UPPER TRIBUNAL (LANDS CHAMBER)
COUNTY COURT AT CENTRAL LONDON

UT Neutral citation number: [2018] UKUT 204 (LC)
UTLC Case No: LRX/79/2017
County Court Claim No: C98YM270

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
COUNTY COURTS ACT 1984

LANDLORD & TENANT – Administration Charge – County Court claim transferred to the First-tier Tribunal (Property Chamber) for determination – Other claims not transferred but determined by FTT judge sitting as a judge of the County Court - Appropriate procedure - Costs

IN THE MATTER OF APPEALS AGAINST DECISIONS OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) AND THE COUNTY COURT AT CHELMSFORD

Between:

Avon Ground Rents Limited

Appellant

and

Sarah Louise Child

Respondent

Re: Flat 63, The Icon,
Southernhay,
Basildon,
Essex SS14 1FH

Before: The Hon. Mr Justice Holgate, Chamber President
His Honour Judge Hodge QC

Sitting at The Royal Courts of Justice, Strand, London WC2A 2LL
on
13 March 2018

The Appellant was represented by **Mr Justin Bates** and **Mrs Amy Just** instructed **by Scott Cohen Solicitors**, Henley-on-Thames

The Respondent was represented by **Mr John Jessup** instructed on a **Direct Public Access** basis

The following cases are referred to in this Decision:
Birmingham City Council v Keddie [2012] UKUT 323 (LC)
BNM v MGN Ltd [2016] 3 Costs LO 441; [2016] EWHC B13 (Costs)
Cain v London Borough of Islington [2015] UKUT 117 (LC)
Chaplair Ltd v Kumari [2015] EWCA Civ 798, [2015] HLR 39
Christoforou v Standard Apartments Ltd [2013] UKUT 586 (LC), [2014] L & TR 12
Freeholders of 69 Marina, St Leonards on Sea v Oram [2011] EWCA Civ 1258
Holding & Management Ltd v Property Holdings & Investment Trust Plc [1989] 1 WLR 1313
Iperion Investments v Broadwalk House Residents Ltd (1994) 27 HLR 196
Southern Land Securities Limited v Poole [2017] UKUT 302 (LC)

The following additional cases were referred to in the skeleton arguments:

Aylesbond Estates Ltd v MacMillan (1998) 32 HLR 1
Coates v Octagon Overseas Ltd [2017] EWHC 877 (Ch), [2017] 4 WLR 91
Coliseum RTM Co Ltd v Dhir LON/00AP/LSC/2016/0351
Continental Property Ventures Inc v White [2007] L & TR 4 [2006] EWLands LRX_60_2005
Crosspite Ltd v Sachdev [2012] UKUT 321 (LC)
Hackney LB v Walker LON/00AM/LSC/2016/0398
IBC Properties Ltd v Abdul CAM/00KF/OLR/2016/0159
Newman v Bailey CAM/00KF/LSC/2017/0033
Tower Hamlets LBC v Begum LON/00BG/LSC/2016/0355
Walkwall Flat Management Co Ltd v Baptist LON/00AC/LSC/2015/0462
Warrior Quay Management Co Ltd v Joachim LRX/42/2006, [2008] EWLands LRX_42_2006
Wellington Court@Stepney Ltd v Begum LON/00BG/LSC/2016/0079
Westleigh Properties Ltd v Fahey CAM/00KF/LSC/2016/0088.

DECISION

Introduction

1. These two related appeals raise important questions of practice and procedure arising out of the flexible deployment of District Judges of the County Court and Judges of the First-tier Tribunal (Property Chamber) ("the FTT") under the Residential Property Dispute Deployment Pilot ("the Pilot"). Amendments made to the County Courts Act 1984 by the Crime and Courts Act 2013 have the effect that all FTT judges (including transferred-in judges) are judges of the County Court (section 5(2)(t) and (u)).

2. In July 2015, the Civil Justice Council set up a working party to consider whether there would be advantages in deploying the judiciary in a flexible manner to ensure that all issues in dispute in property cases were dealt with in one forum. The working party reported in May 2016 recommending flexible judicial deployment in landlord and tenant, property and land registration cases. The Pilot was devised so that the working party's recommendation could be put into practice and evaluated.

3. Since the end of 2016 a number of cases have been conducted under the Pilot so that judges with the appropriate authority have held hearings in which the jurisdiction of the FTT and the jurisdiction of the County Court have been exercised (sometimes colloquially referred to as "wearing two hats"). Sometimes this has occurred where, as in the present case, proceedings in the County Court have been transferred to the FTT under section 176A of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). However, in most cases there has not been a transfer of proceedings between the County Court and the FTT. Instead, there has been a judicial decision in each case to deploy a particular judge, who is both an FTT judge and a County Court judge, to hold a hearing in which all aspects of a single dispute, some of which fall within the jurisdiction of the FTT and others within the jurisdiction of the County Court, are dealt with on the same occasion.

4. The Appellant contends (inter alia) that it is not possible for the FTT (i) to deal with costs which have been incurred in ongoing County Court proceedings but not yet claimed, or (ii) in a case which has been transferred from the County Court to the FTT, to deal with costs which have been incurred in the County Court prior to the transfer of proceedings but not yet claimed. The determination of such costs is said to be the exclusive preserve of the County Court.

The facts

5. The Respondent, Ms Childs, is the long leasehold owner of Flat 63, The Icon, Southernhay, Basildon, Essex for a term of 125 years from 25 December 2006. Under the terms of her lease dated 22 October 2009 she has covenanted to perform and observe the obligations set out in the Fourth Schedule. Those obligations include: (a) the payment of service charges in accordance with Sch. 4, paras. 9 and 10; (b) by Sch.4, para. 1(b), the payment "on a full indemnity basis" of "all cost and expenses incurred by the Landlord or the Landlord's solicitors in enforcing the payment by the Tenant of any Rents Service Charge or other monies payable by the Tenant under the

terms of this Lease"; and (c) by Sch. 4, para. 11(a), the payment of "all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the landlord in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 …" (i.e. forfeiture).

6. On or around 30 November 2015, the Appellant's managing agent issued demands for service charges and ground rent due in advance on 1 January 2016. On 17 December 2015, the Appellant's managing agent issued a demand for the balancing charge for the year ended 31 December 2014. On 19 May 2016, the Appellant's managing agent issued demands for service charges and ground rent due in advance on 1 July 2016. No response or payment was made by the Respondent so, by letters dated 3 August 2016 and 16 August 2016, the Respondent was advised that an initial debt collection fee of £144 had been incurred and that if the arrears were not settled court proceedings would be commenced.

7. On 7 October 2016 the Appellant submitted a claim form to the County Court Money Claims Centre which was issued on 14 October under Claim No C98YM270. The claim form sought "arrears of service charges and administration charges" due from the Respondent to the Appellant under the long lease in the total sum of £1,698.18 together with a court fee of £115 and legal representatives' costs quantified at £80. At or about the same time as the claim form was issued, the Respondent paid £343.02 to the Appellant, representing the total amount of the unpaid balance of outstanding service charges leaving only £1,355.16 outstanding in respect of the claim for administration charges. The Respondent filed a hand-written Defence in which she contended that she had not received any relevant service charge demands, asserted that she had by then paid the balance of the service charge debt, and disputed her liability to pay the administration charges. In the light of this defence, on 9 January 2017 District Judge Mitchell, sitting in the County Court at Chelmsford, made an Order as follows: "Sent to First Tier Property Tribunal for a determination". In the course of opening these appeals, Mr Justin Bates (who together with Mrs Amy Just appeared for the Appellant) indicated that no further costs were incurred in the County Court after the date of this transfer order. All costs thereafter were incurred in the FTT.

8. On 29 March 2017, FTT Judge Edgington made a Directions Order which (so far as material) required the Appellant to file and serve a comprehensive statement in response to the Defence and provided for the service of witness statements from all witnesses of fact. The Appellant duly complied with this Order, serving both a statement in response to the Defence and a witness statement from its managing agent, Mr Adam Azoulay. The Respondent duly served her witness statement in response to the Appellant's evidence and case. By letter dated 27 April the FTT notified the parties that a hearing had been arranged on Thursday 8 June at the Court House in Basildon. This triggered a liability on the part of the Appellant to pay a hearing fee of £200 which it duly did.

9. On 30 May 2017 the FTT wrote to the Appellant's solicitors (with a copy to the Respondent) informing them that the FTT judge would like to use his County Court jurisdiction to deal with all matters relating to costs so that another hearing in the County Court could be avoided. If the Appellant intended to claim any further costs

relating to the claim, the solicitors were invited to supply as a matter of urgency sufficient details to enable an assessment to take place.

10. The Appellant's solicitors responded by email on 1 June 2017 stating that they understood that the matter of court fees, County Court costs and interest claimed under the County Courts Act 1984 were not within the FTT's jurisdiction and seeking confirmation of the basis of the FTT's jurisdiction. The email also suggested that the FTT might consider making a paper determination of the matter given the issues in dispute and in the interests of saving costs. At Judge Edgington's direction, the FTT replied by letter dated 2 June 2017 stating that he was a County Court judge and was simply suggesting that he dealt with anything else after the tribunal hearing whilst everyone was still present, thereby avoiding a further hearing. The letter also stated that a paper determination could only happen at that late stage with the agreement of the Respondent and that there were still questions over how the £1,698.18 was made up and disputed issues of fact which could not be resolved on the papers.

11. The Appellant's solicitors responded by email dated 7 June 2017. They attached a statement of costs (in Form N260, the form appropriate to a summary assessment of court costs) in the total sum of £4,425 (inclusive of VAT and the court issue and tribunal hearing fees). The statement was said to cover the period from the receipt of the defence in the County Court to the date of the tribunal hearing, and included time spent in dealing with matters both in the County Court and the FTT. No fees were claimed for the preparation and submission of the claim or the processing of the request for judgment because those were said to have been included in the fixed fees in the substantive claim. The FTT was invited to note that whilst the Appellant appreciated any costs saving measures in the matter, the solicitors were still not clear with respect to the powers under which the FTT proposed to make a costs award or the regime under which it would fall; clarification upon the issue would greatly assist the Appellant's counsel in preparing the necessary submissions on costs. The solicitors stated that they had not previously encountered a request or proposal of the present nature by the FTT to deal with County Court costs. The solicitors had been informed that there were various pilot schemes in place in which that might be occurring and they inquired whether the instant case was operating under any such scheme. No doubt due to the imminence of the hearing date, that was the final communication on this subject.

12. We consider that the reasonable and well-informed reader would have understood the FTT's letters to mean that the FTT judge proposed to sit alone as a judge of the County Court to deal with the costs of the legal proceedings, both in the County Court and the FTT, after the FTT had determined the substantive issues which remained in dispute between the parties. Those issues were whether the Appellant had duly issued the relevant service charge demands and the Respondent's challenge to the amount and reasonableness of the professional fees and charges claimed by the Appellant in the proceedings as administration charges. Indeed, this would appear to be the way in which the Appellant's legal representatives understood the letters from the FTT (see for example para. 7 of the FTT's decision on 13 Jul 2017 refusing permission to appeal). We received a copy of the skeleton argument for the hearing on 8 June 2017 prepared by counsel (Mrs Amy Just) representing the Appellant. At para. 33 of her skeleton counsel invited "the Court" to award costs, assessed on an indemnity basis,

pursuant to the Appellant's contractual rights under the Lease and CPR 44.5. At para. 42 she invited "the Court" to award costs in accordance with the Appellant's statement of costs. Consistently with that understanding, the Appellant's skeleton argument did not address in terms the issue of the FTT's jurisdiction to make any award in respect of the costs of the substantive claim.

13. The hearing took place on 8 June 2017. The FTT comprised Tribunal Judge Edgington (presiding) and two Tribunal members. The Appellant was represented by Mrs Just (of counsel) and the respondent represented herself. The Appellant called Mr Azoulay as its only witness and the Respondent gave evidence in her defence. The hearing lasted for about three hours. The FTT's decision is dated 13 June 2017.

14. The FTT resolved the factual dispute about the service of the relevant service charge demands in favour of the Appellant. The FTT then considered the substantive claim for ground rent, service charges and administration charges in the total sum of £1,698.18 (of which £343.02 had been paid at about the time the claim was issued, leaving a disputed balance of £1,355.16). It determined that the sum of £473.16 (some 35% of the amount remaining in dispute) plus the court issue fee of £115 (making a total of £588.16) was reasonable and payable forthwith. Since there is no appeal in relation to this part of the FTT's determination, it is unnecessary for this Tribunal to address the precise quantification of this sum. However, it should be noted that the FTT would not have had any jurisdiction to deal with liability for ground rent. That would have been a matter exclusively for the County Court.

15. The FTT also proceeded to "determine the costs claimed contractually as administration charges" (see para. 14 of the Decision). This was a reference to the costs incurred by the Appellant from the time when the claim in the County Court was brought, said to amount to £4,425 (see para. 11 above). The FTT found that administration charges incurred as costs of the proceedings were payable in the sum of £2,208.80 (inclusive of VAT payable on all administration fees and the FTT hearing fee of £200). The total payable was therefore found to be £2,796.96. (We consider that the court issue fee of £115 should strictly have been treated as part of the legal costs.) Even before the delivery of the FTT's written decision on 13 June, Judge Edgington made an order dated 9 June 2017, sitting as a District Judge in the County Court at Chelmsford. which recited that the determination of the FTT was "known to the Court"; allocated the action to the Small Claims Track; gave judgment for the Appellant in the sum of £2,481.96 plus £315 court and tribunal fees; and stated that the total sum of £2,796.96 was payable on or before 31 July 2017.

16. On 7 July 2017 the Appellant requested permission to appeal the FTT's decision. On 13 July 2017 the FTT issued a further written decision determining that it would not review its previous decision and refusing permission to appeal "because it would be disproportionate to the amounts involved and the general points made are not justified in view of the decision, the law or the facts". The FTT recorded that "following the hearing a Tribunal decision was made in respect of all matters and a county court judgment was drawn up and issued". The FTT declined to clarify whether an appeal should be lodged against the county court judgment; stated that no guidance was needed on the question of how cases should be conducted when the FTT judge exercised jurisdiction as a County Court judge since the procedures for such hearings

were "already known"; and recorded that the contractual costs had been "assessed as administration charges" on the basis that the claim which had been transferred to the FTT had included unspecified "costs", and a variable administration charge was "payable only to the extent that the amount of the charge is reasonable" (see Sch. 11 para. 2 of the 2002 Act).

17. In support of its renewed application for permission to appeal to this Tribunal, the Appellant recognised that the sums involved in this case were relatively small. But it explained that the practice adopted in this case of an FTT judge also sitting as a County Court judge was one which was likely to continue in the future and was very likely to become the default method for dealing with residential property disputes. There was said to be no guidance from this Tribunal as to how such cases should be conducted or on how the parallel jurisdictions should operate (whether procedurally or in terms of substantive law). It was said to be a matter of wider public importance that this Tribunal should give guidance at an early stage for the benefit of all interested parties (litigants, judges, and FTT members). On 30 October 2017 the Deputy Chamber President (Martin Rodger QC) granted permission to appeal because "the proposed grounds of appeal are arguable and raise issues of general importance".

18. On 20 December 2017, this Tribunal wrote to the Appellant's solicitors inviting them to consider whether, to ensure that the appeal was properly constituted, and to avoid it being ineffective for procedural reasons, an application should be made to the County Court to appeal those aspects of the decision where the FTT judge had acted (or had purported to act) as a judge of the County Court. As a result, by an Order dated 23 January 2018, Her Honour Judge Walden-Smith, sitting at the County Court at Cambridge, granted permission to appeal out of time and transferred the case to the County Court at Central London. Both members of this Tribunal are judges of the County Court (see section 5(1) and (2) of the County Courts Act 1984) and the parties agreed that the County Court appeal should be heard and determined by us both.

19. On 6 February 2018 the Tribunal received an application from the Respondent for an order under Sch. 11, para. 5 A of the 2002 Act reducing or extinguishing her liability to pay any administration charge in respect of the Appellant's litigation costs of the appeal to the Tribunal. Para. 5A is a new statutory provision which had not been available to the Respondent in relation to the claim brought by the Appellant in the County Court in October 2016 for arrears of service charges and administration charges. In a witness statement dated 1 February 2018 in support of her application, the Respondent stated that she sought an order under para. 5A in relation to the costs of the appeals both to this Tribunal and to the County Court. Having initially reserved its position, during the hearing of these appeals the Appellant (through its counsel) indicated that it did not oppose the making of such an order. By virtue of the transitional provisions referred to in paragraph 37 below, in our judgment the jurisdiction under para. 5A extends to both of the appeals before us.

20. These appeals were heard on Tuesday 13 March. The Appellant was represented by Mr Justin Bates leading Mrs Amy Just (both of counsel). The Respondent was represented by Mr John Jessup (also of counsel). Both parties submitted detailed and helpful written skeleton arguments from their respective counsel. We are grateful to counsel for their written and oral submissions.

The grounds of appeal

Grounds 1 and 3

21. There are four grounds of appeal. It is convenient to take grounds 1 and 3 together.

22. The first ground raises the issue of the jurisdiction of the FTT. The Appellant accepts that the claim was lawfully transferred from the County Court to the FTT under s.176A of the 2002 Act. That claim included the claim for legal costs previously incurred (totalling £840), the court fee (£115) and the legal costs of issue (£80). But it did not extend to the legal costs incurred after the claim had been issued, either in the County Court or the FTT. By the date of the hearing before the FTT, those further costs amounted to £4,425; but those post-issue costs had never been demanded from the Respondent under the terms of her lease nor did they form any part of the claim that had been transferred to the FTT. No application had ever been made by either party for the FTT to determine the reasonableness of those legal costs (and at that time the right to make an application under Sch. 11, para.5A of the 2002 Act did not yet exist[1]). All that had happened was that the Appellant had submitted a statement of those costs (in Form N260) at the request of the FTT. The Appellant submits that the FTT had no jurisdiction, whether by way of transfer or by way of free-standing application, to deal with those post-issue costs. Insofar as the FTT treated the statement of costs (in Form N260) as an application or demand for administration charges (under Sch.11 of the 2002 Act), the Appellant submits that it was wrong to do so; there had been no demand for those costs at all, let alone one which complied with the requirements of ss.47 and 48 of the Landlord and Tenant Act 1987 or Sch.11 of the 2002 Act. The pleaded case in the County Court was simply for an order for costs, i.e. an order under s.51 of the Senior Courts Act 1981 ("the 1981 Act").

23. The Appellant submits that what should have happened is that the FTT should have sat and determined the issues that had been transferred to it from the County Court. Given that the substantive service charges had been paid, all that remained live before the FTT was the smaller amount claimed as administration charges and costs on the claim form. The FTT should then have remitted the case to the County Court to decide what, if anything, to award by way of further costs, pursuant to s.51 of the 1981 Act, taking into account the Appellant's contractual rights under the lease. It is said that whilst, as a matter of jurisdiction, an FTT judge is a judge of the County Court (under s.5(2) of the County Courts Act 1984), "double-hatted sitting" is not permissible under the present procedural rules governing the FTT and the County Court, regardless of any advantages this might have.

24. The third ground of appeal is closely related to the first ground and complains of a lack of reasons. The Appellant objects that the FTT failed to make clear the procedure it was adopting and the jurisdiction it had been exercising. This uncertainty is said to be important because it affects, for example, routes of appeal. The Appellant submits that the written indication from the FTT shortly in advance of the hearing was that its judge intended to sit as a County Court judge to assess the costs. In practice, it is said that the FTT judge sat both as a judge of that Tribunal and as a District Judge, moving

[1] See paras. 36 – 37 below

between one role and the other during the hearing. It is said to be impossible to understand what decision was in fact reached by which judicial body, or what position or adjudicative role was adopted by the other members of the FTT, who should not have played any part in the County Court decision-making process, even if they had been appointed as assessors (of which there is no evidence).

25. The Respondent submits that whichever body, the FTT or the County Court, made the reduction in post-issue costs, it had the necessary jurisdiction to do so; but that, in fact, the reduction was made by the FTT rather than the County Court, as can be seen from both the form and substance of the Decision. As to the latter limb of the submission, the Respondent relies upon paras. 14, 22, 27, 29, 36 and 39 to 41 of the substantive Decision, to which this Tribunal considers that there should be added references also to paras. 34 and 38.

26. As to the former limb, the Respondent argues that the FTT had the necessary jurisdiction to deal with the post-issue/transfer costs on three alternative bases. First, those costs formed part of the "question" transferred to the FTT for determination by virtue of the reference to the claim for "costs" in the Particulars of Claim. Second, the post-issue/transfer costs were "comprehended within" the broader issue of the reasonableness of the administration charges once that issue was placed before the FTT. Finally, if only the issue of the pre-issue costs was transferred to the FTT, that body was required to assess the post-issue/transfer costs as a "subsidiary issue" since the reasonableness or otherwise of the pre-issue administration charges could not be determined in a vacuum, and without examining and determining what other administration charges the Respondent was obliged to pay: did the pre-issue charges stand alone or were they merely the tip of an iceberg and, if so, how big was that iceberg? The Respondent prays in aid observations of this Tribunal (Judge Nigel Gerald) in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC) at [19] to the effect that:

> *"… there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to determine the issues expressly in dispute. But even then, the issues must fall within the scope of the application, not something which arises outside of it."*

The Respondent submits that the jurisdictional distinction drawn by the Appellant between pre- and post-issue/transfer costs is not in keeping with the practical, robust and common-sense approach to jurisdiction suggested by other decisions of this Tribunal such as *Cain v London Borough of Islington* [2015] UKUT 0117 (LC). The FTT's decision to assess post-issue/transfer costs was said to be entirely in line with this approach. Alternatively, if the post-issue/transfer costs were assessed by the FTT judge sitting as a District Judge of the County Court, that Court had jurisdiction to assess those costs under CPR 45.

Ground 2

27. The second ground of appeal is an alternative to the first and arises only if the FTT did have the necessary jurisdiction to determine the amount payable in respect of the post-issue/transfer costs. In this event, the Appellant submits that there was no power

for the judge, who was sitting both as an FTT judge and as a District Judge, to give effect to the FTT's decision by way of a court order. The correct approach should have been to issue the FTT decision and then leave it to the Appellant to apply for permission to enforce the decision in the same way as an order of the County Court under S.176C of the 2002 Act.

28. On this ground of appeal, the Respondent makes three submissions. First, is clear from the correspondence between the Appellant and the FTT that the FTT judge intended to sit as a County Court judge immediately following the FTT hearing. The time for objecting to this time-saving proposal was during that correspondence. Second, the Appellant's objection to the making and enforcement of a County Court order relates to the impact of the way in which the case was conducted on the Respondent and not the Appellant. Third, and in any event, the County Court had the power to give effect to the FTT's determination under s.176A(3) of the 2002 Act.

Ground 4

29. The final ground of appeal asserts a breach of natural justice. The Appellant maintains that it is trite law that a court, tribunal or other judicial decision-maker must give a party affected by its decision an opportunity to make submissions which afford a possibility of influencing the final decision. Para. 22 of the FTT's substantive decision records that it had mentioned one or two of the items on the statement of costs that had concerned the FTT but "as this was largely a Tribunal decision and as the costs schedule had not been filed in time for the Tribunal members to consider it, it was impossible to be more specific". The Appellant submits that particular points were not put to its counsel and she had no opportunity to respond in relation to, for example, the level of fee-earner that had been used and the hourly rate that had been charged. This is said to have been recognised at para. 12 of the decision refusing permission to appeal where the FTT made the point that summary assessment was not like a detailed assessment since there is no discussion about each and every item and the judge normally makes an instant decision, "but in this case, the judge had to consult with his colleagues and an instant decision was not possible". The Appellant submits that the FTT has accepted that it did not put all the points to counsel for the Appellant and that there has been an acknowledged breach of natural justice.

30. On this final ground of appeal, the Respondent points out that in correspondence with the FTT the Appellant had been specifically asked to provide details of any further costs relating to its claim. The Appellant had been fully aware that those costs would be assessed. The Appellant's apparent confusion as to whether it was the FTT or the County Court that would be assessing those costs was immaterial to the question of whether the costs were reasonable. The Appellant had been represented by counsel and had had the opportunity to make representations as to the post-issue/transfer costs. The Respondent had appeared in person and could not reasonably have been expected to have prompted counsel for the Appellant by making line-by-line submissions regarding those costs in the way that a legal representative might have done. The Respondent submits that it was incumbent upon counsel for the Appellant to justify the Appellant's costs.

The relevant statutory provisions

31. S.51(1)(c) of the 1981 Act provides that "the costs of and incidental to all proceedings in … the county court shall be in the discretion of the court". The Civil Procedure Rules ("the CPR") apply to all proceedings in the civil courts including the County Court. CPR 44 contains the general rules about costs. CPR 44.3 governs the basis of assessment and distinguishes between assessment on the standard and the indemnity bases. In either case the court will not allow costs which have been unreasonably incurred or are unreasonable in amount (CPR 44.3(1)). On a standard basis assessment, by CPR 44.3(2) the court will only allow costs which are proportionate in amount and will resolve any doubt about whether costs were reasonably and proportionately incurred, or were reasonable and proportionate in amount, in favour of the paying party. On an indemnity basis assessment, the "proportionality" test does not apply, and the court will resolve any doubt as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party (CPR 44.3(3)).

32. CPR 44.4 identifies the factors to be taken into account in deciding the amount of costs, and enjoins the court in all cases to have regard to all the circumstances. CPR 44.4(3) identifies particular matters to which the court will have regard in assessing costs on the two alternative bases. These include (a) the conduct of all the parties, (b) the amount or value of any money or property involved, (c) the importance of the matter to all the parties, (d) the particular complexity of the matter or the difficulty or novelty of the questions raised, (e) the skill, effort, specialised knowledge and responsibility involved, and (f) the time spent on the case.

33. CPR 44.5 deals with the amount of costs where they are payable under a contract and introduces a rebuttable presumption that they are presumed to have been reasonably incurred and are reasonable in amount, unless the contract expressly provides otherwise.

34. Limitations upon the recoverability of service charges in residential leases are contained within ss.18 and following of the Landlord and Tenant Act 1985 ("the 1985 Act"). Corresponding provisions in relation to "administration charges" are contained in Sch.11 of the 2002 Act. Para. 1(1) of Sch.11 defines an "administration charge" as "an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable directly or indirectly – (a) for or in connection with the grant of approvals under his lease, or applications for such approvals, (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant, (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease". The term "variable administration charge" is defined by para. 1(3) as "an administration charge payable by a tenant which is neither – (a) specified in his lease, nor (b) calculated in accordance with a formula specified in his lease".

35. Para. 2 of Sch.11 provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable. By para. 4(1) a demand for the payment of an administration charge must be accompanied by a summary of the rights

and obligations of tenants of dwellings in relation to administration charges; and by para. 4(3) a tenant may withhold payment of an administration charge which has been demanded from him if para. 4(1) is not complied with in relation to the demand. Para. 5(1) enables an application to be made to the FTT for a determination whether an administration charge is payable and, if it is, as to (amongst other things) the amount which is payable (see also para. 2). But by para. 5(4)(c) no such application may be made in respect of a matter which has been the subject of a determination by a court. An agreement by a tenant is rendered void by para. 5(6) insofar as it purports to provide for a determination in a particular manner or on particular evidence of any question which could be the subject of an application under para. 5(1).

36. Sch.11, para. 5A (inserted with effect from 6 April 2017 by section 131 of the Housing and Planning Act 2016 and corresponding to s.20C of the 1985 Act in relation to service charges) enables a tenant of a dwelling in England to apply to "the relevant court or tribunal" (as explained in the table to para. 5(3)(b)) for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs incurred or to be incurred. By para. 5(2) the relevant court or tribunal may make "whatever order on the application it considers to be just and equitable".

37. By regulation 6 of the Housing and Planning Act 2016 (Commencement No 5, Transitional Provisions and Savings) Regulations 2017 (SI 2017 No 281), para. 5A does not apply in relation to litigation costs incurred, or to be incurred, in connection with "proceedings" begun before 6 April 2017. Thus, the Respondent was unable to invoke para. 5A in relation to the proceedings in this case before either the District Judge sitting in the County Court or the FTT (since the claim was commenced on 14 October 2016 and was sent to the FTT on 9 January 2017). But she has sought to do so in relation to the appeals to this Tribunal and to the County Court. The appeals to this Tribunal and to us sitting as judges of the County Court were separate proceedings brought after 5 April 2017 and may therefore be the subject of an application under para. 5A.

38. S.176A of the 2002 Act provides a power for the court to transfer proceedings to the FTT. By sub-s.(1) "Where, in any proceedings before a court, there falls for determination a question which the [FTT] or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or an application to the tribunal, the court – (a) may by order transfer to the [FTT] 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 [FTT] or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal, as it thinks fit." The enactments specified in sub-s.(2) are the 2002 Act, the Leasehold Reform Act 1967, the 1985 Act, the Landlord and Tenant Act 1987, the Leasehold Reform, Housing and Urban Development Act 1993, and the Housing Act 1996 but, crucially, not the Senior Courts Act 1981 (and thus not s.51 of that Act).

39. Sub-s.176A (3) provides that where the FTT or the Upper Tribunal "has determined the question, the court may give effect to the determination in an order of the court". S.176B of the 2002 Act relates to certain appeals from the FTT to the Upper

Tribunal.[2] S.176C of the 2002 Act provides that any decision of the FTT other than a decision ordering the payment of a sum (which is enforceable in accordance with s.27 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act")), "is to be enforceable with the permission of a county court in the same way as orders of such a court".

40. By s.29 of the 2007 Act, the costs of and incidental to all proceedings in the FTT and the Upper Tribunal are in the discretion of the tribunal in which the proceedings take place, and the relevant tribunal has full power to determine by whom and to what extent the costs are to be paid; but this is subject to any applicable tribunal procedure rules. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169) ("the FTT Rules") makes provision for making orders in respect of costs in r.13. So far as material to the present appeals, the FTT was only empowered to award costs if a person had "acted unreasonably in bringing, defending or continuing proceedings".

41. For completeness we mention the case management powers in rule 6 of the FTT Rules. Rule 6(3)(n) provides an express power to transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and (i) because of a change of circumstances before the proceedings were started, the FTT no longer has jurisdiction in relation to the proceedings, or (ii) the FTT considers that the other court or tribunal is a more appropriate forum for the determination of the case. There will be some cases where that power is exercisable.

Conclusions

Grounds 1 and 3

42. It is important to appreciate that the statutory provisions which permit the flexible deployment of FTT judges as judges of the County Court do not affect the substantive statutory provisions which govern the respective jurisdictions of the County Court and the FTT, nor do they alter the procedural rules which govern proceedings in those two bodies. There are significant differences between them. Procedure in the County Court is governed by the CPR while procedure in the FTT is governed by the FTT Rules. The FTT has no power to enter a money judgment or otherwise require one party to make a payment to another but simply declares what the parties' rights are and leaves questions of enforcement to the County Court.

43. The FTT's jurisdiction to make an award of costs is tightly circumscribed (see para. 40 above) whereas the County Court has much more extensive powers in relation to the award of costs. Indeed, it has been held by the Court of Appeal (in *Chaplair Ltd v Kumari* [2015] EWCA Civ 798, [2015] HLR 39) that where a party has a contractual right to recover its costs on an indemnity basis, the court will generally exercise its discretionary powers under s. 51 of the 1981 Act so as to give effect to that right unless there is a good reason to the contrary (paras. 35 to 36). Even if the claim has been allocated to the small claims track, the court is not restricted to awarding only the fixed costs which can be awarded under the CPR in a case on the small claims track. Where the court gives effect to a contractual right to recover fees on an

[2] Appeals on a point of law are governed by s.11 of the Tribunals, Courts and Enforcement Act 2007.

indemnity basis by making an order in those terms, it nonetheless remains relevant for the court to consider whether an item of costs was not reasonably incurred or the amount claimed for an item was unreasonable in accordance with the rules in CPR 44.3 to 44.5 (see paras. 31 to 33 above).

44. We would add that it may be appropriate for the courts (or for this Tribunal) to consider the relationship between, on the one hand, s.51 of the 1981 Act and the decision in *Chaplair* and, on the other, paras. 2 and 5(6) of Sch.11 to the 2002 Act (see para. 35 above). In view of the ouster clause in para. 5(6), is such a contractual right subject to the control contained in para. 2? If so, would it be relevant for the court to have regard to the rules governing costs in the FTT (to which service charge disputes have been entrusted by the legislation) when exercising the discretionary power under s. 51 of the 1981 Act? These potentially difficult issues were not the subject of argument in these appeals and so we say no more about them here. Any argument about these points will have to await another case where it is appropriate for them to be raised.

45. Different rules govern the time for appealing, the procedure for seeking permission to appeal, and the destination of the appeal, depending upon whether it is sought to appeal a decision of the FTT or the County Court. It is therefore essential that where a judge acts on the same occasion both as a judge of the FTT and as a judge of the County Court, that judge is very clear in his or her own mind as to which "hat" is being worn in relation to each aspect of the decision-making process, and that he or she maintains and articulates a clear distinction at all times between the discrete functions and roles being performed.

46. As this Tribunal (Martin Rodger QC, Deputy President) recognised in *Cain v London Borough of Islington* [2015] UKUT 0117 (LC) at [15] "the jurisdiction exercised by the FTT is statutory. It has no inherent power to determine any question." Nor can jurisdiction be conferred on the FTT by agreement or by consent. At [17] of its judgment in *Cain* this Tribunal also recognised that "the jurisdiction of the FTT in a case transferred to it from the County Court is confined to the question transferred and all issues comprehended within that question". Speaking in the context of the referral to the FTT of the determination of the reasonableness of a service charge demand, the Deputy President went on to

> *"…suggest, however, that that principle ought to be applied in a practical manner, with proper recognition of the expertise of the FTT in relation to residential service charges. When trying to identify which subsidiary issues ought properly to be treated as being included within the scope of the questions transferred it is not appropriate to be too pedantic, especially where an order transferring proceedings is couched in general terms and where there is no suggestion that the court intended to reserve for itself any particular question. It is not uncommon for orders for transfer to be expressed rather generally, and in practice the tribunals of the Property Chamber sensibly recognise that it would be a disservice to the parties (and to the transferring court) for them to adopt an over-scrupulous approach to their jurisdiction."*

47. We do not dissent from any of those observations in *Cain*. But they must be read subject to the important qualification that the FTT has no power (even with the consent of the parties) to extend its jurisdiction, or to arrogate to itself a jurisdiction to determine questions which the County Court had no power to transfer to the FTT for determination. In the context of a transfer under s.176A of the 2002 Act, only questions which the FTT would have had the jurisdiction to determine under any of the enactments specified in s.176A (2) may properly be transferred from the County Court to the FTT. 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). In our judgment, the scope of the questions transferred from the County Court for determination by the FTT depends not just upon the terms of the County Court's order but, more fundamentally, upon whether any particular matter was within the jurisdiction of the FTT under an enactment specified in s.176A(2). Of course, even in those cases where a transfer order is not made and a judge is deployed to sit in both the FTT and the County Court (see para. 3 above), the tribunal must ensure that it does not act outside its jurisdiction.

48. We have already indicated that the FTT's pre-hearing letters (summarised at paras. 8 to 10 of this Decision) would have conveyed to a reasonable and well-informed reader that the FTT was proposing that the FTT judge should sit alone as a judge of the County Court to deal with the issue of the costs of the legal proceedings, both in the County Court and the FTT, after the FTT had determined the issues transferred to it which remained in dispute between the parties. That is the model contemplated by the Civil Justice Council and by the Pilot.

49. However, we are satisfied that this is not the procedure that the FTT actually adopted at, and following, the hearing in this case. We accept the Respondent's submission that the decision on post-issue legal costs was in fact made by the FTT, rather than the County Court. This is clear from both the form, and also the substance, of the FTT's substantive Decision: see paras. 14, 22, 27, 29, 34, 36 and 38 to 41 of that Decision. We reject the Appellant's third ground of appeal. We do not consider that in its substantive Decision the FTT failed to make clear the procedure it was adopting or the jurisdiction it was exercising (even though this was not the procedure that had been fore-shadowed in the pre-hearing correspondence); and we do not consider that any doubt was thrown upon the procedure that the FTT in fact adopted by the terms of its later Decision refusing permission to appeal.

50. This Tribunal accepts the Appellant's submission that the FTT had no jurisdiction, whether by way of transfer or by way of free-standing application, to deal with the costs which the Appellant had incurred in connection with the proceedings after the issue of the claim in the County Court. The FTT appears to have treated such costs as a variable administration charge which was subject to Sch. 11, para. 2 of the 2002 Act and therefore payable only to the extent that the amount of the charge was reasonable, and to have assumed to itself the right to determine the reasonableness of that charge.

51. There is clear authority, in the decision of this Tribunal (Martin Rodger QC, Deputy President) in *Christoforou v Standard Apartments Ltd* [2013] UKUT 0586 (LC), [2014] L & TR 12, that the costs of proceedings before the FTT may properly

constitute costs and expenses incurred by a landlord in enforcing the payment of service charges or other moneys payable by a tenant under the terms of their lease (thus falling within the scope of Sch. 4, para. 1(b) of the Lease in the instant case); and that such costs are properly to be regarded as a variable administration charge within the meaning of Sch. 11, para. 1(1) of the 2002 Act. In addition, the Court of Appeal has decided (*Freeholders of 69 Marina, St Leonards on Sea v Oram* [2011] EWCA Civ 1258) that such costs also fall within the scope of a covenant corresponding to Sch. 4, para. 11(a) of the Lease, since a determination by the FTT of the reasonableness of the service and administration charges is a condition precedent to the enforcement of their recovery by forfeiture (see para. 5 above). However, as at the date of the hearing before the FTT in June 2017, such costs had not yet become payable under the relevant provisions of the Respondent's lease nor had there yet been any demand made for their recovery so that they had not yet become "administration charges" within Sch.11, para. 1(1) of the 2002 Act; nor had the issue of their reasonableness yet been referred to the FTT. As such, the FTT was not yet seised of any jurisdiction over such costs. Accordingly, the FTT erred in this case by treating the legal costs incurred after the commencement of the County Court proceedings brought to recover unpaid service charges and administration charges previously demanded, as if those post-issue costs represented further "administration charges" *at that stage* ie. when the FTT purported to assess the reasonableness of those costs under Sch. 11 of the 2002 Act (see paras. 15 and 16 above).

52. On the submissions advanced before us in these appeals (see paras. 43 - 44 above), such costs were amenable to an award under s.51 of the 1981 Act. But in our judgment any such award was a matter for the County Court, and not for the FTT, because jurisdiction to award costs under s.51 of the 1981 Act has not been conferred on the FTT and because s.176A of the 2002 Act does not authorise the County Court to transfer an issue falling within that jurisdiction to the FTT. This Tribunal rejects each of the three bases upon which the Respondent submits that the FTT had the necessary jurisdiction to deal with the post-issue costs recorded at para. 26 of this Decision. It does so on the short ground 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). It should also be noted that once the Court has determined the amount of the costs recoverable under s.51 of the 1981 Act, the effect of Sch. 11, para. 5(4)(c) of the 2002 Act is that there is no scope for the jurisdiction under Sch. 11 to apply to those costs.

53. This analysis potentially raises some practical problems. We understand that many lessors have commonly relied upon lease terms of the kind referred to in para. 5 above (and on *Chaplair*) to demand payment by a lessee of the whole of the legal costs they have incurred in proceedings to recover service charge arrears from that lessee, including dealing with any issues about the reasonableness of such service charges. Where this happens, the lessee has only been able to challenge the reasonableness of such "post-issue" costs once they are demanded and become "administration charges" amenable to control under the 2002 Act and by being willing to become involved in yet more litigation. That process could carry on *ad infinitum*, generating unnecessary litigation, professional fees and costs. Para. 5A of Sch. 11 of the 2002 Act has been

introduced to enable a lessee to make an application for an order to reduce or extinguish litigation costs which have been or *are to be* incurred. The order made by the court or tribunal does not depend upon those costs having already become "administration charges." Provided that a lessee makes an application under para. 5A it is possible for the court or tribunal to address this litigation "carousel".

54. However, the argument in the present case has revealed a further potential problem. As the Appellant rightly pointed out before the FTT, the post-issue costs which the judge proposed to consider, could only at that stage have been assessed by him under s. 51 of the 1981 Act and only in the County Court, not the FTT. Where that step is taken under a "twin-hatting" procedure, a lessor who relies upon contractual rights in a lease to claim reimbursement of post-issue legal costs (applying *Chaplair*) can avoid those costs being controlled under Sch. 11 of the 2002 Act (para. 5(4)(c) of Sch.11). Mr. Bates suggested that some landlords might find this option attractive. Although this would bring the assessment of ongoing costs to a head, and thereby terminate the stream of ongoing fees and costs which might otherwise continue, he indicated that it would give landlords the benefit of an accelerated cash flow as well as avoiding control under Sch. 11. In so far as that practice might develop, we consider that it would be an unintended and undesirable consequence of the Pilot.

55. There are three potential remedies for dealing with this issue. First, the problem identified reinforces the need for a tenant who decides to make an application under the 1985 or 2002 Acts challenging the recoverability of service charges or administration charges, also to consider making a properly formulated application under para. 5A of Sch.11 for an order reducing or extinguishing liability for litigation costs yet to be incurred (see para. 36 above). Second, it is important that the court properly applies all the tools available in CPR 44.4 to 44.45 to control costs, even where the landlord relies upon a contractual right to recover costs on an indemnity basis. Third, consideration may need to be given to the relationship between lease terms to which *Chaplair* applies, s. 51 of the 1981 Act and Sch. 11 of the 2002 Act (see para. 44 above). This issue could also be relevant to tackling the problem identified in para. 53 above.

56. If in the present case Sch.11, para. 5A had applied to the claim in the County Court and the proceedings before the FTT, those bodies would have had the necessary jurisdiction to reduce the Respondent's liability to pay any administration charge in respect of the costs of those proceedings to whatever amount it should consider "just and equitable"; but the relevant transitional provisions prevented the Respondent from relying on that jurisdiction before the FTT in the present case (see para. 37 above).

57. The Court of Appeal considered the corresponding jurisdiction to limit the recoverability of legal costs by way of service charge under s.20C of the 1985 Act in the case of *Iperion Investments v Broadwalk House Residents Ltd* (1994) 27 HLR 196. On the footing that the tenant was contractually liable to pay a share of the landlord's legal costs of proceedings as part of the service charge, the Court of Appeal held that it should exercise its statutory power under s.20C to order that such costs should be disregarded in determining the amount of the service charge payable by the tenant. It was held to be just and equitable to exercise the discretion in favour of a tenant who had been awarded the costs of legal proceedings against his landlord.

Delivering the leading judgment, Peter Gibson LJ said (at pp.202-3) that an obvious circumstance which Parliament must be taken to have had in mind in enacting s.20C was a case where a tenant had been successful in litigation against his landlord yet the costs of the proceedings were within the scope of the service charge recoverable from the tenant. Where a tenant has been successful in litigation against his landlord and the court has decided not merely that he should not be ordered to pay any costs to the landlord but instead the landlord should pay the whole or part of the tenant's costs, it is unattractive that the tenant should subsequently find himself having to pay any part of the landlord's costs through the service charge. Citing observations of Nicholls LJ in the earlier Court of Appeal decision in *Holding & Management Ltd v Property Holdings & Investment Trust Plc* [1989] 1 WLR 1313, the Court of Appeal said that a landlord "should not get through the back door what had been refused by the front".

58. Had the para. 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondent's contractual liability to pay the legal costs that the Appellant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters (and not simply by reference to whether costs had been incurred reasonably and were reasonable in amount). We recognise that this would have effected an alteration to the parties' contractual position, but that is the very purpose of the para. 5A jurisdiction. Since this jurisdiction was not available to the Respondent before the County Court or the FTT, however, we need say no more about this aspect of the case.

59. We therefore uphold the appeal on the first ground, although only in relation to the FTT's determination of the reasonableness of the post-issue costs (and the consequential County Court money judgment in the sum so determined). There was no appeal from the FTT's determination of the reasonableness of the pre-issue administration charges (and the consequential County Court judgment) in the sum of £588.16 (although we consider that strictly the Court issue fee of £115 which was included within this sum should properly have fallen to be determined as part of the costs of the proceedings, and thus by the County Court).

60. We accept the Appellant's submission that what should have happened in this case is that the FTT should have confined itself to determining the reasonableness of the pre-issue costs as an administration charge and should then 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 FTT's power to make an award of legal costs in respect of proceedings before that tribunal is restricted by r.13 of the FTT Rules, and the Appellant accepted at the hearing before us that this rule was not engaged. 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. On that basis, we can see no objection to the FTT judge proceeding straight to a determination of those costs sitting as a District Judge in the County Court, without the need for a separate hearing on a different occasion, provided adequate notice has been given to the parties that he proposes to adopt this course. The Pilot contemplates the giving of such

notice. The case should be listed for hearing both before the FTT and also before the FTT judge sitting on his own as a judge of the County Court, and the other members of the FTT should play no part in this part of his decision. In centres where the FTT and County Court sit in the same building, the Pilot promotes the more efficient use of valuable judicial resources by enabling litigation which raises issues for determination by both that tribunal and the court to be addressed on the same occasion.

Ground 2

61. We will express our conclusions on ground 2, although in the light of our decision on ground 1 it does not arise. We reject the Appellant's second ground of appeal which involves the submission that there was no power for the FTT Judge sitting as a District Judge to give effect to the FTT's decision by way of a Court order. We do not accept the submission that the correct approach was for the FTT to have issued its decision and then left it to the Appellant to apply for permission to enforce the decision in the same way as an order of the County Court under S.176C of the 2002 Act. We agree with the Respondent that the County Court had the power to give effect to the FTT's determination under s.176A(3) of the 2002 Act. It is unnecessary for a party to have resort to the enforcement route under s.176C (with its attendant procedural requirements in CPR 70.5 and the associated Practice Direction) in relation to any case which has been transferred to the FTT under s.176A of the 2002 Act. In such a case, the County Court may give direct effect to the FTT's determination in an order of the Court by virtue of s.176A(3).
62. If it were necessary (as the Appellant submitted) to have recourse to the procedure under s.176C, it is difficult to see why Parliament should have enacted s.176A(3) which, on the Appellant's analysis, would be a dead letter. The Appellant submitted that the enforcement process under s.176C involved at least two significant safeguards for the parties. First, it was said to enable the party who was found to be liable to make a payment to do so before any possibility of the entry of a County Court judgment might arise. But a party who wishes to make any payment for which it is liable can always invite the Court to direct that judgment shall not be entered until a later date, and only then if the liability remains unsatisfied. Secondly, it was said to facilitate the proper disposal of appeals, in the sense that the Court would be unlikely to allow the enforcement of a decision of the FTT which was subject to an appeal. But the party liable to make a payment can always seek a stay of execution of any judgment pending the final disposal of any appeal if proper grounds for such a stay exist.

Redetermination of costs

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 Appellant indicated that it was content that, sitting on appeal from the decision of the County Court, we should exercise our power under CPR 52.10(1) to determine the amount of the post-issue legal costs; and the Respondent'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.

64. Since the Appellant has a contractual right to recover its costs of these proceedings on an indemnity basis (pursuant to Sch.4, paras. 1(b) and 11(a) of the Lease), those costs

fall to be assessed in accordance with CPR 44.5 and CPR 44.3 and 44.4 (summarised at paras. 31 - 33 of this Decision). The proportionality test does not apply. The Court will not allow costs which have been unreasonably incurred or which are unreasonable in amount, although on an assessment under CPR 44.5 there is a rebuttable presumption that costs have been reasonably incurred and are reasonable in amount. In assessing the costs, the Court must have regard to all the circumstances of the case and pay particular regard to the several factors specifically identified in CPR 44.4(3). We note that in paras. 28 and 29 of its decision the FTT relied upon the decision of Master Gordon-Saker, the Senior Costs Judge, in *BNM v MGN Limited* [2016] 3 Costs LO 441, [2016] EWHC B13 (Costs) and suggested that proportionality "has some relevance" to the application of CPR 44.4(3). We disagree. *BNM* did not deal with the assessment of costs on the indemnity basis and the proportionality test does not apply to such an assessment.

65. In the present case there was no dispute before the FTT or before us that it was appropriate for the Appellant to incur the costs of legal representation. In other cases, this will primarily be a matter for the FTT (or a District Judge applying s.51 of the 1981 Act) to address. However, it should not be thought that we condone this practice. The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear. In many cases there will be no issue about the relevant principles to be applied, and their application will not be so difficult as to make legal representation essential or even necessary. In such cases a representative from the landlord's managing agents should be able to deal with the issues involved. After all, those agents will have been directly involved in the decisions taken pursuant to the lease to provide services, to set annual budgets and estimated charges, to incur service charge costs and to serve demands for service charges. Where that is so, a court may reach the conclusion that it was unreasonable for the costs of legal representation to be incurred, whether in whole or in part. Under CPR 44.3 to 44.5 such a conclusion would be compatible with a clause in a lease providing for the recovery of costs on an indemnity basis.

66. Whether or not it is reasonable to rely upon legal representation before the FTT (or a District Judge sitting in the County Court) in a particular case, we strongly endorse the FTT's concerns about the size of the bundle which was presented to it in the present case. It appears that this concern applies more generally (see para. 4 of the FTT's decision). The lease was copied 3 times and many other documents were duplicated. The FTT rightly pointed out the wasted expenditure involved and the inappropriate burden imposed upon the members of the FTT. Judicial resources are finite and under great (and increasing) pressure. For example, the proper use of pre-reading time, so that a hearing may proceed more efficiently, is impeded where a party produces a bundle of this nature. It may also make it more difficult for a litigant in person to participate. Notwithstanding the FTT's strictures in the present case, the appeal bundle placed before this Tribunal also contained 3 copies of the lease and much other duplicated material. It would appear that solicitors are simply not paying attention to what is said by tribunals or judges. This is unacceptable, and a radical change in the present culture is long overdue.

67. Problems of this kind are often raised in decisions of the courts. Judges are used to applying the rules on costs so as to help discourage such conduct. The position is no different in relation to service charge disputes. It should not be thought that a contractual provision in a lease for the recovery of a landlord's litigation costs on an indemnity basis enables that party, relying upon s.51 of the 1981 Act, to avoid the curbing of excessive expenditure on proceedings through the proper application of the principles in the CPR.

68. As we have said, in the present case the Respondent did not take issue with the Appellant's choice to rely upon legal representation before the FTT and the District Judge. We must therefore proceed on that basis. We begin by reviewing the adjustments made by the FTT to the costs claimed by the Appellant.

69. When assessing the post-issue legal costs, the FTT applied an hourly rate of £180 in place of the £250 claimed for a Grade B fee earner. We consider that this adjustment was justified; and at the hearing of these appeals, counsel for the Appellant indicated that the Appellant did not object to the adoption of this hourly rate.

70. The FTT reduced the claim for attendances from 5 hours to 3.9 and the time spent on documents from 4.9 hours to 2.4 hours. It substituted for counsel's brief fee for the hearing of £950, three hours of fee earner's time at £180 in the total sum of £540. Against the £4,110 claimed (including VAT but excluding court issue and FTT hearing fees totalling £315), the FTT allowed £2,008.80 (£1,674 plus VAT of £334.80). This should be compared with the sum allowed by way of administration charges (excluding court issue fee) of only £473.16.

71. We find the level of costs incurred post-issue, mainly in the FTT, troubling. The costs are very high relative to the amount effectively claimed (£1,355.16), and even more so to the amount determined as reasonable by the FTT (£473.16). However, on an indemnity basis assessment, proportionality is not engaged, and although regard must be had to the amount at stake, the Court must also have regard to the issues involved, the reasonableness of the work carried out and the time spent. In this case the Respondent disputed not only the reasonableness of the sums claimed but also whether any proper demands had been served. This increased the work which the Appellant's representatives had to undertake.

72. Having regard to the terms of the FTT judge's procedural directions order, we consider that the particular criticisms and reductions which the FTT chose to make about the time spent on attendances and documents were ill-founded. The criticism that the time spent in perusing the Defence was excessive (without more) ignores the fact that there were various documents which accompanied the Defence which the Respondent had apparently annotated by hand and which would also have needed to be read. We also consider that the decision to instruct counsel rather than a solicitor did not (without more) merit a reduction in the amount of costs. In the pre-hearing correspondence the FTT judge had already stated that there were disputed issues of fact which could not really be resolved on the papers and the solicitors retained by the Appellant were situated some distance from the hearing centre. Had the responsible fee-earner undertaken the advocacy, there would inevitably have been travelling time while the instruction of a local agent would have involved additional costs, over and

above simply the time spent at the hearing, which might well have approached, if not exceeded, counsel's fee. That fee included the preparation of a detailed written skeleton argument which must have been of considerable assistance to the FTT members when preparing for a hearing involving a litigant in person. For these reasons we do not consider that the reasoning given by the FTT supports its decision to reduce the number of hours spent by the Appellant's legal team.

73. However, the FTT made other findings which were critical of the Appellant and which we endorse, but it did not go on to apply relevant criteria in CPR 44.4(3) to those findings. In particular, it did not assess either the reasonableness of the costs incurred or the amounts claimed by reference to the conduct of the parties and whether any efforts were made before and during the proceedings to try to resolve the dispute. Nor did the FTT refer to the manner in which it had determined the issues in the 2002 Act proceedings. True enough, the Respondent failed on one issue (whether demands had been served on her). On the other hand, she was successful in persuading the FTT to reduce by 65% the amount of the administration charges which remained in dispute (see para. 14 above). In effect, the Respondent had to make an application under the 2002 Act in order to achieve that outcome.

74. In para. 36 of its decision the FTT analysed in some detail the manner in which the litigation was conducted. In summary, on 30 September 2016 (when the Appellant's Solicitors said that they were instructed to issue proceedings for forfeiture by 5 October) the remaining service charge debt was only £343.02 and below the limit for forfeiture. The Respondent repeated her request for a breakdown of the fees and costs which were also being claimed, failing which she would have to apply to the Tribunal. The FTT rejected the Appellant's response that that information had already been provided. Shortly after that, the Appellant issued its claim in the County Court and the Respondent paid the debt of £343.02, leaving only the fees and costs for recovery of that sum in dispute. The FTT found that it was incumbent on the Appellant at that stage "to just step back and see what was happening. Their refusal to do this or to give details of the administration charges so that the Respondent had the information to assess their reasonableness and could make an offer was incomprehensible." The Appellant has not sought to challenge any of these findings (or similar findings made in paras. 39 and 42 of the decision). In our judgment the FTT's assessment of the position was correct.

75. During the hearing it was pointed out that these findings by the FTT were relevant to a proper assessment of the Appellant's post-issue costs under s. 51, even on the indemnity basis. It could be said that they would lead to the court assessing those costs at a figure lower than the sum arrived at by the FTT. However, the Respondent did not ask this Tribunal to consider substituting a lower figure. That would have required more detailed argument and consideration of items in the Appellant's costs schedule with both parties. Nevertheless, having regard to the unchallenged and well-founded criticisms of the Appellant's conduct of the litigation, as well as the relative success of the parties on the two issues properly before the FTT, we consider that the conclusions we reached in para. 72 above would not justify any increase in the amount of the costs which the FTT purported to order under s. 51 of the 1981 Act.

Ground 4

76. Since we consider that the FTT erred in law in assuming jurisdiction to determine the amount of the post-issue legal costs, it is unnecessary for us to consider the Appellant's fourth ground of appeal. However, we wish to emphasise the need to give the receiving party a chance to deal with any specific criticisms of items in a costs statement which the judge sitting in the County Court may have in mind when assessing costs under s.51, particularly if those points are not raised by the paying party, just as the FTT would do when conducting a hearing to determine the reasonableness of an administration charge under the 2002 Act. In the instant case, we can envisage that the Appellant would have had a number of responses to the specific points of detail relied upon by the FTT to reduce the costs claimed if the FTT had raised those points with the Appellant's legal representative beforehand.

Application under Sch. 11, para. 5 of the 2002 Act

77. Regardless of the outcome of these appeals, the Respondent seeks an order under Sch.11, para. 5A of the 2002 Act that the Appellant should not be allowed to recover any of its legal costs in these proceedings under the terms of the Respondent's lease or otherwise In his skeleton argument, counsel for the Respondent drew our attention to the following matters: (1) the Appellant had stated that it was "not unsympathetic to the proposition that Ms Child - who has no interest in these wider issues - should not be the subject of the costs of the appeal" but nonetheless it had not offered any undertaking that it would not pursue the Respondent for the costs of the present action; (2) the Respondent had not had any contact from the Appellant attempting to negotiate or secure her agreement not to resist the proceedings; (3) the Respondent had not in any way significantly added to the cost of the present appeal; (4) none of the points raised by the Appellant in its Grounds of Appeal related to the conduct of the Respondent. If the Appellant were to succeed on its appeals, it would therefore be because the FTT or the County Court had fallen into error. The Respondent referred to obiter observations of this Tribunal in *Southern Land Securities Limited v Poole* [2017] UKUT 0302 (LC) (on the corresponding provision in relation to the power to limit the recoverability of legal costs by way of service charges) at para. 27:

> *"In my view the hearing before this Tribunal was caused by a mistake by the FTT which was not promoted by Mr Poole. In those circumstances the just order is that each side pay their own costs before this Tribunal. That is achieved by making an order under s 20C. I would provisionally make an order under s 20C in respect of this Tribunal."*

We endorse these observations, which seem to us to apply equally to the instant appeals.

78. Having taken instructions, during the hearing of these appeals, the Appellant (through its counsel) indicated that it did not oppose an order under para. 5A. We consider that it was right not to do so. We therefore make an order under para. 5A in relation to the Respondent's costs of the appeal to the FTT and the County Court. In the event, we do not consider that any additional legal costs have been incurred by the Appellant in relation to the County Court aspect of these appeals.

Determination

79. For the reasons set out above the Tribunal allows the appeal from the FTT's determination, sets aside the determination that the total payable by the Respondent is £2,796.96 and substitutes an order determining: (1) that of the claim for administration charges, the sum of £473.16 is reasonable, and (2) that the FTT had no jurisdiction to determine administration charges incurred as costs of the proceedings.

80. As a consequence of the preceding paragraph, and sitting as the County Court, we allow the appeal by setting aside the judgment for £2,796.96. Having made a fresh determination under s. 51 of the 1981 Act of the costs payable by the Respondent to the Appellant, we substitute judgment for the Appellant for £473.16 for administration charges and £2,323.80 for legal costs and court issue and FTT hearing fees, making a sum of £2,796.96 in total.

Future lessons

81. We consider that this case provides a number of important lessons for the future where cases are transferred from the County Court for hearing in the FTT. First, the scope of what is transferred to the FTT depends not just upon the terms of the Court's order but more fundamentally upon whether the matter was within the jurisdiction of the FTT, as defined more particularly in s.176A(2) of the 2002 Act. When a transfer order is drawn up care needs to be taken to see that it identifies the specific matters being transferred, that those matters do fall within the FTT's jurisdiction and that they fall within the scope of the power to order the transfer.

82. Second, jurisdiction cannot be conferred on the FTT (or for that matter on the County Court) by consent. Statements suggesting otherwise must in future be avoided. For example, paras. 3.2, 5.1, 5.3, 6.1 and 6.2 of the Practice Guide for the Residential Property Dispute Deployment Pilot suggest that the FTT may decide issues falling outside its own jurisdiction but within that of the County Court, and *vice versa.* Although a person who is a judge of both the FTT and the County Court may wear two hats, these two separate jurisdictions (and their respective procedural rules) cannot be elided, or treated effectively as a single jurisdiction, without legislative change. No doubt our comments on what was intended to be a helpful introduction to the pilot can be addressed by some suitable redrafting.

83. Third, the FTT only has jurisdiction to determine the costs of proceedings pursuant either to r.13 of the FTT Rules or an application in accordance with Sch. 11, para. 5A of the 2002 Act. The FTT has no jurisdiction to determine the costs of proceedings under s.51 of the 1981 Act, which are the preserve of the Court, applying any relevant contractual costs provisions in the lease and the applicable provisions of CPR 44. The FTT must leave the issue of costs falling outside its jurisdiction to the County Court. This emphasises the need for a tenant to consider making an early application under para. 5A, both to the County Court and to the FTT. Since a para. 5A application has to be made to the Court or tribunal to which the proceedings relate, there may need to be two applications in so far as costs are, or may be, incurred in proceedings before two different courts or tribunals. We understand that the standard form of application to the FTT under section 27A of the 1985 Act already makes provision for an additional

application under Sch. 11, para. 5A of the 2002 Act. Where proceedings are transferred from the County Court to the FTT for determination, the possibility of making such an application is a matter which can be considered at a case management hearing or in directions given by the procedural judge.

84. Fourth, there can be no objection to an FTT judge sitting also as a judge of the County Court to determine under s. 51 of the 1981 Act the costs of proceedings transferred from the County Court, both in that Court and in the FTT.[3] But the judge must be very clear about which role he is performing, and should ensure that he does not involve his fellow FTT members in making any decision in the exercise of the County Court's jurisdiction. Sitting as a judge of the County Court, the FTT judge may also give effect to any decision of the FTT in an order of the Court under s.176A(3) of the 2002 Act. However, the rules of natural justice require the County Court judge to give a fair and proper opportunity to each of the parties to address him on any points he may consider to be relevant to his decision.

The Hon. Mr Justice Holgate, Chamber President
His Honour Judge Hodge QC

20 June 2018

[3] As the law currently stands. See paras. 43 - 44 and 50 – 52 above.