Neutral Citation Number: [2022] EWCA Civ 831

Case No: CA-2021-002750

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CLERKENWELL & SHOREDITCH
Deputy District Judge Paul
Claim No C0DE35P1

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2022

Before:

LADY JUSTICE MACUR
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between:

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF TOWER HAMLETS	**Claimant/ Respondent**
- and -	
ALI JIVARAJ KHAN	**Defendant/ Appellant**

- -
- -

Lara Simak (instructed by **OJN Solicitors**) for the **Appellant**
Philip Rainey QC (instructed by **Legal Services, London Borough of Tower Hamlets**) for the **Respondent**

Hearing date: 26 May 2022

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Approved Judgment

Lord Justice Newey:

1. In this appeal, the appellant, Mr Ali Jivaraj Khan, challenges an order for costs made in favour of the respondent, the Mayor and Burgesses of the London Borough of Tower Hamlets ("the Council"), by Deputy District Judge Paul ("the District Judge"), sitting in the County Court at Clerkenwell & Shoreditch. The appeal raises issues as to whether the Council had a contractual right to the costs or, alternatively, was entitled to them pursuant to section 51 of the Senior Courts Act 1981 ("the 1981 Act").

2. Mr Khan holds a long lease of a maisonette at 6 Cambria House, Salmon Lane, London. The lease was granted by the Council on 29 July 2002 for a term of 125 years from 23 May 1988. The Council was then, and remains, the freehold owner of the property.

3. As might be expected, Mr Khan's lease contained provision both for payment of service charges (which, by clause 4(4), were "to be recoverable in default as rent in arrear") and enabling the Council to forfeit in the event of non-payment of rent or breach of covenant (clause 6). Further, by clause 3(9) Mr Khan covenanted:

> "To pay to the Lessors all costs charges and expenses including Solicitors' Counsels' and Surveyors' costs and fees at any time during the said term incurred by the Lessors in or in contemplation of any proceedings in respect of this Lease under Sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof including in particular all such costs charges and expenses of and incidental to the preparation and service of a notice under the said Sections and of and incidental to the inspection of the Demised Premises and the drawing up of Schedules of Dilapidations such costs charges and expenses as aforesaid to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court."

4. On 23 May 2016, the Council issued County Court proceedings against Mr Khan claiming £4,917.07 in respect of service charges. On 2 December 2016, Deputy District Judge Couch made an order under which the claim was transferred to the First-tier Tribunal (Property Chamber) ("the FTT") "to decide upon the reasonableness of the service charge which are claimed in this claim".

5. The matter came on for hearing before the FTT on 27 March 2017, by which time the amount outstanding on the Council's case had apparently fallen to £3,663.78 as a result of payment which Mr Khan had made. In a decision dated 9 May 2017, the FTT determined that the amount claimed by the Council was reasonable. The FTT requested the parties to make any submissions about costs, including any application under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the FTT Rules"), within 10 days, while noting that it had "no jurisdiction over … county court costs". Mr Khan applied for permission to appeal to the Upper Tribunal ("the UT"), but that was refused on 1 December 2017.

6. In the meantime, the Council had applied to the FTT for an order for costs against Mr Khan under rule 13 of the FTT Rules on the ground that he had acted unreasonably in his conduct of the proceedings. That application was heard on 27 March 2018 and, in a

decision dated 8 June 2018, the FTT decided against making any costs order. The FTT said this in paragraphs 19-22 of its decision:

> "19. The Tribunal is satisfied that this is not a case for any award of costs under Rule 13(1)(b).
>
> 20. The UT set out a three-stage test:
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> (i) Has the person acted unreasonably applying an objective standard?
>
> (ii) If unreasonable conduct is found, should an order for costs be made or not?
>
> (iii) If so, what should the terms of the order be?
>
> 21. The Tribunal is satisfied that [Mr Khan] acted unreasonably applying an objective standard. It accepts the arguments of the [Council] that there were no merits in [Mr Khan's] arguments, and that his actions in seeking adjournments, not attending the hearing, appealing, and writing long and complex letters in connection with what was a simple service charge case was unreasonable behaviour. At no stage was anything that resembled a coherent defence to the [Council's] claim presented to the tribunal. This was despite the [Council], and the tribunal giving [Mr Khan] every chance to make his case.
>
> 22. However, in the particular circumstances of the case, taking into account the particular disabilities and behavioural characteristics of [Mr Khan], and his genuine if misguided belief in the justice of his cause, the Tribunal considers that no order for costs under rule 13 should be made."

7. Mr Khan sought permission to appeal the FTT's decision, but this was refused by the UT on 2 October 2018.

8. On 2 November 2018, the Council issued an application in the County Court for a costs order in its favour. The application notice explained:

> "The Claimant seeks to recover its contractual costs of £23,802.80 under the terms of the Lease and pursuant to CPR 44.5 and judgment directly from the Defendant as the costs in the 'FTT' were incidental to the service of a section 146 notice. The Claimant will say that the effect of clause 3(9) is the creation of a contractual obligation; this should be construed to permit the recovery of costs on an indemnity basis. The need to sue a leaseholder in the County Court was the first step to forfeiting a residential lease and, therefore, is clearly incidental to forfeiture.

> The jurisdiction to award costs falls under s.51 of the Senior Courts 1981 Act and had not been conferred on the FTT. Furthermore, because s.176A of the Commonhold & Leasehold Reform 2002 Act does not authorise the County Court to transfer an issue falling within that jurisdiction to the FTT, the matter of costs was never transferred. The only questions which the FTT would have had the jurisdiction to determine are those enactments specified in s.176A (2). These do not include the determination of the costs of the instant proceedings in the County Court since such costs fall to be determined under s.51 of the 1981 Act, which is not specified in s.176A(2)."

9. Ms Genevieve Ikenchukwu of the Council made two witness statements in support of its application. In each, she said, "Not only are costs contractual, but the award of costs on an indemnity basis is the equitable decision in the extant circumstances". Ms Ikenchukwu exhibited to her second statement the Council's statement of case in support of its rule 13 application to the FTT. The statement of case, which was dated 1 June 2017 and verified by a statement of truth, cited clause 3(9) of Mr Khan's lease and continued:

> "15. On the 10th May 2016, Judge and Priestly Solicitors … sent to [Mr Khan] a letter before action … indicating their notice of intention to issue proceedings and resulting from these proceedings, to issue a Notice pursuant to s146 of the Law [of] Property Act 1925.
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> 16. The letter further affirms [the Council's] position and reminds [Mr Khan] that any costs incurred as a result of any proposed proceedings will be a cost of and incidental to the preparation of such notice.
>
> 17. The [Council] avers that any costs incurred from the 10th May 2016 were incidental and in contemplation to the issuing of the s146 notice thus should be awarded to the [Council] in this respect."

10. The Council's application was heard by the District Judge on 28 January 2019. The Council was represented by junior counsel. Mr Khan appeared in person.

11. The Council's counsel had prepared a skeleton argument. This explained in paragraph 12 that the Council "relies upon clause 3(9) of the Lease to recover the legal costs directly from [Mr Khan] as the costs in the FTT were 'incidental' to the service of a section 146 notice". The author went on in paragraph 16:

> "[The Council] avers that the effect of clause 3(9) is the creation of a contractual obligation; this should be construed to permit the recovery of costs on an indemnity basis. The need to sue a leaseholder in the county court is the first step to forfeiting a residential lease and, therefore, is clearly incidental to forfeiture as per *Freeholders of 69 Marina*. Even though the operative clause in *Freeholders of 69 Marina* allowed costs to be

> recovered where they were also in contemplation of forfeiture, the Court of Appeal allowed the contractual costs as the proceedings were incidental to forfeiture. There was no requirement in that instance to show that the landlord had contemplated forfeiture."

12. The Council's counsel is recorded as saying the following in the course of his submissions at the hearing:

> "'Incidental' means, effectively, those costs that have been incurred in County Court or in the FTT because … , by virtue of getting a judgment, that is for costs of service charges, that is a condition precedent to us serving a 146 Notice"
>
> "Now, if you were particularly interested, the latest decisions have drawn a distinction between contemplation and incidental to forfeiture. So, … we do see some leases to say, 'You can only recover your costs which are in contemplation of 146 Notices', then you would have to, at the outset, prior to the issuance of proceedings have set-out in some correspondence that you are ultimately going to seek to forfeit the lease and that this is a condition precedent to that, which is slightly more onerous for landlords than a clause which includes incidental to because where they are incidental, you don't need to establish and state of [inaudible], they are simply incidental to forfeiture …."

13. The District Judge ordered Mr Khan to pay £3,663.78 plus interest in respect of outstanding service charges and also to pay the Council's costs assessed summarily at £20,000. He concluded in the first of two ex tempore judgments:

> "19. I am only dealing with the fact that up until today, costs have been incurred in pursuing first of all the original claim, then having it dealt with in the First-tier Tribunal, then in responding to the application for an appeal that was dealt with in December last year, then another application to appeal that was lodged in October of last year.
>
> 20. Those are costs which London Borough of Tower Hamlets pursues with reference to responsibility to do so, primarily on behalf of the other Council Tax payers in that Borough but also as a public authority in respect of tax payers generally.
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> 21. It is quite plain from the way in which the law is structured, that those costs are recoverable and therefore the only question I have to resolve today … is if those costs are recoverable in law, is how much, and that is my decision."

In his second judgment, the District Judge said that he accepted that costs should be awarded on an indemnity basis, but nevertheless said that he had to have regard to overall proportionality. He held that £20,000 would be a proportionate sum.

14. Mr Khan applied for permission to appeal and, on 9 July 2020, he was granted it by His Honour Judge Roberts, sitting in the County Court at the Mayor's & City of London Court. Judge Roberts further directed that the appeal should be transferred to this Court.

15. When the matter came on before us, Mr Khan was advancing three grounds of appeal. They can be summarised as follows:

    i) The decision of the Court of Appeal in *Freeholders of 69 Marina, St Leonards-on-Sea v Oram* [2011] EWCA Civ 1258, [2012] L&TR 4 ("*69 Marina*") was wrong and should not be followed or, alternatively, should be confined to its particular facts;

    ii) The Council's costs of the proceedings in the County Court and FTT were not "incidental to the preparation and service of a notice under [sections 146 and 147 of the Law of Property Act 1925]" within the meaning of clause 3(9) of Mr Khan's lease; and

    iii) Neither was the Council entitled to recover its costs on the footing that they were incurred "in contemplation of" proceedings under sections 146 and 147 of the Law of Property Act 1925 ("the LPA") within the meaning of clause 3(9) of Mr Khan's lease.

    Early in her oral submissions, however, Ms Lara Simak, who appeared for Mr Khan, abandoned the last of these grounds.

16. The Council, as well as taking issue with Mr Khan's grounds of appeal, filed a respondent's notice in which it contended that the District Judge's decision should be upheld for the following additional or alternative reasons:

    i) Had Mr Khan properly sought to challenge before the District Judge the factual basis of the Council's claim that the costs of the FTT proceedings were "in contemplation of" forfeiture, the Council would have referred to a letter of claim dated 10 May 2016 which expressly referred to forfeiture;

    ii) Regardless of whether Mr Khan was entitled to contractual costs under clause 3(9) of Mr Khan's lease, it was entitled to its costs, including those of the FTT phase of the proceedings, pursuant to section 51 of the 1981 Act and CPR Part 44;

    iii) The Judge's decision to award indemnity costs was justifiable on the alternative ground that Mr Khan had been found by the FTT to have behaved unreasonably in challenging the service charge claim; and

    iv) This Court should, if necessary, re-exercise the costs discretion in favour of the Council.

17. Issues thus arise as to, first, whether the District Judge was right to order Mr Khan to pay the Council's costs pursuant to clause 3(9) of his lease and, secondly, whether the

Council should anyway have been awarded, or should now be awarded, its costs under section 51 of the 1981 Act.

18. In the event, the Council has not served any notice under section 146 of the LPA on Mr Khan. It has instead applied for a charging order over Mr Khan's lease.

Relevant legislative provisions

19. Section 146 of the LPA bars a landlord from forfeiting for breach of covenant without prior service of a notice. However, section 146(11) states that the section does not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

20. Since 1996, it has not been possible for a landlord of premises let as a dwelling to forfeit for non-payment of service charge without the tenant's liability being either admitted by the tenant or established in Tribunal, Court or arbitral proceedings. In its current form, the material provision, section 81(1) of the Housing Act 1996 ("the 1996 Act"), reads:

> "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."

Subsection 4A, inserted by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), explains that references in the section to the exercise of a right of re-entry or forfeiture include the service of a section 146 notice.

21. Section 176A of the 2002 Act empowers the Court to transfer to the FTT a question which the latter would have jurisdiction to determine under, among other legislation, section 27A of the Landlord and Tenant Act 1985, which provides for applications to be made to the FTT to determine whether a service charge is payable. Section 176A(1) states:

> "Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—
>
> (a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question;
>
> (b) may then dispose of all or any remaining proceedings pending the determination of that question by the First-tier

> Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal, as it thinks fit."

There was a similar power to transfer part of proceedings to the Leasehold Valuation Tribunal ("the LVT"): see paragraph 3 of schedule 12 to the 2002 Act.

22. Section 51 of the 1981 Act gives Courts a discretion in relation to the costs "of and incidental" to proceedings in them. Section 51(1) provides:

> "Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
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> (a) the civil division of the Court of Appeal;
>
> (b) the High Court;
>
> (ba) the family court; and
>
> (c) the county court,
>
> shall be in the discretion of the court."

23. CPR 44.2 states that, where the Court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the Court may make a different order. By CPR 44.5, where the Court assesses costs payable under the terms of a contract:

> "the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which—
>
> (a) have been reasonably incurred; and
>
> (b) are reasonable in amount,
>
> and the court will assess them accordingly."

24. Turning to the position as regards Tribunal proceedings, section 29 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") states:

> "(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."

25. Under the FTT Rules, however, there are only limited circumstances in which the FTT can make an adverse costs order. Rule 13 of the FTT Rules allows the FTT to make such an order against a party only if the person "has acted unreasonably in bringing, defending or conducting proceedings".

The contractual claim: clause 3(9) of the lease

26. It is the Council's case that clause 3(9) of Mr Khan's lease gave it a contractual right to the costs which the District Judge ordered Mr Khan to pay. It contends that the costs were "incidental to the preparation and service of" a notice under section 146 of the LPA or, alternatively, that they should be held to have been incurred "in contemplation of" forfeiture proceedings.

Authorities

27. We were referred to various cases in which issues have arisen in relation to provisions comparable to clause 3(9) of Mr Khan's lease.

28. The earliest of them was *Contractreal Ltd v Davies* [2001] EWCA Civ 928 ("*Contractreal*"). In that case, a landlord claimed to be entitled to its costs of proceedings it had brought in the County Court in compliance with section 81 of the 1996 Act for a declaration as to the amount of service charge payable by the tenant. The lease contained an undertaking by the tenant to pay:

> "all costs (including solicitors' costs and surveyors' fees) incurred by the landlord of and incidental to the preparation and service of: —
>
> (i) a notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by order of the court
>
> (ii) a schedule of dilapidations recording the breaches of the tenant's covenant to yield up the flat in repair of the termination of the term hereby granted or
>
> (iii) proceedings for the recovery of any of the rents reserved".

29. One of the landlord's contentions in *Contractreal* was that the costs at issue were incidental to future proceedings for the recovery of rent. The Court of Appeal rejected that submission. Arden LJ gave several reasons. First, she said in paragraph 36:

> "if the whole of the costs were costs incidental to the costs of the preparation and service of proceedings for the recovery of rent it would be, as it seems to me, a case of the tail wagging the dog. Normally the natural meaning of the word 'incidental' is to denote a lesser or subordinate sum, whereas on this argument the incidental costs are a very substantial sum indeed."

Secondly, Arden LJ, having cited *Wright v Bennett* [1948] 1 QB 601, *Department of Health v Envoy Farmers Ltd* [1976] 1 WLR 1018, *Aiden Shipping Co Ltd v Interbulk Ltd* [1985] 1 WLR 1222 (reversed on other grounds: [1986] AC 965) and *In re Llewellin*

(1887) 37 Ch D 317, said in paragraph 41 that the authorities "show that the expression 'of and incidental to' is a time-hallowed phrase in the context of costs and that it has received a limited meaning, and in particular that the words 'incidental to' have been treated as denoting some subordinate costs to the costs of the action". Lastly, Arden LJ observed as follows in paragraph 42:

> "Next, there have not yet been, and indeed may never be, any proceedings for the recovery of rent to which such costs would be incidental. Finally, in the particular context of this clause I note that the expression is 'of and incidental to the preparation and service of proceedings for the recovery of any rents and any of the rents reserved'. It would, it seems to me, be odd if the effect of the clause is that the costs of the whole of the proceedings under section 81, claimed to be £21,000 or more, could be recovered from the tenants, but only a much narrower category of costs could be claimed under this clause in respect of the proceedings for recovery of rent themselves, namely the costs of and incidental to the preparation and service of those proceedings."

30. The landlord also argued in *Contractreal* that it was entitled to its costs of the existing proceedings because no section 146 notice could be served without section 81 of the 1996 Act first being complied with and so the proceedings were "incidental" to the service of such a notice. As to that, however, Arden LJ said in paragraph 45:

> "The difficulty with this argument is that section 146(11) makes it clear that in these circumstances (that is, non-payment of rent) a notice under section 146 is not required. There will be no intention by the landlord to serve such a notice. In all the circumstances, it seems to me that that part of the clause cannot apply."

31. For his part, Wright J, the other member of the Court, said in paragraph 68:

> "I agree with my Lady that the charging clause in the lease, even with the limited effect that I agree with her it has, has no impact on the landlord's entitlement to costs in this action. The costs incurred were not 'of and incidental to' the preparation and service of a section 146 notice, since no such notice was necessary to support a claim for forfeiture in the circumstances of this case, the service charges in the lease having been expressly reserved as rent by the terms of the lease. Nor, in my judgment, were these costs of and incidental to a claim for recovery of the rent reserved. The proceedings launched by the claimant in this action were expressly related to the new requirement imposed upon landlords by section 81 of the Housing Act 1996, which is a requirement governing the right not of the recovery of rent but of re-entry or forfeiture."

32. The next case to which we were taken was *69 Marina*. Clause 3(12) of the lease in question there required the tenant to pay:

> "all expenses including solicitors' costs and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147 of the Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court and … all expenses including solicitors' costs and surveyors' fees incurred by the Landlord of and incidental to the service of all notices and schedules relating to wants of repair of the premises".

The landlords brought proceedings in the LVT to determine the tenants' liability for service charge and, the tenants having failed to pay the sums found due, issued a County Court claim. The tenants denied liability for the landlords' costs on, among others, the grounds that "the service charge was recoverable as rent so that s.146 is not in point" and costs which the landlord incurred in the LVT were "not incidental either to: (a) the preparation and service of a s.146 Notice; or (b) to the service of notices and schedules relating to wants of repair": see paragraph 16. The landlords, however, claimed "all the costs against the Lessees under cl.3(12) as costs incidental and preparatory to the service of the s.146 Notice or notices and schedules relating to wants of repair" (see paragraph 17), and Morritt C, with whom Hooper and Rafferty LJJ agreed, said in paragraph 18 that he preferred the landlords' submissions. In the first place, Morritt C held that the landlords could not forfeit for non-payment of service charge without first serving a section 146 notice. He explained in paragraph 18 that section 18 of the 1996 Act and section 168 of the 2002 Act each "requires or recognises that even when so determined the enforcement of that liability is subject to the provisions of s.146 even if the lease treats it as an additional rent recoverable as such". Secondly, Morritt C said in paragraph 20:

> "In those circumstances the district judge was right to have concentrated on the terms of cl.3(12). Liability under that covenant extends to:
>
> > "(a) expenses … incurred by the landlord … in or in contemplation of proceedings under s.146 … ; and
> >
> > (b) … all solicitors costs … incurred by the landlord of and incidental to the service of all notices and schedules relating to wants of repair … ."
>
> Given that the determination of the tribunal and a s.146 Notice are cumulative conditions precedent to enforcement of the Lessees' liability for the Freeholders' costs of repair as a service charge it is, in my view, clear that the Freeholders' costs before the tribunal fall within the terms of cl.3(12). If and insofar as any of them may not have been strictly costs of the proceedings they appear to have been incidental to the preparation of the requisite notices and schedules."

33. In *Barrett v Robinson* [2014] UKUT 322 (LC), [2015] L&TR 1, Martin Rodger QC, the Deputy President of the Upper Tribunal (Lands Chamber), noted in paragraph 55

that, before the Court of Appeal's decision in *69 Marina*, it had "been understood that it was not necessary to serve a s.146 notice as a prelude to proceedings to forfeit a lease for non-payment of a service charge reserved as rent" and so that "the costs of proceedings under s.81 of the 1996 Act or s.27A of the 1985 Act could not properly be regarded as being incidental to or in contemplation of the service of a notice under s.146". However, *69 Marina*, the Deputy President said in paragraph 55, was now "high authority that s.81 of the 1996 Act requires that the enforcement by forfeiture of a tenant's obligation to pay a service charge is subject to the provisions of s.146 of the 1925 Act, even if the lease treats the service charge as an additional rent recoverable as such".

34. Even so, the Deputy President concluded that the lease at issue in *Barrett v Robinson* did not enable the landlord to claim the costs of an application which the tenant had made to the LVT under section 27A of the 1985 Act. While, the Deputy President said in paragraph 45, "a determination under s.81 would have been a necessary prelude to service of a s.146 notice, and … a determination under s.27A of the 1985 Act of the amount of the service charge would equally have satisfied the requirements of s.81", there was "no evidence whatsoever that the [landlord] contemplated proceedings for the forfeiture of the [tenant's] lease or the service of a notice under s.146 as a preliminary to such proceedings": paragraph 53. Clause 4(14), the material lease provision, obliged the tenant to pay:

> "all reasonable costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court".

"Costs will only be incurred in contemplation of proceedings, or the service of a notice under s.146", the Deputy President said in paragraph 52, "if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure": "[a] landlord which does not *in fact* contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as cl.4(14) as providing a contractual right to recover its costs". In paragraph 51, the Deputy President said:

> "For costs to be recoverable under cl.4(14) a landlord must show that they were incurred in or in contemplation of proceedings, or the preparation of a notice, under s.146. Sometimes it will be obvious that such expense has been incurred, as when proceedings claiming the forfeiture of a lease are commenced, or a notice under s.146 is served. In other circumstances it will be less obvious."

35. In *Willens v Influential Consultants Ltd* [2015] UKUT 0362 (LC) ("*Willens*"), the question was whether a landlord was entitled to the costs of FTT proceedings relating to service and administration charges under clause 3(13) of the lease, which provided for the tenant to bear "all expenses including solicitor's costs and disbursements and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in

contemplation of proceedings under sections 146 or 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court". On the evidence, the Deputy President said in paragraph 14 that he was "entirely satisfied that service of a notice under section 146 and, if necessary, proceedings for the forfeiture of [the tenant's] lease, were clearly in the contemplation of [the landlord] at the time it incurred the expenditure on legal fees which the FTT found was recoverable as an administration charge under clause 3(13)". The Deputy President went on, "[t]he only issue raised by [the tenant] was whether [the landlord] had the necessary contemplation and I am satisfied that it did".

36. *No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119, [2022] L&TR 10 ("*No.1 West India Quay*") concerned a clause in a lease providing for the tenant to pay costs incurred by the landlord "under or in contemplation of any proceedings under Sections 146 or 147 of the Law of Property Act 1925 by the Lessor in the preparation or service of any notice thereunder respectively and arising out of any default on the part of the Lessee notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court". The FTT found on the facts that the landlord had had no intention of forfeiting, but it was argued on behalf of the landlord that that was irrelevant. The Court of Appeal did not accept this. Henderson LJ, with whom Underhill and Dingemans LJJ agreed, rejected at paragraph 53 a submission that *Barrett v Robinson* had been wrongly decided and said in paragraph 57:

> "The words 'in contemplation of any proceedings' in clause 3.10.1 do in my view require an investigation of the landlord's state of mind at the time when the costs were incurred, although any intention formed at that stage to serve a section 146 notice will of necessity be contingent upon the conditions of section 81 of the 1996 Act being satisfied."

37. Henderson LJ thought *69 Marina* "clearly distinguishable" (paragraph 57) and also said this in paragraph 56 about that case:

> "I would add that the decision of this court in *69 Marina* has proved controversial, but not on the point with which we are now concerned. The controversial proposition, which this court endorsed in *69 Marina* without having been referred to earlier Court of Appeal authority which arguably cast doubt on it, was that the enforcement by forfeiture of a tenant's obligation to pay a service charge is subject to the provisions of section 146 of the 1925 Act, even if the lease treats the service charge as an additional rent recoverable as such: see the decision of the Deputy President in *Barrett v Robinson* at [55] and [56]."

38. The last case to mention is *Kensquare Ltd v Boakye* [2021] EWCA Civ 1725 ("*Kensquare*"). That involved a clause in a lease under which the tenant was to pay "all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of … the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court". I concluded, in paragraph 43 of a judgment with which Stuart-Smith and Andrews LJJ expressed agreement, that "read naturally, those words are quite wide enough to apply to the costs of the FTT

proceedings which [the landlord] had no choice but to bring if it wished to serve a section 146 notice". "The parties to the lease", I said, "agreed that the tenant should bear costs incurred for the purpose of the service of a section 146 notice, and the costs which [the landlord] incurred in the 2017 FTT proceedings fit that description".

Is 69 Marina *binding?*

39. As was pointed out by the Deputy President in *Barrett v Robinson* and by Henderson LJ in *No. 1 West India Quay, 69 Marina* has been controversial in so far as it was there held that a section 146 notice must be served before a lease is forfeited for non-payment of service charge even if the lease treats service charge as additional rent. However, Ms Simak did not challenge that aspect of *69 Marina*. Her contention was rather that the Court of Appeal had decided in *Contractreal* that costs incurred in one set of proceedings cannot be recovered as incidental to or otherwise related to other proceedings in the context of lease clauses such as those at issue in *Contractreal* and the present case and that, *Contractreal* not having been cited in *69 Marina*, the latter case was decided per incuriam and should not be followed.

40. In *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718, Lord Greene MR, giving the judgment of the Court, concluded at 729-730 that the Court was bound to follow previous decisions of its own subject only to these exceptions:

> "(1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3.) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

41. Earlier in his judgment, Lord Greene had referred to a case in which the Court of Appeal had declined to follow a previous decision which had been made in ignorance of a provision in the Rules of the Supreme Court, which, as Lord Greene noted at 729, had "statutory force". Lord Greene continued at 729:

> "Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions per incuriam fall outside

> the scope of our inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it - in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point - in such a case a subsequent court is bound by the decision of the House of Lords."

42. In *Morelle Ltd v Wakeling* [1955] 2 QB 379, the Court of Appeal returned to the question of when it was free to depart from a previous decision of the Court. Evershed MR, giving the judgment of the Court, said at 406:

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the judgments were based and to say of it: 'Here was a manifest slip or error.' In our judgment, acceptance of the Attorney General's argument would necessarily involve the proposition that it is open to this court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of counsel could provide. Such a proposition would, as it seems to us, open the way to numerous and costly attempts to re-open questions now held to be authoritatively decided."

43. In the present case, it is not in fact clear that *69 Marina* was decided in ignorance of *Contractreal*. The report we have of the Court of Appeal's decision in *69 Marina* does not purport to list authorities which were cited but to which there was no reference in the judgments. It is not, therefore, possible to say with certainty that the Court was not taken to *Contractreal* in *69 Marina*.

44. The more fundamental point, however, is that there is no necessary inconsistency between *Contractreal* and *69 Marina*. The clauses at issue in *Contractreal* and *69 Marina* differed significantly. In *69 Marina*, costs were recoverable if incurred "incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or … in or in contemplation of proceedings under Section 146 or 147 of the Act" or if "of and incidental to the service of all notices and schedules relating to wants of repair of the premises". In *Contractreal*, the tenant was to meet costs incurred by the landlord "of and incidental to the preparation and service of … a notice under section 146 of the Law of Property Act 1925 … or … proceedings for the recovery of any rents reserved". Unlike the *69 Marina* provision, therefore, that with which the Court was concerned in *Contractreal* omitted any mention of "contemplation", section 146 "proceedings" or "notices and schedules relating to wants of repair", but included a reference to "proceedings for the recovery of any of the rents reserved". Arden LJ made the points I have cited in paragraph 29 above when explaining why the costs in question were not incidental to *the recovery of rent*. Moreover, the specific way in which the *Contractreal* clause was drafted meant, as Arden LJ said in paragraph 42, that it would be "odd if the effect of the clause is that the costs of the whole of the proceedings under section 81, claimed to be £21,000 or more, could be recovered from the tenants, but only a much narrower category of costs could be claimed under this clause in respect of the proceedings for recovery of rent themselves, namely the costs of and incidental to the preparation and service of those proceedings". The *69 Marina* provision gave rise to no similar oddity. On top of that, as discussed further in paragraph 49 below, it is far from clear that Morritt C's conclusions in *69 Marina* depended on his considering any of the relevant costs to have been "incidental" to a section 146 notice. To the extent that Morritt C may have relied on the costs having been "incidental" to anything, he spoke of their "appear[ing] to have been incidental to *the preparation of the requisite notices and schedules*" (emphasis added).

45. In *Kensquare*, I said at paragraph 42 that "comparison with leases which have featured in other cases does not provide a reliable guide to how Ms Boakye's lease is to be construed". In that connection, I quoted among other things the observation of His Honour Judge Bridge, sitting in the UT, in *Sinclair Gardens Investments (Kensington) Ltd v Avon Estates (London) Ltd* [2016] UKUT 317 (LC), at paragraph 21, "Each case is fact-specific, in the sense that what must be construed is the particular clause in the particular lease of the particular property, and conclusions arrived at by previous courts or tribunals in relation to other clauses in other leases of other property are unlikely to be of much assistance". The point has a resonance in the present context. It cannot be taken for granted from the fact that one clause has been held to allow, or not to allow, a landlord to recover a particular category of costs that the same will be true of a differently worded clause.

46. Returning to *Contractreal* and *69 Marina*, I do not accept that any ratio of *Contractreal* was as wide as Ms Simak suggested: it was not decided on the basis that costs incurred in one set of proceedings can never be recovered as related to another set of proceedings. Even assuming, therefore, that *Contractreal* was not cited, it is by no means evident that *69 Marina* would have been determined differently had the Court known of *Contractreal*, and the two cases cannot be regarded as conflicting. In short, I do not accept Ms Simak's contention that we can reject *69 Marina* as having been

decided per incuriam. Neither, however, can what was said in *Contractreal* about the meaning of "incidental" be taken to have been superseded.

Were the costs which the District Judge awarded "incidental to the preparation and service" of a section 146 notice?

47. Mr Philip Rainey QC, who appeared for the Council before us (but not below), argued that the District Judge had been right to conclude that the Council's costs of the County Court and FTT proceedings had been "incidental to the preparation and service of a notice under [section 146 of the LPA]" within the meaning of clause 3(9) of Mr Khan's lease. Mr Rainey accepted that, just as "[t]he words 'in contemplation of any proceedings' … require an investigation of the landlord's state of mind at the time when the costs were incurred" (to quote Henderson LJ in *No.1 West India Quay*), so there must be evidence that the landlord had service of a section 146 notice in mind if costs are to be considered "incidental" to such service. He said, however, that the District Judge had the requisite evidence before him. He relied in this respect on the references in the statement of case mentioned in paragraph 9 above to a letter before action giving notice of "intention to issue proceedings and resulting from these proceedings, to issue a Notice pursuant to s146 of the Law [of] Property Act 1925". He further sought permission to adduce the letter itself, which states, "Please note that in the absence of payment, and following conclusion of the proceedings, it is our Client's intention to prepare and issue a Notice pursuant to S146 of the Law of Property Act 1925 and thereafter seek forfeiture of the lease".

48. Mr Rainey submitted that, having regard to section 81 of the 1996 Act, the Council could not serve a section 146 notice as it had envisaged without first establishing in the County Court/FTT proceedings that there was outstanding service charges and, hence, that the costs it incurred in that litigation were "incidental" to the intended section 146 notice. He relied not only on *69 Marina*, but on subsequent cases dealing with clauses in leases entitling landlords to costs. He suggested that provisions allowing a landlord to recover costs incurred "in contemplation of" a section 146 notice or proceedings mean much the same as clauses permitting recovery of costs "incidental to" such a notice of proceedings.

49. There seem to me, however, to be compelling counter-arguments. In the first place, it simply cannot be assumed that "incidental to" and "in contemplation of" mean the same thing. Regard must be had to the specific language which the parties have chosen to include in the particular lease. Secondly, none of the post-*69 Marina* authorities to which we were referred turned on whether costs had been "incidental to" a section 146 notice or proceedings. The clauses at issue in *Barrett v Robinson* and *No.1 West India Quay* did not include the words "incidental to", *Willens* was decided on the basis that the relevant costs had been incurred "in contemplation of" forfeiture proceedings and, in *Kensquare*, I concluded that the costs in question had been incurred "for the purpose of" a section 146 notice. Thirdly, the words "incidental to" tend to suggest something subordinate. One of the meanings given to "incidental" in the Oxford English Dictionary is "[s]uch as is incurred (in the execution of some plan or purpose) apart from the primary disbursements". In the same vein, Arden LJ observed in *Contractreal* that "the natural meaning of the word 'incidental' is to denote a lesser or subordinate sum" and that, in the context of costs, the expression "of and incidental to" "has received a limited meaning". Finally, *69 Marina* does not seem to me to provide secure support for Mr Rainey's submissions. There is room for argument as to which element

of the material lease provision Morritt C had in mind when he referred in paragraph 20 to costs being "strictly costs of the proceedings", and his reference to any other costs as "appear[ing] to have been incidental to the preparation of the requisite notices and schedules" was conditional, somewhat tentative and capable of being understood as tied to "notices and schedules relating to wants of repair" rather than to the section 146 notice which was served. It is noteworthy that the parts of clause 3(12) of the lease which Morritt C quoted in paragraph 20 of his judgment were "expenses … incurred by the landlord … in or in contemplation of proceedings under s.146" and "all solicitors costs … incurred by the landlord of and incidental to the service of all notices and schedules relating to wants of repair". He was not on the face of it relying on the landlord's entitlement to "solicitors' costs and surveyors' fees incurred … incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925".

50. In the present case, of course, no section 146 notice has been served, and it is, I think, very much open to question whether costs of proceedings can be deemed "incidental" to "the preparation and service of" a section 146 notice when no such "preparation" or "service" has ever taken place. While costs can be incurred "in contemplation of" the service of a section 146 notice without any such notice being prepared or served in the event, the extent to which costs can be considered "incidental" to "the preparation and service" of a notice which is never undertaken strikes me as much more doubtful. In any case, it seems to me that the costs which the Council incurred in its litigation with Mr Khan were too remote from "the preparation and service" of a section 146 notice on Mr Khan to be considered "incidental" to such "preparation and service". To regard the sizeable costs of the proceedings as so "incidental" would, to echo what was said in *Contractreal*, be "a case of the tail wagging the dog".

Is the Council entitled to its costs as incurred "in contemplation of" section 146 proceedings?

51. Mr Rainey submitted that, even if the Council was not entitled to its costs as "incidental to the preparation and service of" a section 146 notice, they were due as "incurred … in contemplation of" section 146 proceedings within the meaning of clause 3(9) of Mr Khan's lease.

52. No such contention was, however, advanced below. The application notice explained that costs were sought on the basis that they were "*incidental* to the service of a section 146 notice" and suing in the County Court was said to be "clearly *incidental* to forfeiture" (emphasis added in each instance). Further, the Council's then counsel stated in his skeleton argument that "the costs in the FTT were 'incidental' to the service of a section 146 notice" and that there was therefore "no requirement … to show that the landlord had contemplated forfeiture". Likewise, come the hearing before the District Judge, the Council's counsel relied on clause 3(9)'s reference to "incidental" rather than on the costs having been incurred "in contemplation of" section 146 proceedings and told the District Judge that that removed the need to show that forfeiture had been in prospect.

53. Nor was it suggested in the Council's respondent's notice before this Court that the District Judge's decision should be affirmed on the footing that the relevant costs had been incurred "in contemplation of" section 146 proceedings. It is true that the respondent's notice said that the Council would have referred to the letter of 10 May

2016 "[h]ad [Mr Khan] sought to challenge before the Court below the factual basis of the [Council's] claim that the costs of the FTT proceedings were 'in contemplation of' forfeiture", but the premise was unfounded: the Council did not claim before the District Judge that the costs of the FTT proceedings were "in contemplation of" forfeiture, and the respondent's notice did not do so directly, either. This part of the respondent's notice appears to have been a response to Mr Khan's third ground of appeal, which he withdrew.

54. It is of course the case that this Court sometimes allows new points to be taken on appeal. The relevant principles have been discussed recently in *Singh v Dass* [2019] EWCA Civ 360 and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146. On the other hand, just as a trial is "not a dress rehearsal" but "the first and last night of the show" (as Lewison LJ pointed out in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29, at paragraph 114), so the hearing of the Council's application before the District Judge was "not a dress rehearsal" and nor was the hearing of Mr Khan's appeal before us. Further, it is at least conceivable that, had the Council contended below that it had incurred the costs it was seeking "in contemplation of" forfeiture proceedings, Mr Khan would have put forward materials suggesting otherwise or at any rate indicating that not all of the costs had been so incurred (say, because there had come a point when the Council had ceased to think in terms of forfeiture). In circumstances, moreover, where the respondent's notice does not positively assert that the District Judge's decision should be affirmed on the new basis of "contemplation", it seems to me that we should decline to allow the Council to run the point.

Conclusion

55. In my view, the District Judge, who it should be said did not have the benefit of extended legal argument such as we heard, was mistaken in accepting that the Council was contractually entitled to the costs of the FTT and County Court proceedings. Contrary to the Council's case, they were not "incidental to the preparation and service of" a section 146 notice within the meaning of clause 3(9) of Mr Khan's lease, and it is not appropriate for us to allow the Council now to contend instead that the costs were incurred "in contemplation of" forfeiture proceedings.

The general discretion as to costs: section 51 of the 1981 Act

56. Mr Rainey argued that, were we to conclude (as I have) that the District Judge's order cannot be sustained by reference to clause 3(9) of Mr Khan's lease, it should stand nonetheless on the strength of the Court's power to make costs orders under section 51 of the 1981 Act.

57. Mr Rainey submitted that the District Judge made his order on the basis of both clause 3(9) of Mr Khan's lease and section 51 of the 1981 Act. I am not myself convinced of that. It is surely much more likely that the District Judge, having accepted that clause 3(9) applied, saw no need to consider what the position would otherwise be. I accept, however, that the Council had cited section 51 in the application notice that was before the District Judge and that it is open to it to rely on section 51 in this Court.

58. That being so, the case for awarding the Council its County Court costs appears to me to be overwhelming. It was the successful party and, for good measure, Mr Khan's

arguments had been found by the FTT to have "no merits". In the circumstances, I think we should uphold the District Judge's order at least to the extent that it relates to the County Court element of the proceedings. There being, however, nothing to take the case "out of the norm" (to quote from the judgment of Lord Woolf CJ in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879, [2002] CP Rep 67, at paragraph 32), the standard basis of assessment should apply.

59. The more difficult question is whether the Council should recover its costs in so far as they relate to the proceedings in the FTT. The Council succeeded there as well, of course, but a very different costs regime applies in the FTT and, here, the FTT was invited to make a costs order in the Council's favour but decided not to do so.

60. In this connection, Mr Rainey relied on the decision of the UT (Holgate J and His Honour Judge Hodge QC, sitting also as Judges of the County Court) in *Avon Ground Rents Ltd v Child* [2018] UKUT 204 (LC), [2018] HLR 44 ("*Avon*"). In that case, a landlord had issued County Court proceedings to recover service and administration charges and, the tenant having paid the service charge arrears, the claim was transferred to the FTT for determination of the liability to administration charges. In its decision, the FTT not only settled how much was payable by way of administration charge, but determined what was due to the landlord in respect of its costs in the County Court and FTT "contractually as administration charges". The UT allowed an appeal on the basis that "the FTT only has jurisdiction in relation to matters properly transferred to it by the county court under s.176A of the 2002 Act; and an award of the costs of legal proceedings under s.51 of the 1981 Act does not fall within the scope of the matters capable of transfer to the FTT under s.176A because that provision is not one of the enactments specified in s.176A(2)": see paragraph 52. In paragraph 60, the UT said that the FTT "should … have left the determination of the costs of the proceedings (including those before the FTT) to be determined by the county court under s.51 of the 1981 Act, and in accordance with the relevant provisions of the CPR". The UT went on in paragraph 60:

> "On the argument we have heard, the costs of the proceedings in the FTT fell within the scope of s.51 as forming 'costs of and incidental to' the proceedings in the county court, since the case had been sent to the FTT by order of that court."

61. The UT then made a fresh determination, concluding in paragraph 80 that the landlord was entitled to a specified sum "for legal costs and court issue and FTT hearing fees". The UT had explained in paragraph 63:

> "Since the post-issue costs were determined by the FTT, rather than the county court, and in our judgment the FTT had no jurisdiction to determine such costs, its determination of the reasonableness of those costs should be set aside. At the hearing of these appeals, the [landlord] indicated that it was content that, sitting on appeal from the decision of the county court, we should exercise our power under CPR r.52.10(1) to determine the amount of the post-issue legal costs; and the [tenant's] counsel did not object to this course. Since the FTT had no jurisdiction

> to determine this issue, we consider that we should revisit the matter of the post-issue costs afresh."

62. Martin Rodger QC, sitting this time as a Judge of the County Court, took a different view in *John Romans Park Homes Ltd v Hancock*, 17 October 2019, unreported, to which Mr Rainey rightly drew our attention. In that case, an issue as to whether the Mobile Homes Act 1983 applied was transferred from the County Court to the FTT under section 231B of the Housing Act 2004. Once that issue had been determined, the case returned to the County Court and an order was made for the appellant to pay the respondents' costs, including costs incurred in the FTT and in an appeal to the UT. Mr Rodger allowed an appeal, holding in paragraph 66 that the County Court Judge had been "wrong to regard the costs of the tribunal stages of the proceedings as falling within his discretion in section 51(1), 1981 Act".

63. Mr Rodger's core reasoning can be seen from this passage from his judgment:

> "44. [Counsel for the respondents'] proposition that, after a question has been transferred from the court to a tribunal, there remains only a single set of proceedings which are proceedings in the county court, seems to me to ignore the reality that transferred proceedings move from one distinct judicial forum to another. The rules which will apply to the determination of the question are the tribunal's procedural rules. The product of the tribunal's considerations will be a tribunal decision determining the question referred to it. Such a determination is not advisory or incomplete, and requires no endorsement or adoption by the court before it definitively resolves the question between the parties. The Court's role under section 231B(2) [of the Housing Act 2004] and section 176A(3) [of the 2002 Act] is to give effect to the tribunal's determination. An appeal against the tribunal's decision may only be pursued through the appellate structure created by statute for tribunal appeals; no appeal would lie through the court appellate structure against an order of the court giving effect to a tribunal's determination on the basis that the tribunal's determination had been wrong.
>
> 45. In the language of section 51(1) [of the 1981 Act] and section 29(1) [of the 2007 Act] it would therefore be unsurprising for a question transferred by the court to the FTT to be treated as having ceased to be 'proceedings in the county court' and to have become 'proceedings in the First-tier Tribunal'. That would be consistent with the way in which section 51 is applied to the costs of proceedings which progress through distinct stages within the court structure. It would also recognise what seems to me to be obvious, namely that the resolution of questions within the tribunal structure

> involves 'proceedings in the First-tier Tribunal' and 'proceedings in the Upper Tribunal'.
>
> 46. If the tribunal stages of the proceedings are properly regarded as involving proceedings in the First-tier Tribunal and in the Upper Tribunal, then the issue of which forum has jurisdiction over costs incurred in the tribunals becomes clear. Section 51(1) is expressed to be 'subject to the provisions of this or any other enactment'. Where costs are incurred in proceedings in the FTT or the Upper Tribunal 'full power to determine by whom and to what extent the costs are to be paid' vests in those tribunals by section 29(2). To treat costs incurred at those stages as falling within the discretion of the court under section 51(1) would be contrary to the express terms of section 29(2), and would ignore the direction that section 51(1) is subject to the provisions of any other enactment.
>
> 47. In any event, the same costs cannot both be within the discretion of the FTT and yet remain within the discretion of the county court. I appreciate that the relevant Tribunal Procedure Rules have the effect, generally, that costs will not be ordered at the end of proceedings in the FTT, but that is not invariably the case. Before the county court makes any decision on costs, the FTT may already have exercised its power to make an order for the repayment of tribunal fees, or even for the payment of wasted costs or costs where a party has behaved unreasonably. The consequence of [counsel for the respondents'] argument that transferred proceedings remain at all times 'proceedings in the county court' would have to be that the same proceedings are never 'proceedings in the First-tier Tribunal' to which section 29 applies. That seems to me impossible to reconcile with the transfer of the relevant part of the proceedings to the tribunal."

64. Mr Rodger also made this point in paragraph 61 of his judgment about the consequences of the approach endorsed in *Avon*:

> "By going first to the county court a party could obtain the benefits of costs shifting, even if the dispute was eventually determined by the FTT following transfer by the court. The same dispute resolved entirely in the FTT would involve no costs shifting. Parties would be incentivised to start proceedings in their preferred forum as early as they could."

65. With regard to *Avon*, Mr Rodger noted in paragraph 60 that on the two occasions "on which it expressed the conclusion that costs incurred in the FTT were within the scope of section 51 the Court qualified that conclusion as being based 'on the submissions

advanced before us' and 'on the argument we have heard'", that "[t]here was no real resistance to the court determining the costs there and then" and that [t]he only real issue was the quantification of those costs".

66. It is also to be noted that Judge Elizabeth Cooke appears to have taken the same view as Mr Rodger in *Behjat v Crescent Trustees Ltd* [2022] UKUT 115 (LC). Speaking of a case in which proceedings had been begun in the County Court, transferred to the FTT and returned to the County Court, Judge Cooke referred in paragraph 9 to the County Court determining liability for "the costs of the county court proceedings (but only those costs, and not those incurred in the FTT, which are within the FTT's jurisdiction and subject to very different rules)".

67. For my part, I find Mr Rodger's reasoning and conclusions convincing. I agree with him that, where part of proceedings has been transferred from the County Court to the FTT (in the present case, under section 176A of the 2002 Act), the County Court has no jurisdiction to make any order for costs in respect of the FTT proceedings. It follows that the District Judge had no power to order Mr Khan to pay the Council's costs of the FTT stage of this litigation.

68. Even, however, if I had reached a different conclusion on the extent of the County Court's jurisdiction, I would not have thought it appropriate for us to make an order in the Council's favour under section 51 of the 1981 Act in respect of the proceedings in the FTT. The Council applied to the FTT for an order for costs to be made in its favour, but the FTT decided against doing so. The Council is now trying to have a second bite at the cherry. I would not have considered that, as a matter of discretion, we should award the Council costs which the FTT, from which the Council had sought costs, had declined to grant it.

69. In all the circumstances, I would limit the order for costs which the District Judge made in favour of the Council to the County Court element of the proceedings.

Conclusion

70. I would allow Mr Khan's appeal to the extent of varying paragraph 2 of the District Judge's order so that it provides for Mr Khan to pay the Council's costs of only the County Court element of the litigation, to be assessed in detail on the standard basis if not agreed. The Council is not, in my view, entitled to any costs order in its favour as regards the proceedings in the FTT.

Lord Justice Nugee:

71. I agree.

Lady Justice Macur:

72. I also agree.