in order to defeat the claim for interim rent. Bingham LJ reached the same conclusion, that the tenant could not be permitted to resile from the position it had taken in the proceedings, although he relied on the general unwillingness of the court to countenance inconsistent conduct by one party in proceedings which is prejudicial to the other. He expressed the relevant principle in these terms:

> "If in the course of litigation a party (A) accepts the truth of an assertion of fact expressly or impliedly made by his opposing party (B) and founds on that fact formally to claim relief to which he would not be entitled if that fact were not true (A knowing if the fact is true or not, whether or not B knows), and if the litigation is

> thereafter conducted on the basis of the truth of that fact, A may ot thereafter assert the falsity of that fact and retract his acceptance and its truth where the effect would be both to deny B a remedy which would have been available to B had A asserted the falsity of that fact from the beginning and to deny B a remedy to which A's acceptance of that fact entitled him."

54. In *Plintal* an RTM company gave notice of its claim and applied to a leasehold valuation tribunal for a determination of its entitlement to acquire the right to manage. The landlord disputed the company's entitlement on grounds including that the claim notice had not been properly served on it. The RTM company conceded that the claim had not been served and that it was not entitled to the relief it had claimed. The LVT ruled that the landlord was not entitled to its costs of the proceedings because no valid claim notice had ever been given to it. On appeal the Lands Tribunal applied the principle identified in *Benedictus* and held that the RTM company could not, in the same proceedings, assert the validity of its claim notice and then rely on its invalidity to avoid liability for the costs of the proceedings.

55. In her additional written submissions Ms Madjirska-Mossop relied on *Plintal* and argued that because the respondent had relied on the validity of the application before the FTT and on the appeal until a few days before the hearing, it could not rely on the invalidity of the application to avoid liability for the appellant's costs. She submitted that the application "remained extant until the point its ineffectiveness was conceded" and that its concession was in effect a withdrawal of the application which ought not to be permitted except on the basis of dismissal by the Tribunal. Alternatively, whether or not the application was effective for the purpose of section 84, it was effective for the purpose of section 88(3) and, on the dismissal of the application, the appellant should be entitled to its costs.

56. I do not accept Ms Madjirska-Mossop's submissions.

57. I would first say that I do not consider the respondent's very late decision to concede the appeal makes any difference to the operation of the statutory provisions. If the proceedings had taken their expected course, with the respondent seeking to uphold the decision of the FTT until the conclusion of the argument, and the appeal had then been allowed by the Tribunal, the same question would have arisen. That question is whether an RTM company whose claim fails because its original notice of claim was deemed by section 87(1)(a) to have been withdrawn when proceedings were not commenced in time, is liable to pay the reasonable costs incurred by a landlord as party to the proceedings before the tribunal, or whether the RTM company's liability for costs under section 88 is limited to costs incurred by the landlord down to the time of the deemed withdrawal.

58. The answer to that question is found in sections 88 and 89 whose general structure and effect is clear. The general rule is that the RTM company is liable to pay the reasonable costs incurred by the landlord in consequence of the claim notice (section 88(1)). That rule is qualified in three respects. First, by the clarification of what are to be regarded as "reasonable costs" provided by section 88(2). Secondly, by section 88(3), which allows the recovery of costs incurred in tribunal proceedings only if the tribunal dismisses the RTM company's application.

And, finally, by the provision in section 89(2) of a cut-off date for the liability of the RTM company where a claim notice given by the company is “at any time withdrawn or deemed to be withdrawn”; in those circumstances the company’s liability under section 88 is only for costs incurred by the landlord down to “that time” i.e. the time of the actual or deemed withdrawal.

59. I do not consider that the language of section 89(1)(a), which applies the cut-off date where a claim notice “is at any time withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter” is capable of being understood as referring to the date on which it is determined by a tribunal, or acknowledged by the RTM company, that deemed withdrawal has occurred. What is critical is the time when the notice is deemed by a provision of Chapter 1 to have been withdrawn, not the time it is appreciated that that has happened.

60. It is also notable that the cut-off date for an RTM company’s liability provided by section 89(2) is not itself qualified in a case to which section 88(3) applies i.e. where costs have been incurred by a landlord in tribunal proceedings. The Act does not provide that costs incurred in proceedings after a deemed withdrawal are payable by the company as an exception to the general rule that liability last only until the date of deemed withdrawal.

61. It follows that the section 88(2) cut-off of the RTM company’s costs liability applies even when costs are incurred after the cut-off date in tribunal proceedings in which the issue is whether a deemed withdrawal has occurred or not.

62. The Tribunal’s decision in *Post Box Ground Rents* does not suggest a different outcome. That case was concerned with the effect of section 88(3) and did not touch on the consequences of deemed withdrawal or the effect of section 89(2). It is true that the respondent’s application will not have been brought to an end until its dismissal by this decision, but that does not affect the bar imposed by section 89(2) on the recovery of costs incurred after a deemed withdrawal of a claim notice.

63. Nor do I consider that the principles illustrated by *Benedictus* and *Plintal* allow a different conclusion.

64. In *Benedictus* there was a consensus, on which the application was based and which was disturbed only by the tenant’s decision to resile from it, as to facts which, if true, would have rendered the tenant liable for the interim rent. There has never been such a consensus in this case. It has always been the appellant’s case that the proceedings were not properly constituted because no the claim notice was deemed to have been withdrawn. The appellant would therefore have anticipated that section 89(2) would apply to its entitlement to recover costs.

65. In *Plintal* there was no deemed withdrawal of the notice of claim, and the application failed because the notice of claim had not been validly served. Costs were incurred in the proceedings in which the RTM company’s primary case was that it was entitled to acquire the right and its secondary case was that no there were no costs in consequence of a claim notice

given by the company because the notice had not been validly given. The Tribunal held that the company was estopped from contending that no notice had been given. That conclusion was only possible because there is nothing in the Act to prevent it. To achieve a similar result in this case would not simply involve the assumption of a state of facts contrary to reality, but would require that section 89(2) be ignored. That is not permissible.

66. It follows that if an application for costs was before the Tribunal (which it is not) I would dismiss it.

Martin Rodger QC

Deputy Chamber President

1 April 2019