



Neutral Citation Number: [2021] EWCA Civ 1881

Case No: B2/2021/0515

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON**  
**Her Honour Judge Baucher**  
**Case No: E01W1947**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/12/2021

**Before:**

**LORD JUSTICE NEWEY**  
**LORD JUSTICE NUGEE**  
and  
**MR JUSTICE FRANCIS**

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**Between :**

**TERMHOUSE (CLARENDON COURT)**  
**MANAGEMENT LIMITED**  
- and -  
**ATHIR AL-BALHAA**

**Claimant/**  
**Respondent**  
  
**Defendant/**  
**Appellant**

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**Timothy Cowen** (instructed by direct access) for the **Appellant**  
**Jonathan Wragg** (instructed by **PDC Law**) for the **Respondent**

Hearing date: 1 December 2021  
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**Approved Judgment**

**Covid-19 Protocol:** This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Friday 10 December 2021 at 10:30am

## **Lord Justice Newey:**

1. The First-tier Tribunal (Property Chamber) (“the FTT”) does not itself have enforcement powers, but its decisions can potentially be enforced through Court mechanisms, notably pursuant to section 176C of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) or section 27 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). The issue raised by the present appeal, which is of wider significance, is whether a decision of the FTT on an application under section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) can be enforced in such a way.

### **Basic facts**

2. Clarendon Court, Sidmouth Road, London NW2 comprises six blocks, each of ten flats. The appellant, Mr Athir Al-Balhaa, has a long lease of one of these. The freehold is held by Clarendon Court (Freehold) London Limited, a tenant-owned company. The respondent, Termhouse (Clarendon Court) Management Limited (“Termhouse”), a management company, has responsibility for, among other things, raising the service charges for Clarendon Court.
3. On 3 September 2017, Mr Al-Balhaa made an application to the FTT under section 27A of the 1985 Act. The application was stated to relate to service charges for 2013-2017. Asked by the application form for a “Description of the question(s) you wish the Tribunal to decide”, Mr Al-Balhaa listed, among other things, whether or not “(1) there are any service charges outstanding”, “(7) There are no provisions in the lease for me to make a compulsory contribution to the Reserve Funds” and “(9) the funds from the sale of the garages in the amount of £66,000 can be distributed and my share of £1,100 be paid to me”.
4. When the matter came before the FTT (Tribunal Judge Adrian Jack and Tribunal Member Susan Coughlin), it was agreed between the parties that “the sole issues for the Tribunal were the determination of the service charges due in 2015-16 and 2016-17” and that, under the terms of Mr Al-Balhaa’s lease, “the landlord is entitled to recover contributions to the reserve fund from the tenant” and “the landlord is not entitled to recover through the service charge its legal costs incurred in litigation with the tenant” (see paragraphs 3 and 4 of the FTT’s decision). In the course of its decision, given on 16 May 2018, the FTT explained that the landlord had claimed by way of service charge contributions two half-yearly payments of £2,385.01 for each of 2015-2016 and 2016-2017 (or, in total, £9,540.04) and that Mr Al-Balhaa had disputed a number of elements of the service charge accounts, including £23,604 for legal fees. The FTT decided that only £2,000 of the legal fees were properly allowable and concluded its decision as follows under the heading “DETERMINATION”:

“1. The figure of £21,604 in respect of legal costs is disallowed in the final service charge accounts for 2015-16. Otherwise nothing is disallowed.

2. Nothing is disallowed in the service charge demands on account in 2016-2017.

3. The landlord shall reimburse the tenant £200 in respect of the fees payable to the Tribunal.
4. The Tribunal refuses to make an order under section 20C of the Landlord and Tenant Act 1985 or a costs order under rule 13 of the Tribunal's Procedure Rules."
5. On 9 August 2018, Termhouse applied to the County Court at Willesden for the FTT's decision to be enforced pursuant to CPR 70.5. The application, which was made using practice form N322A, identified "The amount of the decision" as £9,196.54 and left blank a box for "Less amount paid". After adding a Court fee of £44 and solicitor's costs of £75.50, the "Total now owing" was given as £9,316.04.
6. On 25 September 2018, a "Proper Officer sitting at the County Court at Willesden" ordered that Termhouse "may enforce the award in this court" and specified the "amount enforceable" as £9,316.04.
7. On 22 October 2018, Mr Al-Balhaa applied for the 25 September order to be set aside. In a witness statement made in opposition to that application, Mr Reece Wheeldon of Termhouse's solicitors explained how the £9,316.54 figure had been arrived at. He said that, since Mr Al-Balhaa's contribution to Clarendon Court service charges is set by his lease at 1.59%, the amount that fell to be deducted from his service charges as a result of the FTT's disallowance of legal fees of £21,604 was "1.59% x £21,604 = £343.50". On that basis:

"the Claimant sought to enforce the award of the FTT in the sum of £9540.04 - £343.50 = £9197.04. In addition to that sum the Claimant also sought its costs of seeking to enforce the award being £44.00 (the court fee) and £75.00 (being fixed legal costs) = £9,316.54."
8. (I observe in passing that Mr Wheeldon's arithmetic has gone slightly awry. £9,540.04 minus £343.50 is £9,196.54 and the total when sums of £44 and £75 are added is £9,315.54, not £9,316.54. However, the amount deemed enforceable in the 25 September order was £9,316.04 and that accurately represented the aggregate of £9,196.54, £44 and the "solicitor's costs" of £75.50.)
9. District Judge Kanwar dismissed Mr Al-Balhaa's application on the papers on 27 September 2019, but Mr Al-Balhaa appealed. His appeal came before Her Honour Judge Baucher, sitting in the County Court at Central London, who, however, dismissed it. Mr Al-Balhaa now challenges Judge Baucher's decision in this Court.

### **The legal framework**

10. Section 27A of the 1985 Act, pursuant to which Mr Al-Balhaa made his application to the FTT, provides:

"(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

  - (a) the person by whom it is payable,

- (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- ...
- (4) No application under subsection (1) or (3) may be made in respect of a matter which—
- (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment ....”

11. Preceding sections of the 1985 Act impose restrictions on the service charges which can be claimed from tenants. Thus, by section 19(1), costs can be taken into account in determining the amount of a service charge “only to the extent that they are reasonably incurred” and, “where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard” and “the amount payable shall be limited accordingly”. As Lewison LJ said of section 19(1) in *Point West GR Ltd v Bassi* [2020] EWCA Civ 795, [2020] 1 WLR 4102 (“*Point West*”), at paragraph 8, “the 1985 Act overlays the lessee’s contractual liability by the imposition of a cap”. Other limitations on service charge claims are to be found in, for example, section 20B (setting a time limit on service charge demands), section 21A (allowing a tenant to withhold payment of a service charge if the landlord has failed to supply information or a report in accordance with section 21) and section 21B (allowing a tenant to withhold payment of a service charge if a demand for it was not accompanied by the requisite summary of the rights and obligations of tenants).
12. Section 27A of the 1985 Act was inserted into it by the 2002 Act. As amended in 2013, the 2002 Act also provides, by section 176A, that, where Court proceedings raise a question which the FTT would have jurisdiction to determine under, among others, the 1985 Act, the Court may transfer to the FTT “so much of the proceedings as relate to the determination of that question” and, by section 176A(3), once the FTT “has determined the question, the court may give effect to the determination in an

order of the court”. When first enacted, the 2002 Act similarly provided, by paragraph 3 of schedule 12, for transfers to the leasehold valuation tribunal, the FTT not yet having been established.

13. Paragraph 3 of schedule 12 to the 2002 Act and, now, section 176A(3) of that Act find an echo in section 81(5A) of the Housing Act 1996 (“the 1996 Act”), which was first added to the 1996 Act by the 2002 Act. In its present form, section 81, headed “Restriction on termination of tenancy for failure to pay service charge”, provides:

“(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless—

(a) it is finally determined by (or on appeal from) the appropriate tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or

(b) the tenant has admitted that it is so payable.

...

(5A) Any order of a court to give effect to a determination of the appropriate tribunal shall be treated as a determination by the court for the purposes of this section ....”

A landlord may not, accordingly, seek to forfeit for a tenant’s failure to pay a service charge unless it has been “finally determined ... that the amount of the service charge ... is payable by him, or ... the tenant has admitted that it is so payable” and a Court order “to give effect to a determination” of the FTT is to be treated as a determination of the Court for this purpose.

14. Another section of the 2002 Act, section 176C, is central to the issues on this appeal. Section 176C reads:

“Any decision of the First-tier Tribunal or Upper Tribunal under or in connection with an enactment specified in section 176A(2), other than a decision ordering the payment of a sum (as to which see section 27 (enforcement) of the Tribunals, Courts and Enforcement Act 2007), is to be enforceable with the permission of a county court in the same way as orders of such a court.”

15. The 1985 Act is one of the enactments specified in section 176A(2) of the 2002 Act. Section 27 of the 2007 Act, which is also mentioned in section 176C of the 2002 Act, states in sub-section (1):

“A sum payable in pursuance of a decision of the First-tier Tribunal or Upper Tribunal made in England and Wales—

- (a) shall be recoverable as if it were payable under an order of a county court in England and Wales;
- (b) shall be recoverable as if it were payable under an order of the High Court in England and Wales.”

16. Finally, it is relevant to refer to CPR Part 70 and one of the Practice Directions supplementing it. CPR 70.5, headed “Enforcement of decisions of bodies other than the High Court and the County Court and compromises enforceable by enactment”, is in these terms:

“(1) This rule applies, subject to paragraph (2), where an enactment provides that—

- (a) a decision of a court, tribunal, body or person other than the High Court or the County Court; or
- (b) a compromise,

may be enforced as if it were a court order or that any sum of money payable under that decision or compromise may be recoverable as if payable under a court order.

...

(2A) Unless paragraph (3) applies, a party may enforce the decision or compromise by applying for a specific method of enforcement under Parts 71 to 73, 81, 83, 84, and 89, and Schedule 2 CCR Order 28 and must—

- (a) file with the court a copy of the decision or compromise being enforced; and
- (b) provide the court with the information required by Practice Direction 70A.

(3) If an enactment provides that a decision or compromise is enforceable or a sum of money is recoverable if a court so orders, an application for such an order must be made in accordance with paragraphs (4) to (7A) of this rule.

(4) The application—

- (a) may, unless paragraph (4A) applies, be made without notice; and
- (b) must be made to the court for the district where the person against whom the order is sought, resides or carries on business, unless an enactment, rule or practice direction provides otherwise or the court otherwise orders.

...

- (5) The application notice must—
  - (a) be in the form; and
  - (b) contain the information required by Practice Direction 70A.
- (6) A copy of the decision or compromise must be filed with the application notice.
- (7) An application other than in relation to a conditional compromise may be dealt with by a court officer without a hearing ....”

17. Practice Direction 70A provides so far as relevant:

- “4.2 An application under rule 70.5(3) for an order to enforce a decision or compromise must be made by filing an application notice in practice form N322A.
- 4.3 The application notice must state—
  - (a) the name and address of the person against whom the order is sought;
  - (b) how much remains unpaid or what obligation remains to be performed; and
  - (c) where the application relates to a conditional compromise, details of what under the compromise the applicant is required to do and has done under the compromise in addition to discontinuing or not starting proceedings.”

### **The judgment**

- 18. Mr Al-Balhaa’s submissions to Judge Baucher raised three main issues. We are now concerned with only one of them: whether the FTT’s decision was susceptible to enforcement in the County Court.
- 19. In that connection, Judge Baucher noted in paragraph 26 of her judgment that the FTT decision “was not an award whereby [Termhouse] could seek to use the operative provision of S27 of the Tribunals, Courts and Enforcement Act 2007”. However, Judge Baucher concluded in paragraph 29 that Termhouse was “entitled to use S176C [of the 2002 Act] and CPR 70.5 to enforce the decision and to hold otherwise would make the section otiose and override the clear intention of its operation”. She observed in paragraph 29 that “[t]he determination by the FTT was a ‘decision’ not an award” and that “[t]he statute refers to ‘any decision’ which clearly encompasses the determination [the FTT] made in this case”.

## **The parties' positions**

20. Mr Timothy Cowen, who appeared for Mr Al-Balhaa, argued that Judge Baucher was mistaken in thinking that section 176C of the 2002 Act was applicable and that, even if it was, CPR 70.5 did not apply. He suggested that decisions of Courts and Tribunals can be divided into three categories. In the first place, a Court or Tribunal might order someone to make a payment. Where the FTT does so (for instance, by way of costs order), Mr Cowen said, enforcement is possible under section 27 of the 2007 Act. Secondly, a Court or Tribunal might order someone to do, or to refrain from doing, something other than make a payment. In the case of an FTT decision to that effect, Mr Cowen said, section 176C of the 2002 Act would be available. That, he said, would be the position if, for example, the FTT ordered a landlord to nominate or approve an insurer pursuant to paragraph 8 of schedule 1 to the 1985 Act. Thirdly, a decision might be declaratory in nature. Where that is so, Mr Cowen said, neither section 176C of the 2002 Act nor section 27 of the 2007 Act will be in point, and the FTT decision at issue in the present case was of this type. It did not require Mr Al-Balhaa either to make a payment or to do or refrain from doing anything else. In the alternative, Mr Cowen submitted that, even if section 176C could apply, CPR 70.5 could not be used, or at any rate that resort could not be had to it without prior permission from the County Court.
21. For his part, Mr Jonathan Wragg, who appeared for Termhouse, supported Judge Baucher's decision. Although, he submitted, the FTT decision was not one "ordering the payment of a sum" (to quote section 176C of the 2002 Act) and therefore outside the scope of section 27 of the 2007 Act, it did serve to determine how much was outstanding from Mr Al-Balhaa and so could appropriately be enforced under section 176C. In fact, Mr Al-Balhaa had himself asked the FTT to decide whether "there are any service charges outstanding", and he had not suggested that he was confused as to the implications of the FTT's decision or how the £9,316.04 held to be enforceable had been calculated. Mr Wragg further argued that, section 176C being in point, so was CPR 70.5.

## **Discussion**

22. Section 176C of the 2002 Act allows a decision of the FTT other than one ordering the payment of a sum to be enforced "in the same way as orders of [the County Court]". Plainly, a County Court order which was merely declaratory in nature could not be the subject of enforcement. It must follow that an FTT decision which is no more than declaratory is similarly incapable of enforcement and that section 176C cannot be invoked in such a case.
23. Is, then, a decision of the FTT on an application under section 27A of the 1985 Act just declaratory? Arguing to the contrary, Mr Wragg submitted that the jurisdiction of the FTT under section 27A extends to deciding what the tenant owes. He pointed to the fact that section 27A provides for the FTT to determine whether a service charge is "payable" and told us that the FTT sometimes specifies in terms what is outstanding from the tenant. He sought support for his contentions in section 81 of the 1996 Act, which bars a landlord from forfeiting for non-payment of a service charge unless it has been finally determined that the amount is "payable" or the tenant has admitted that that is so. In that context, Mr Wragg said, "payable" must mean "due". A sum cannot be said to be "payable", Mr Wragg suggested, if it has already been paid.

24. However, the terms of section 27A of the 1985 Act make it impossible to equate “payable” with “due”. Subsection (2) provides for subsection (1) to apply “whether or not any payment has been made”. Where there has been payment, the FTT will necessarily be considering, not whether there is an outstanding liability, but how much could be charged by way of service charge. That the role of the FTT is to decide what service charges can be charged rather than what the tenant owes is also indicated by subsection (4), prohibiting any application in respect of a matter which has been agreed or admitted by the tenant.
25. Section 19 of the 1985 Act points in the same direction. That limits the amount “payable” in respect of a service charge on the basis of reasonableness. Plainly, “payable” refers there to what can be charged.
26. Nor is section 81 of the 1996 Act inconsistent with that view of section 27A of the 1985 Act. “Payable” can be expected to have the same meaning in the two provisions, but it cannot be inferred that the word “payable” signifies “due” in section 81. If “payable” means “properly charged” in sections 81 and 27A alike, a landlord will be unable to seek to forfeit for non-payment of a service charge without a prior determination that the service charge was legitimately levied but there need have been no determination that the service charge was due. In such a case, however, it will be open to the tenant to dispute that anything is outstanding (say, because he has paid or has a set-off) in forfeiture proceedings. It is noteworthy here that section 2 of the Protection from Eviction Act 1977 makes it an offence to enforce a right of re-entry or forfeiture “otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them”.
27. This analysis of section 27A of the 1985 Act is supported by *Cannon v 38 Lambs Conduit LLP* [2016] UKUT 371 (LC). In that case, a service charge demand had not contained the landlord’s name and address as required by section 47 of the Landlord and Tenant Act 1987 with the consequence that the amount demanded was “to be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant”. His Honour Judge Bridge, sitting as a Judge of the Upper Tribunal, nevertheless held that the FTT had jurisdiction to make a determination under section 27A in relation to the subject matter of the demand. He said in his decision:

“31. ... Section 27A is intended to provide a low cost, easily accessible machinery for dispute resolution. It is facilitative, enabling parties to resolve whatever their service charge dispute may be by referring the issue to the tribunal. The provision itself is, consistent with this objective, widely drawn. The tribunal is required to consider the provisions of the lease, and then to consider whether ‘a service charge’ is ‘payable’. If it is ‘payable’, then the tribunal may be asked to determine the persons by or to whom it is payable, the amount payable, and (significantly for this case) the date at or by which it is payable. It does not have to be satisfied that the charge is payable here and now (the appropriate word might be ‘due’).

32. Section 47 has a quite different purpose, as I have explained above. That purpose is achieved by requiring the

landlord, as a pre-condition to successful enforcement of the service charge, to provide the tenant with his name and address in writing. Unless and until that is done, then the charge is not 'due'. But it does not follow that where the charge is not due, the F-tT cannot consider an application under section 27A. As long as there is a service charge, the F-tT may be asked, and required to answer, the questions that naturally arise. If a demand has been made which does not comply with section 47, but the F-tT takes the view, having considered the application, that the tenant is otherwise obliged to make payment under the service charge, it retains jurisdiction. It may determine that the charge (which it may quantify if required to do so) is payable if and only if a section 47 compliant demand is served by the landlord on the tenant."

28. Mr Wragg sought support for his submissions in *Cain v Islington LBC* [2015] UKUT 542 (LC) ("*Cain*"), *Jarowicki v Freehold Managers (Nominees) Ltd* [2016] UKUT 435 (LC) ("*Jarowicki*") and *Avon Ground Rents Ltd v Child* [2018] UKUT 204 (LC) ("*Avon*"), but I do not think any of these cases helps. In *Cain*, the question was whether an application under section 27A of the 1985 Act was impossible because the tenant had agreed or admitted the service charges so that section 27A(4) applied. That being the issue, the Upper Tribunal necessarily had to consider matters other than whether the service charges had been properly charged. I do not think the decision casts any significant light on the breadth of the FTT's jurisdiction under section 27A.
29. In *Jarowicki*, the FTT had "found that the appellant was liable under his lease to 'pay a proportion' of the service costs but nowhere "state[d] a figure for the amount of service charges payable". For example, as regards two invoices it had said that "only 50% of the appropriate proportion of the cost of these invoices should be applied to the Applicant's service charge account" without quantifying this amount. The Upper Tribunal (Martin Rodger QC, Deputy Chamber President, and A.J. Trott FRICS) concluded in paragraph 17 of its decision:

"The appellant's complaint in his application for permission to appeal was that 'I cannot calculate the true expenses, because all these invoices are confusing'. The FTT itself referred ... to its task having been made difficult by the duplication of invoices and the use of invoices for different developments. When the respondent provided a copy of the documents used at the FTT hearing for the purpose of this appeal it asked for permission to supplement them with a complete set of service charge demands for the period in dispute. In circumstances where the potential for confusion and uncertainty was so great, it was incumbent on the FTT to make clear the answer to the statutory question posed by section 27A(1)(c) by determining the amounts payable as service charges. It should have stated those amounts as absolute figures rather than as percentages or proportions of unspecified sums which it left to the parties to interpret. Its omission to do so is was a breach of its duty to record its decision clearly and to provide proper reasons."

The point was thus that the FTT had failed to make clear what was payable. The Upper Tribunal was not concerned with whether “payable” means “due”.

30. In *Avon*, proceedings in the County Court had been transferred to the FTT, which had made an order in respect of costs incurred in the proceedings on the basis that they were “claimed contractually as administration charges”. The Upper Tribunal (Holgate J and His Honour Judge Hodge QC) allowed an appeal on the basis that “the FTT had no jurisdiction, whether by way of transfer or by way of free-standing application, to deal with the costs which the Appellant had incurred in connection with the proceedings after the issue of the claim in the County Court” (see paragraph 50). As the Tribunal noted in paragraph 61 of its decision, that conclusion made it unnecessary for the Tribunal to address an alternative ground of appeal, to the effect that, supposing the FTT to have had jurisdiction to make the order it did, any enforcement had had to be undertaken via section 176C of the 2002 Act, not section 176A. The Tribunal nevertheless expressed the view, obiter, that the County Court could have given direct effect to the FTT’s determination by virtue of section 176A(3) without anyone needing to invoke section 176C. The point with which the Tribunal was concerned in this respect was thus whether any enforcement would be possible under section 176A rather than section 176C, not whether a section 27A determination is capable of enforcement under section 176C.
31. Mr Cowen accepted that FTT decisions on applications under section 27A of the 1985 Act sometimes state what is due from the tenant rather than just whether the relevant service charges were properly imposed. He queried whether the FTT in truth has jurisdiction to make such decisions, but we do not need to resolve that question. It seems to me that, even assuming that it is open to the FTT to say what a tenant actually owes rather than merely what has properly been charged, such a decision will be no more than declaratory, and in fact I should be surprised if the FTT went so far as to purport to order a tenant to make a payment in respect of outstanding service charges, let alone to require the tenant to do so within any particular time frame. Even, therefore, in a case in which the FTT expresses a conclusion on what the tenant currently owes, the landlord will not be able to resort to either section 176C of the 2002 Act or section 27 of the 2007 Act for enforcement. If needs be, the landlord should issue new proceedings in the County Court in which the FTT’s decision will be binding on the parties.
32. In any event, there is no question of the FTT having attempted to specify what Mr Al-Balhaa owed in the present case. Its determination involved the disallowance of £21,604 of legal costs and the decision that nothing else should be disallowed as regards either 2015-2016 or 2016-2017. Not only did the FTT not try to work out what amount was outstanding from Mr Al-Balhaa on the basis of its conclusions, but it is impossible to do so from the FTT decision alone. Mr Wheeldon has explained in his witness statement that Mr Al-Balhaa bears 1.59% of total service charges, but the FTT decision does not say so.
33. In the circumstances, it seems to me that the FTT decision can no more be enforced under section 176C of the 2002 Act than it can under section 27 of the 2007 Act. It neither orders Mr Al-Balhaa to make any payment nor requires him to do or refrain from doing anything else. It is declaratory in nature and so not susceptible to enforcement pursuant to either section 176C of the 2002 Act or section 27 of the 2007 Act.

34. In the light of that conclusion, I do not need to consider Mr Cowen's alternative arguments on CPR 70.5.

**Conclusion**

35. I would allow the appeal.

**Lord Justice Nugee:**

36. I agree.

**Mr Justice Francis:**

37. I also agree.