UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – administration charge – leasehold covenant requiring tenant to pay landlord's costs of enforcement proceedings – determination of service charge liability by F-tT – partially successful application for costs under rule 13 – whether costs may subsequently be claimed as a contractual administration charge – appeal allowed

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

BETWEEN:

87 ST GEORGE'S SQUARE MANAGEMENT LTD

Appellant

and

MICHAEL HENRY ANTHONY WHITESIDE

Respondent

Re: Basement Flat No.1,
87 St George's Square,
London SW1 3QW

Martin Rodger QC, Deputy President

The Royal Courts of Justice,
London WC2A

13 September 2016

Mr Edward Denehan, instructed by Nash & Co, solicitors, appeared for the appellant
Mr Michael Whiteside on his own behalf.

The following cases are referred to in this decision:

Chaplair Ltd v Kumari [2015] EWCA Civ 798

Daejan v Benson [2013] UKCS 14

Henderson v Henderson (1843) 3 Hare 100

Johnson v Gore Wood & Co [2002] 2 AC 1

Stevens & Cutting Ltd v Andersen [1990] 1 EGLR 95

Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 0290 (LC)

Introduction

1. Where, because of unreasonable behaviour by the tenant, a landlord has been has been awarded some of its costs of service charge proceedings in the First-tier Tribunal (Property Chamber) under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, may the landlord subsequently rely on a contractual indemnity clause in the lease to claim the whole of the costs of the same proceedings as an administration charge?

2. That is the issue in this appeal against a decision of the F-tT given on 30 November 2015. The F-tT answered the question in the negative, holding that the landlord had exhausted its entitlement to claim costs on any basis following an order in the landlord's favour under rule 13(1)(b) requiring the tenant to pay 20% of the landlord's costs of the proceedings. The landlord, 87 St George's Square Management Limited, now appeals against that decision having been granted permission to appeal by the F-tT.

The background facts

3. 87 St George's Square in Pimlico is part of a Grade II listed terrace of substantial town houses built in the 1840s. In 1992 the building was divided into six flats, each of which was demised by a lease in a standard form for a term of 150 years less 12 days from 25 December 1951.

4. The appellant is a company whose members and shareholders are the owners of five of the six flats in the building. The respondent, Mr Whiteside, is the owner of the sixth flat, which is the basement flat, and is not a member of the company. Mr Whiteside is required under his lease to contribute through a service charge 16% of the costs incurred by the appellant in connection with services provided to the building.

5. Mr Whiteside's long lease of the basement flat was granted to him on 3 February 1993. At that time the lease included at clause 3(e) a covenant by Mr Whiteside to pay the costs incurred by the lessor or superior lessor in connection with any notice given under section 146 of the Law of Property Act 1925. In proceedings between the appellant and Mr Whiteside in March 2000 it was acknowledged by the appellant that it had no entitlement to add any part of the costs it incurred in the tribunal proceedings to the service charge. Nor, at that time, was there any obligation on Mr Whiteside personally to reimburse expenses incurred in tribunal proceedings precipitated by his failure to pay service charges. Thus, after a hearing spread over three days in which Mr Whiteside challenged almost every item in the service charge statements for the years 1998 and 1999, and was wholly unsuccessful in reducing the expenditure to which he was required to contribute 16%, the appellant was nevertheless substantially out of pocket because of the legal costs it had incurred in responding to the unsuccessful challenge.

6. On 25 October 2010, in anticipation of a further dispute with Mr Whiteside over unpaid service charges and future expenditure, the appellant obtained an order from a leasehold valuation tribunal under section 38, Landlord and Tenant Act 1987 deleting the original clause 3(e) from each of the leases of the flats in the building, including Mr Whiteside's lease, and substituting a new clause including a second obligation in these terms:

> 3(e) To pay all costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor or Superior Lessors:
>
> (i) …
>
> (ii) for the purposes of or in connection with the enforcement of any of the Lessee's covenants herein contained against the Lessee and without prejudice to the generality of this sub-clause the costs charges and expenses which the Lessor or the Superior Lessor are entitled to recover from the Lessee under this sub-clause include the reasonable costs charges and expenses of proceedings or in contemplation of proceedings in connection with the enforcement of the Lessee covenants herein contained before any court or tribunal provided that the Lessor may only recover those costs charges and expenses under this sub-clause which are reasonably and properly incurred.

7. The anticipated dispute between Mr Whiteside and the appellant duly materialised. The appellant wished to carry out major work to the lift and the fabric of the building. Mr Whiteside objected in principle to being required to contribute towards the cost of work to the lift, which does not serve his basement flat. He also objected to the consultation exercise undertaken by the appellant's agents under section 20, Landlord and Tenant Act 1985 on the grounds (correctly, as the F-tT subsequently found) that the period allowed for him to respond to the consultation was two days shorter than required by the statute. Mr Whiteside refused to pay his contribution of £18,727 towards the cost of the major works which was included in the 2014 service charge. He also refused to pay certain other sums going back as far as 2009 including some large items (£2,011 in respect of fire safety precautions) and some very much smaller items (£16 towards the cost of stationery in 2012, for example).

The service charge proceedings

8. On 27 October 2014 the appellant issued three applications before the F-tT. The first sought a determination as to the payability and reasonableness of the service charges claimed from Mr Whiteside for the years 2009-2014. The second application, under section 20ZA of the Landlord and Tenant Act 1985 sought dispensation from the statutory consultation requirements in respect of the 2013 works to the extent that they were found not to have been complied with. Finally, the appellant sought a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that Mr Whiteside was in breach of his obligations in the lease to pay the service charge.

9. The applications made by the appellant in October 2014 said nothing about costs.

10. The applications came before the F-tT for determination at a hearing held over two days in March 2015. In its decision given on 12 May 2015 the F-tT found that the appellant had failed to comply with the consultation requirements in section 20 of the 1985 Act because the initial consultation notice had been delivered to Mr Whiteside only 28 days before the expiry of the consultation period (thereby failing to give him the full 30 days to which he was strictly entitled in which to respond). Nevertheless the F-tT was satisfied that Mr Whiteside had had a full opportunity to participate in the consultation, and had done so in a number of lengthy letters putting forward his views on the proposed works. Mr Whiteside had not alleged that he had sustained any prejudice as a result of the shortened consultation period and, on that basis, the F-tT therefore exercised its discretion to dispense with the consultation requirements to the extent that they had not be complied with.

11. Mr Whiteside had not challenged the costs of the major works to any significant extent, but had taken a number of small points (described by the F-tT as "sniping around the edges"). As a result he was found liable to contribute the whole of the sum of £18,727.04 claimed as his 2014 contribution towards the major works.

12. The F-tT also found that the total service charge payable by Mr Whiteside was £24,403.79 but that after credit was given for certain payments and allocations the arrears then due from him totalled £20,830.68. It was that figure which the tribunal determined was payable by Mr Whiteside to the appellant. Having made that primary finding the F-tT went on to make a determination under section 168(4) of the 2002 Act that Mr Whiteside was in breach of his obligation to pay the service charge.

13. I was informed by Mr Denehan that, towards the conclusion of the March hearing, and no doubt with a view to avoiding the need for a further hearing, the F-tT invited the parties to make any submissions they wished to make in relation to costs. With that prompting Mr Denehan made an application under rule 13(1)(b) inviting the F-tT to order Mr Whiteside to pay the whole of the appellant's costs of the proceedings because of what he submitted were Mr Whiteside's unreasonable actions in conducting the proceedings.

14. The F-tT dealt with the application for costs in its substantive decision of 12 May 2015. It was generally critical of Mr Whiteside for his pursuit of objections to relatively minor items of expenditure which he had eventually abandoned during the hearing, and considered that he had behaved unreasonably by not making those concessions at an earlier stage. Nevertheless the F-tT accepted that he had been entitled to raise the more substantial points in relation to fire safety works and the 2013 major works. It also acknowledged that there had been a failure of consultation by the appellant concerning the major works, although in a relatively minor respect which had not caused Mr Whiteside any prejudice. The F-tT regarded Mr Whiteside's other objections to the major works (the "sniping round the edges") as

unreasonable. It considered that, in general, Mr Whiteside had behaved unreasonably in the manner in which he presented his case and described him as having "gone overboard" in resisting the appellant's claims. He had also made unpleasant allegations in correspondence.

15. In paragraph 50 of its decision the F-tT reached the following conclusion on the application for costs:

> We conclude that his behaviour has been unreasonable, such as to give rise to some liability for costs under the provisions of rule 13. However, we do not consider it appropriate for him to pay the totality of the Applicant's costs. They are at fault in respect of the section 20 procedures in relation to the major works in 2014. Taking the matter in the round, we conclude that Mr Whiteside's conduct in pursuing matters that should not have been pursued or should have been discontinued at an earlier stage and in the verbose nature of his documentation has caused the Applicant to incur additional and unnecessary costs. It is very difficult to determine what the level of those costs should be. The conduct in our view does not extend to defending the major works in respect of fire safety and the external and internal refurbishment. There were issues that he was entitled to pursue. Doing the best we can we conclude that Mr Whiteside should contribute a sum equal to 20% of the Applicant's costs.

16. At that stage no consideration appears to have been given either by either the appellant or the F-tT to the appellant's contractual rights under clause 3(e)(ii) of the lease. The decision concluded by the F-tT then gave directions for the appellant to provide details of its costs by 26 May 2015.

The administration charge proceedings

17. On 2 June 2015 the appellant's solicitors wrote to the F-tT's referring to the award of costs already made in its favour and explaining that, rather than comply with the directions to submit its costs for assessment, the appellant intended to rely on its contractual rights. The letter said this:

> "Whilst our client acknowledges the award made by the Tribunal, nevertheless, after most careful consideration, it has decided not to take any further action under it, choosing instead to rely on its rights to recover all of its reasonable costs incurred in relation to the proceedings, under the requisite provisions of the respondent's flat lease. In which respect, we shall be writing to the respondent shortly with a demand for those costs."

On receipt of that letter the tribunal wrote accepting it as a withdrawal of the application for costs and closed its file.

18. On 10 June 2015 the appellant's solicitors wrote to Mr Whiteside informing him that the appellant had incurred costs in the service charge proceedings totalling

£40,710 (including VAT) and provided a detailed breakdown. Payment of that sum was demanded under clause 3(e) of the lease.

19. Mr Whiteside declined to pay and asserted in correspondence that the F-tT had already determined that the reasonable contribution required of him towards the appellant's costs was 20% of the total. Consistent with that assertion Mr Whiteside tendered the sum of £8,142, being 20% of the total costs claimed.

20. On 27 July 2015 the appellant applied to the F-tT under paragraph 5 of Schedule 11 to the 2002 Act to determine whether a variable administration charge was payable by Mr Whiteside and, if so, the amount so payable.

21. Part I of Schedule 11 to the 2002 Act regulates the recovery of administration charges. An administration charge (as defined by paragraph 1(1)) is an amount payable by the tenant of a dwelling as part of or in addition to the rent and which is payable, directly or indirectly in respect of a failure by the tenant to make a payment to the landlord or another party to his lease or in connection with a breach (or alleged breach) of a covenant or condition in his lease.

22. A variable administration charge is an administration charge which is neither specified in the lease, nor calculated in accordance with a formula specified in the lease. By paragraph 2 of Schedule 11 a variable administration charge is payable only to the extent that the amount of the charge is reasonable. By paragraph 5 an application may be made to a tribunal for a determination whether an administration charge is payable and the amount which is payable.

23. The F-tT delivered its decision on the appellant's application on 30 November 2015. The substance of the decision is found in paragraphs 8 and 9. Having referred to the fact that it had already made an award of costs under rule 13(1)(b) on account of Mr Whiteside's unreasonable behaviour in the conduct of the service charge proceedings the F-tT went on:

> 8. The sum to be paid was assessed at 20% of the applicant's costs. It is my finding, therefore that the tribunal has already made a decision with regard to the respondent's liability to pay costs incurred in connection with the proceedings and that a further attempt under the 2002 Act to recover costs is inappropriate. It seems to me it would be wrong to allow the applicant to, in effect, have two bites at the cherry. It has the effect of rendering our decision under the rules otiose.
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> 9. If I am wrong in this regard then I must remind myself that the jurisdiction of the tribunal to determine costs is generally one of no cost liability for the losing party. The question of reasonableness to be applied to the question of administration charge requires me to consider the findings of the tribunal made in May of this year when we determined Mr Whiteside's liability in connection with the proceedings. It is, therefore, my finding that the applicant is not entitled to recover any further costs as an administration charge in

respect of those incurred from the time that the application was issued, which is 27 October 2014.

24. The F-tT then found that by reason of clause 3(e)(ii) of the lease the appellant was entitled to recover the costs incurred before the service charge application made on 27 October because those costs were not covered by its decision of 12 May 2015. The tribunal proceeded to assess those costs and found that it was reasonable for the appellant to have instructed an advocate of Mr Denehan's seniority and experience, that the hourly rates charged by the appellant's solicitors were reasonable, and that the costs incurred in work undertaken before the commencement of the proceedings were also reasonable. The F-tT therefore determined that the administration charge Mr Whiteside was contractually liable to pay totalled £3,774.

The appeal

25. In support of the appeal Mr Denehan submitted that the F-tT had been correct to regard sums payable under clause 3(e)(ii) of the lease as variable administration charges. It had been in error, however, in treating its decision under rule 13(1)(b) as determinative of the appellant's contractual entitlement to recover costs. Mr Whiteside could only be ordered to pay costs under rule 13(1)(b) if he had acted unreasonably in conducting the service charge proceedings. In contrast, the recovery of costs under clause 3(e) had nothing to do with conduct in those proceedings, and the appellant was entitled to recover its costs even if Mr Whiteside had acted entirely reasonably. Mr Denehan also submitted that the F-tT had given no explanation for its conclusion that it would be "inappropriate" for the appellant to recover the variable administration charge under clause 3(e) because of its earlier determination under rule 13(1)(b). Nor had it explained why it mattered that the award under rule 13 would become otiose if the appellant was entitled to pursue its claim for the full sum as a variable administration charge.

26. Mr Whiteside made moderate and constructive oral submissions which reiterated the more detailed statement of case he had filed earlier. His principal submission was that only one set of costs had been incurred by the appellant and the application made to the F-tT under rule 13(1) sought to recover the whole of those costs. That application had succeeded only to the extent of 20% of the costs and there had been no appeal against that determination. The appellant were therefore stuck with it and could not seek a better outcome by a different route. Had they wished to rely on the contractual entitlement to costs they should either have made no application under rule 13 or should have coupled it with an application under clause 3(e).

27. Mr Whiteside also pointed out that until the appellant was granted dispensation from full compliance with the statutory consultation provisions, by far the greater part of the sum eventually found to be payable by him (£18,727 out of a total of £20,830) had not yet been due. Until the F-tT made its decision of 12 May 2015 his liability to contribute towards the 2013 major works was limited by section 20(6), Landlord and Tenant Act 1985 to £250 (which he had paid in response to the original demand). As

the appellant had had no right to receive any larger sum, there could be no question of it having incurred costs in connection with the enforcement of Mr Whiteside's covenants. It followed, Mr Whiteside submitted, that the costs incurred by the appellant in the F-tT proceedings should, to a very substantial degree, be treated as falling outside the scope of clause 3(e). He had therefore been entitled to rely on the statutory cap on his contribution and ought not to be demonised, or criticised, for standing on his legal rights.

28. Finally Mr Whiteside raised a separate point about the costs of the fire safety works undertaken by the appellant in 2009, which he said had not been the subject of any prior statutory consultation; he therefore could not understand why the F-tT had not reduced the charge of £2,000 claimed in respect of that work. It is not clear to me from the F-tT's decision whether any reliance was placed by Mr Whiteside on an absence of consultation in relation to these works. Nor (quite properly) have I been provided with all of the documents which were before the F-tT to enable me to determine whether the issue now raised ought to have been considered. What is clear, however, is that Mr Whiteside did not seek to appeal the May 2015 decision in which his liability was established. It is therefore not possible for him to seek to go behind that decision in order to reduce his liability for the contractual administration charge.

Discussion and conclusion

29. In support of his submission that the appellant had only a single entitlement to recover the same set of costs Mr Whiteside relied on the Tribunal's recent decision in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (LC) in which the Tribunal gave guidance on the application of rule 13(1)(b). The Tribunal held that, although unreasonable conduct is an essential pre-condition of the power to award costs under the rule, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal (paragraph 27). In the exercise of that discretion it is open to a tribunal to make an order for the payment of the whole of a party's costs by the party judged to be unreasonable, but such an order will not be appropriate in every case and may only be made where it would be fair and just to do so (paragraph 29). Moreover, while the nature, extent and consequences of the unreasonable conduct found to have occurred are relevant factors to be taken into account in deciding whether to make an order for costs, and in determining the form of that order, the power is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned (paragraphs 40-42). Mr Whiteside is therefore correct, up to a point, in saying that it would have been open to the F-tT to have exercised its discretion in May 2015 to make an order against him in respect of the whole of the costs of the service charge proceedings, but that it declined to do so.

30. While I agree with Mr Whiteside to that extent, I nevertheless, accept Mr Denehan's submission that the F-tT elided its consideration of two quite separate entitlements on the part of the appellant. As a party to the lease the appellant has a contractual entitlement clause 3(e)(ii) to recover its reasonable costs of enforcement action to the extent that those costs were reasonably and properly incurred. Quite separately from that right, the appellant also had an entitlement, as a party to

proceedings before the F-tT, to seek an award of costs under rule 13(1)(b) if it could satisfy the tribunal that Mr Whiteside had conducted the proceedings unreasonably.

31. Where a party has two legal routes to the recovery of the same sum, it will not be entitled to recover that sum twice but there is no reason why it should be required to elect between those routes unless they are inconsistent. In *Stevens & Cutting Limited v Andersen* [1990] 1 EGLR 95 Stewart-Smith LJ stated the principles relevant to the doctrine of election between causes of action in the following terms:

> "A party may be deprived of the right to pursue a certain course of conduct if, when faced with two alternative and inconsistent courses of action, he chooses one rather than the other and his election is communicated to the other party."

In this case there is no inconsistency between a claim to enforce the contractual right to recover costs and an invitation to the F-tT to exercise his discretionary power to award costs. The exercise of the tribunal's procedural power under rule 13(1)(b) depended on the satisfaction of a condition, namely that there should have been unreasonable conduct on the part of Mr Whiteside, which was not a requirement of the appellant's substantive contractual claim under clause 3(e). The position was simply that the appellant had two routes to the achievement of the same objective; its ability to pursue one route did not require it to make any assertion or claim which undermined or contradicted the basis of its entitlement to rely on the alternative route. There was simply no inconsistency between the two courses available to the appellant.

32. Why then should it be regarded as "inappropriate" (to use the F-tT's word) for the appellant to pursue its contractual right after the tribunal had already made a decision in its favour permitting it only 20% of the total costs under rule 13(1)(b)? Mr Whiteside suggested that the principle in *Henderson v Henderson* (1843) 3 Hare 100 was applicable and provided an answer in his favour.

33. In *Henderson* the principle was established that the court requires parties to litigation to bring forward their whole case at one time, and will not (except under special circumstances) permit a new claim to be advanced in subsequent litigation if it ought properly to have been brought forward as part of the subject matter of an earlier dispute.

34. As Lord Bingham explained in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31 the rule in *Henderson v Henderson* is not to be applied mechanically but only as part of a "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue that could have been raised before."

35. In my judgment there is no abuse of process or procedural estoppel in the circumstances in which the appellant brings forward its claim for administration

charges. It appears that neither party had originally anticipated making submissions on the issue of costs during the May 2015 hearing before the F-tT, and the appellant's successful application under rule 13 was made at the invitation of the F-tT itself. At that stage, except to the extent that Mr Whiteside had withdrawn certain of his objections to the smaller sums originally in issue, neither party knew what decision the F-tT would make on the disputed service charges. Even if the appellant anticipated making a claim to recover all of its costs as an administration charge under clause 3(e) it is entirely understandable that it was not in a position at that stage to invite the F-tT to make a determination of its entitlement under Schedule 11 of the 2002 Act. Having received and considered the F-tT's decision the appellant then discontinued the further pursuit of its application for costs in favour of reliance on its contractual claim. Mr Whiteside was not misled or inconvenienced by the course of action taken by the appellant and in my judgment it would be an unjustified windfall to him were the appellant to be prevented from relying on its contractual right.

36. When it made its decision on the administration charge the F-tT was not referred to the decision of the Court of Appeal in *Chaplair Ltd v Kumari* [2015] EWCA Civ 798. At the hearing of the appeal Mr Denehan submitted that *Chaplair* was conclusive of the issue of the appellant's entitlement to claim costs under the lease after a refusal by the F-tT to permit full recovery on an application under rule 13. I agree.

37. In *Chaplair* a landlord commenced proceedings in the county court to recover unpaid rent and service charges and for an indemnity against the costs of the proceedings pursuant to the terms of the lease. The service charge element of the claim was transferred to the leasehold valuation tribunal which made a determination in the landlord's favour but refused an application under the equivalent of rule 13 in force at that time (paragraph 10 of Schedule 12 to the 2002 Act) which allowed the tribunal to make an order for the payment of costs up to a maximum of £500 where a party had conducted the proceedings vexatiously, abusively, disruptively or otherwise unreasonably. When the proceedings were transferred back to the county court the landlord made a further application for its costs, including the costs of the proceedings before the LVT, relying on its contractual right under the lease to an indemnity against costs arising out of the tenant's failure to perform her obligations under the lease. The Court of Appeal held that the county court judge had power to deal with costs incurred in the LVT proceedings notwithstanding the earlier dismissal by the LVT of the application under paragraph 10 of Schedule 12. No question of *res judicata* or estoppel arose out of the decision of the LVT on costs or because the LVT was not asked to make the orders for costs ultimately made by the judge (paragraph 40).

38. I therefore accept Mr Denehan's submission that the F-tT was wrong not to treat the two claims separately and in regarding its prior decision under rule 13(1) as prohibiting the appellant from recovering its costs by relying on its contractual right.

39. As far as Mr Whiteside's second substantive point is concerned (paragraph 27 above), I think there is more substance in it. Until the F-tT granted dispensation from

the statutory consultation requirements, Mr Whiteside was not obliged to pay more than £250 towards the costs of the 2013 major works. He complied with that obligation in good time. The appellant had no right to take enforcement action against him in respect of the sum of £18,727 for which he was eventually found liable until it had achieved a dispensation.

40. Mr Denehan submitted that it was inevitable that the F-tT would grant dispensation having regard to the decision of the Supreme Court in *Daejan v Benson* [2013] UKCS 14, but he nevertheless accepted that until dispensation was achieved the appellant had no cause of action in respect of the costs of the major works. Mr Denehan submitted that it was obvious that the appellant would have resisted a claim for payment in respect of the major works even if there had been full compliance with the consultation requirements. That may or may not be true, as Mr Whiteside seems to be assiduous in complying with what he considers to be his obligations, but in any event it does not seem to me to be sufficient to enable the appellant to have the benefit of clause 3(e)(ii). As I read the F-tT's decision Mr Whiteside's main response to the claim in respect of the major works was to rely on the statutory cap imposed by section 20 of the 1985 Act whenever there has been a failure to comply with the consultation requirements. Everything else was simply "sniping round the edges" without any real challenge to the sums involved.

41. For these reasons it is therefore not possible to regard the proceedings as a whole as being "in connection with the enforcement of the Lessee's covenants" where, at the commencement of the proceedings there has, as yet, been no significant breach of the covenants so far as they related to the costs of the major works. The appellant has no entitlement to its costs in so far as they concerned the costs of the major works. It will be necessary for there to be a further assessment of the extent to which the costs were "reasonably and properly incurred" in connection with the enforcement of Mr Whiteside's obligations (as required by clause 3(e)(ii)) and whether the amount of the charge is reasonable (paragraph 2 of Schedule 11 to the 2002 Act).

Disposal

42. At the conclusion of the hearing I asked both parties how they would like me to proceed in the event that I accepted the appellant's primary argument and allowed the appeal. Mr Whiteside was very anxious to resolve the proceedings once and for all without the need for a further hearing generating further costs. He was very critical of the costs incurred by the appellant in the original proceedings which he described as extravagant and unconscionable and was loath to become involved in further arguments about the costs of pursuing claims for costs.

43. On behalf of the appellant Mr Denehan invited me to remit the application to the F-tT for it to determine the amount of the administration charge it was entitled to recover in the light of my conclusions. The appellant had not come to the hearing prepared for an assessment of its administration charges and the better forum for them to be considered was before the F-tT, with its knowledge of how the proceedings had

been conducted. That is a course I would be willing to take only if I was satisfied that I could not fairly determine the costs on a summary basis in this tribunal.

44. With considerable regret I am satisfied that it is necessary in this case to remit the appeal to the F-tT for it to determine the quantum of the costs reasonably incurred by the appellant in the original proceedings before it. Because the appellant has no entitlement to its costs in so far as they concerned the costs of the major works it will be necessary for the F-tT to form a view on how much of its time and the costs of preparation were attributable to the major works issues. I may be wrong, but from my reading of the decision it appears that relatively little time was spent on that issue at the hearing although there was evidence in relation to the question of dispensation and the various sniping points taken by Mr Whiteside. By far the greater part of the time before the F-tT seems to have been taken up in dealing with very small sums claimed as contributions towards electricity, the cleaners, the installation of a phone in the lift and other minor matters which, it is clear from the decision, the F-tT considered to have been argued by Mr Whiteside with disproportionate zeal. Only the F-tT will be able to say whether that impression is accurate and to assess how much of the cost of preparation and hearing time ought properly to be attributed to issues on which the appellant did not require the indulgence of the tribunal to make good a claim.

45. The F-tT has already formed a view about the reasonableness of the charging rates of the appellant's advisors and both parties have already made full written submissions to the F-tT on the quantum of the costs recoverable as administration charges. It ought not, therefore, to be necessary for the parties to incur any further expense once the appeal is remitted to the F-tT, which should be able to make its own apportionment with the benefit of this decision and the parties' earlier representations.

46. Mr Whiteside also apprehended that the appellant would seek to recover its costs of this appeal as an administration charge and invited me to deal with that issue as well. Any application concerning liability for the payment of an administration charge would have to be made to the F-tT. I would hope that both in relation to the original costs and to any question concerning costs incurred in the appeal the parties would first make a determined attempt to reach a sensible agreement on quantum before incurring further costs in making submissions on those issues.

Martin Rodger QC
Deputy President

10 October 2016