

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

**Neutral Citation Number: [2018] UKUT 341 (LC)
Case No: LRX/19/2018**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – tribunal procedure – costs – jurisdiction of First-Tier Tribunal to award costs – Tribunals, Courts and Enforcement Act 2007 s.29 – Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 rule 13 – manager appointed under s. 24 Landlord and Tenant Act 1987 – manager subsequently making application to First-Tier Tribunal to enforce landlord’s obligations – question arising as to the identification of the “proceedings” for the purpose of deciding whether the landlord had acted unreasonably in defending or conducting proceedings – whether any separate costs jurisdiction under s.24 of the 1987 Act

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

BETWEEN:

MARCUS J STAPLES

Appellant

- and -

DANUTE LIUBA CRANFIELD

Respondents

**Re: 8 Portland Place,
Brighton,
East Sussex. BN2 1DG**

Decision on Written Representations

His Honour Judge Huskinson

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The following case is referred to in this decision:

Willow Court Management Company Limited and Others v 231 Sussex Gardens Right to Manage Limited [2016 UKUT] 0290 (LC)

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) (the FTT) dated 11 January 2018 whereby the FTT decided that, in the circumstances of the particular application before it, the FTT had no jurisdiction to order the respondent to pay certain costs which had been incurred by the appellant in applying to the FTT to obtain a variation of a management order.

2. The present appeal is solely concerned with the question of the FTT's jurisdiction to make a costs order as sought in the present case. The appeal is not concerned with the merits of the application supposing that jurisdiction exists.

3. The relevant facts of the case can be briefly stated as follows.

4. The respondent is the freehold owner of 8 Portland Place, Brighton, East Sussex, BN2 1DJ (the building). The building is divided into five flats held upon long leases at low rents by lessees, but one of the flats is retained by the respondent.

5. Various problems arose in the management of the building. The details of these problems do not need to be rehearsed in this decision.

6. The lessees of flats in the building (apart from the respondent herself) applied to the FTT for the appointment of a manager under the Landlord and Tenant Act 1987 section 24. By a decision dated 5 May 2016 the FTT appointed Mr Marcus J Staples (the present appellant) as manager of the building.

7. Appended to the FTT's decision appointing the appellant as manager was a management order, paragraphs 12 to 16 of which contain the following provisions under a heading "The Cooperation of the Respondent and Accounting for Uncommitted Service Charges and Reserve Fund":

"12. The Respondent is directed to cooperate with the Manager and give reasonable assistance to the Manager.

13. Without prejudice to the generality of the foregoing, the Respondent shall within 28 days of the date of this order account for and hand over to the Manager all uncommitted service charges.

14. The Respondent shall transfer the balance of the Reserve Fund to the Manager within 28 days of the date of this order.

15. The Respondent shall provide within 28 days from the date of this Order a complete income and expenditure account, including movements in and out of the Reserve Fund from 24 June 2012, the date of the last accounting for the Reserve Fund, to the date of this Order and showing the accumulated surplus or deficit for that period together with the original, or true copies of, the supporting vouchers and the underlying records.

16. The Applicants shall refund out of service charge monies so far withheld, any deficit shown by the account referred to in paragraph 15 above.”

8. The management order also contains the following in paragraph 17 under the heading “Liberty to apply”:

“The Manager may apply to the First-Tier Tribunal (Property Chamber) for further directions in accordance with S. 24 (4), Landlord and Tenant Act 1987. Such directions may include, but are not limited to:

- a. Any failure by any party to comply with an obligation imposed by this Order;
- b. For directions generally;
- c. Directions in the event that there are insufficient sums held by him to discharge his obligations under this order and/or to pay his remuneration.”

9. The case reference number allocated to the application for the appointment of a manager given by the FTT was CHI/ooML/LAM/2016/0003.

10. The applicant took the view that the respondent had failed properly to comply with her obligations under paragraphs 12 to 15 of the management order. As a result on 24 August 2017 the appellant made an application to the FTT for directions and/or a variation of the order appointing the appellant as manager. The application sought the amendment of the order by affixing a penal notice to the obligations in paragraphs 13, 14 and 15 of the order. The purpose of this being because it was perceived that, having regard to a decision in the High Court (Chancery Division) in *Coates v Octagon Overseas Ltd* [2017] 4 WLR 91, the affixing of such a penal notice was first required before the appellant could seek the permission of the County Court to enforce the order of the FTT. Documentation was attached to this application to the FTT for the purpose of seeking to make good the appellant’s complaints that the respondent had failed to comply with the relevant paragraphs of the management order.

11. In response to this application the FTT issued directions dated 21 September 2017. The respondent submitted documents by way of a response to the application on 20 October 2017.

Further directions were issued by the FTT on 24 October 2017. The respondent submitted further responses dated 1 November 2017 and 8 November 2017. There was a telephone hearing conducted by the FTT (in which the appellant and respondent participated) on 9 November 2017 as a result of which the FTT on that date gave further directions. In effect the FTT noted that the management order requirements had now been complied with in part, but still had not been fully complied with as regards paragraph 15 of the management order. The FTT ordered the respondent to comply fully with paragraph 15 by 21 December 2017 with a penal notice to be automatically endorsed on the order in default. The directions of 9 November 2017 noted that the appellant had sought an order that the costs of the application dated 24 August 2017 should be paid by the respondent either under section 24(4) of the Landlord and Tenant Act 1987 or rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013. However the FTT did not at that stage determine this application for costs but directed that further submissions should be made by each party in respect of costs.

12. By its decision dated 11 January 2018 the FTT gave its decision regarding costs. In paragraphs 12 to 18 the FTT stated:

“12. Both the applicant and respondent contend that the Tribunal has jurisdiction under Rule 13 to order the respondent to pay costs but only where the respondent has been guilty of unreasonable conduct. The applicant says that the failure to comply with the management order was unreasonable conduct. The respondent says that her conduct cannot be described as unreasonable in the sense explained in the case of *Willow Court Management Company Limited and Others v 231 Sussex Gardens Right to Manage Limited* [2016 UKUT] 0290 (LC).

13. The Tribunal disagrees that Rule 13 is applicable in this case. As the Upper Tribunal decision at paragraph 95 of the *Willow Court* decision states: *Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(b)(1) analysis.*” As the Upper Tribunal goes on to say, this is not an absolute rule and cites the example that motive for bringing proceedings may be taken into account in determining reasonableness. In the current case, the Applicant does not contend that the Respondent’s unreasonableness relates to her conduct either in the course of the application for variation or in allowing the matter to go through to a hearing but in the fact it was necessary to make the application at all. In the Tribunal’s view this is not conduct in “bringing defending or conducting proceedings” as required in Rule 13. Rather, it was conduct which led up to and caused the application to be made, a situation similar that which applied and was ruled out as being relevant in paragraph 95 of *Willow Court*. As Rule 13 is not engaged it is not necessary for the Tribunal to consider further the three-stage process laid down in *Willow Court* or to take into account whether or not the respondent was truly a litigant in person.

14. If Rule 13 does not apply, does section 24 of the 1987 Act confer the necessary jurisdiction? The Tribunal thinks not. Section 29(1) of the 2007 Act applies to **all** (emphasis added) proceedings in the First-tier Tribunal. No distinction is made between

applications for a substantive determination and enforcement action. Furthermore, the Upper Tribunal in *Willow Court* makes clear that the Tribunal's power to order costs derives from section 29 of the 2007 Act. Section 29(1) is expressly subject to Tribunal Procedure Rules, which brings us back to Rule 13 where costs may **only** (emphasis added) be awarded where a party has acted unreasonably in "bringing, defending or conducting proceedings."

15. There is no express reference to costs in section 24 of the 1987 Act as it now exists. At one time section 24A of the Act expressly provided that: *No costs incurred by a party in connection with proceedings under this Part before a leasehold valuation tribunal [the predecessor of the First-tier Tribunal] shall be recoverable by order of any court*". Thus, at that time costs were dealt with separately from the rest of section 24. This leads the Tribunal to conclude that, although widely worded, section 24(4) is not intended to include costs within its ambit. Section 24A was initially replaced by Schedule 12 paragraph 10 of the 2002 Act which in turn has been superseded by disapplied by Rule 13.

16. The Tribunal did consider whether the management order itself gave the appointed manager the power to recover his costs incurred in enforcing the provisions of the order. Although paragraph 17a of the management order gives the manager liberty to apply to the Tribunal for further directions in the event of a failure by any party to comply with the obligations imposed by the order, no mention is made there as to the costs of such an application. The manager is, however, entitled to re-imburement of his costs from the service charge under paragraph 4f of the management order.

17. For all the above reasons the Tribunal is driven to conclude that in the circumstances of this particular application the Tribunal has no jurisdiction to order the respondent to pay the costs of the application to vary the management order.

18. In conclusion, therefore, the Tribunal makes no order as to the costs of the application to vary the management order.

The FTT's power to award costs

13. The power of the FTT to award costs was considered by the Upper Tribunal in *Willow Court Management Co Ltd and Others v 231 Sussex Gardens Right to Manage Ltd* [2016] UKUT 290 (LC). Paragraphs 8 to 14 of that decision are in the following terms:

8. The FTT came into existence as part of the unified tribunal system on 1 July 2013. Before that date disputes over service charges were determined by leasehold valuation tribunals which had only a very limited power to award costs under paragraph 10(4) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. LVTs could order a party which had acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with proceedings before it to pay up to £500 in costs.

The source of the FTT's power

9. The FTT's power to award costs is derived from section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides (so far as relevant) as follows:

29. Costs or expenses

(1) The costs of and incidental to –

- (a) all proceedings in the First-tier Tribunal; and
- (b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may –

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) “wasted costs” means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

10. By section 29(3) the power to determine by whom and to what extent costs are to be paid, which is conferred by section 29(2), has effect subject to the FTT's procedural rules. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which came into force on 1 July 2013, makes the following relevant provisions:

13. Order for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only –

- (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
 - (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
 - (i) an agricultural land and drainage case
 - (ii) a residential property case or
 - (iii) a leasehold case; or
 - (c) in a land registration case.
- (2) The Tribunal may make an order requiring a party to reimburse any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
- (3) The Tribunal may make an order under this rule on an application or on its own initiative.
- (4) A person making an application for an order for costs –
- (a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
 - (b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.
- (5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends –
- (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
 - (b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
- (6) The Tribunal may not make an order for costs against the person (the “paying person”) without first giving that person an opportunity to make representations.
- (7) – (8) [Assessment and interest on costs]
- (9) The Tribunal may order an amount to be paid on account before the costs of expenses are assessed.

11. Whenever the FTT exercises any power conferred by the 2013 Rules, or interprets those Rules, it is required by rule 3(3) to seek to give effect to the overriding objective. It is therefore relevant to recall the content of rule 3, which provides as follows:

3. Overriding objective and party's obligations to cooperate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes –

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal.

(b) avoiding unnecessary formality and seeking flexibility in the proceedings.

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it –

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must –

(a) help the Tribunal to further the overriding objective; and

(b) cooperate with the Tribunal generally.

12. The source and structure of the FTT's power to award costs is therefore apparent. The general principle is laid down by section 29(1): costs of all proceedings are in the discretion of the FTT, which has full power to determine by whom and to what extent the costs are to be paid, subject to the restrictions imposed by the 2013 Rules. Those restrictions prohibit the making of an order for costs except in the circumstances described in rule 13(1).

13. Rule 13(1) identified three circumstances in which an order for costs may be made. In all cases rule 13(1)(a) allows the FTT to make an order for the payment of "wasted costs" as that expression is defined in section 29(5) of the 2007 Act; we will consider that power later. In the three categories of case referred to in rule 13(1)(b), (agricultural land and drainage, residential property, and leasehold cases) the FTT has power to award costs only if a person has acted unreasonably in bringing, defending or conducting proceedings. Finally, rule 13(1)(c) has the effect that, in a land registration case, the power to award costs is unrestricted, other than by the overriding objective.

14. A “leasehold case”, to which the power in rule 13(1)(b) applies, if any case in respect of which the FTT has jurisdiction under any of the enactments specified in section 176A(2) of the Commonhold and Leasehold Reform Act 2002 (rule 1(3)); those enactments include the Landlord and Tenant Act 1985, section 27A of which confers jurisdiction on the FTT to make determinations in relation to service charges.

FTT’s powers upon appointing a manager under section 24 of the Landlord and Tenant Act 1987

14. Section 24 of the Landlord and Tenant Act 1987 makes provision for the appointment of a manager by the FTT. Subsections (4) to (6) are in the following terms:

- (4) An order under this section may make provision with respect to –
 - (a) such matters relating to the exercise by the manager of his functions under the order, and
 - (b) such incidental or ancillary matters, as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give directions with respect to any such matters.
- (5) Without prejudice to the generality of subsection (4), an order under this section may provide –
 - (a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;
 - (b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;
 - (c) for remuneration to be paid to the manager by any relevant person or by the tenants of the premises in respect of which the order is made or by all or any of those persons;
 - (d) for the manager’s functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.
- (6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

Appellant’s submissions

15. On behalf of the appellant the following submissions are advanced.

16. The application dated 24 August 2017 was an administrative step taken in the context of the earlier order (namely the order dated 5 May 2016) whereby the appellant had been appointed

manager. The application for variation of the order (as made by this application dated 24 August 2017) was inextricably linked to the earlier order. Accordingly when considering for the purposes of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 rule 13 whether the respondent has acted unreasonably in bringing, defending or conducting proceedings it is necessary to look at the respondent's conduct in relation to the proceedings which included and flowed from the making of the management order on 5 May 2016. It is submitted that it is wrong to consider separately the application (dated 24 August 2017) for the variation of the management order and then to conclude that the conduct of the respondent which is complained of was not conduct in "bringing defending or conducting proceedings" but was instead earlier conduct which led up to and caused the application to be made.

17. The appellant further submits that the FTT in paragraph 13 of its decision was correct in recognising that in paragraph 95 of the *Willow Court* decision the Upper Tribunal says that it is not an absolute rule that it is "only behaviour related to the conduct of the proceedings themselves may be relied on the first stage of the rule 13(b)(i) analysis" and the Upper Tribunal gave an example namely that the motive for bringing proceedings may be taken into account in determining reasonableness. The appellant submits that if the appellant's argument noted in paragraph 16 above is wrong, then in the present case the motive of the respondent in failing to comply with the management order (thereby making necessary the application of 24 August 2017) can be taken into account.

18. The appellant further submits that even if the conduct of the respondent is only examined in relation to the proceedings subsequent to the application dated 24 August 2017, such conduct in relation to those proceedings can properly be said to be unreasonable and thereby can give rise to jurisdiction to make a costs order.

19. Separately from the foregoing the appellant submits that, even if costs cannot be awarded against the respondent under section 29 of the Tribunals, Courts and Enforcement Act 2007 and the 2013 Rules (as decided by the FTT) there is a separate self-standing power to award the appellant the costs of the application for variation of the management order (i.e. the application dated 24 August 2017) namely a power which arises under the provisions of section 24(4) of the Landlord and Tenant Act 1987. The appellant submits that section 24(4) can act as a stand-alone wide-ranging primary statutory provision giving an additional costs jurisdiction to the FTT.

The respondent's submissions

20. The respondent supports the decision of the FTT for the reasons given by the FTT.

21. Section 29 of the 2007 act is the statutory provision giving the FTT its costs jurisdiction. The power is exercisable only by reference to rule 13. The respondent emphasised that rule 13 commences with the provision that the FTT “may make an order in respect of costs **only** ...”

22. Accordingly it is not possible to find in section 24 of the 1987 Act a separate costs jurisdiction for the FTT in relation to proceedings before it. If the circumstances of the case are such that there is no jurisdiction to award costs under section 29 and rule 13, then the result is there is no jurisdiction at all to award costs. That is the situation in the present case.

23. The respondent submits that the appellant’s criticism of her conduct and respondent’s argument that this conduct was unreasonable is unjustified, but that in any event the criticism the appellant makes is criticism of her conduct prior to the application of 24 August 2017 – it is not criticism of her actions in defending or conducting the proceedings flowing on from this application of 24 August 2017.

24. The appellant as manager is entitled to an indemnity for his costs out of the service charge account. The management order paragraph 17 does not assist the appellant and does not make any provision for the appellant’s costs of any further application to the FTT.

Discussion

25. The appellant seeks an order for costs of and incidental to the application dated 24 August 2017 whereby the appellant sought a variation of the management order made by the FTT in its decision dated 5 May 2016.

26. The Tribunals, Courts and Enforcement Act 2007 section 29 provides that these costs are in the discretion of the FTT. This however is subject to the 2013 Rules. These rules provide in rule 13 (1) (b) that the FTT may make an order in respect of costs only “if a person has acted unreasonably in bringing, defending or conducting proceedings in a leasehold case”. A “leasehold case” to which this power applies is any case in respect of which the FTT has jurisdiction under any of the enactments specified in section 176A(2) of the Commonhold and Leasehold Reform Act 2002. The enactments there specified include the Landlord and Tenant Act 1987.

27. The conduct on the part of the respondent which the appellant argues was unreasonable (and hence it is argued provides the foundation for an adverse costs order against the respondent) is conduct after the making of the management order on 5 May 2016, being conduct (so the appellant alleges) which amounted to unjustified and unreasonable refusal to

comply with the terms of the management order, thereby necessitating the further application dated 24 August 2017.

28. It is true that if the application dated 24 August 2017 is regarded as some form of entirely self-standing litigation then it can be said (as was said by the FTT) that the conduct complained of by the appellant is (or is principally) not conduct in “bringing defending or conducting proceedings” but instead is conduct which led up to and caused the application of 24 August 2017 to be made.

29. However in my view it is wrong to regard the application dated 24 August 2017 in this manner. It was not a self-standing piece of litigation. Instead it was an application made for the purpose of enforcing a previous order of the FTT. It is notable that the application of 24 August 2017 bears the same title number as the proceedings in which the management order itself was made. I do not consider anything can turn up on the label (by way of title number to litigation), but what is important is the reason why the application of 24 August 2017 properly did bear the same title number, namely it was all part and parcel of those proceedings to appoint a manager.

30. The management order itself in paragraph 17 recognised that the manager might need to apply to the FTT in accordance with section 24(4) for further directions including directions seeking to deal with any failure by any party to comply with any obligation imposed by the management order. This is what the appellant was doing when he made the application of 24 August 2017.

31. I am not required in this decision, which is concerned solely with jurisdiction, to form any view as to whether the respondent’s conduct was or was not unreasonable at any particular time. However for the purpose of testing the question of whether jurisdiction to award costs against her exists it is appropriate to assume (but without deciding) that the FTT could properly conclude that some or all of her conduct in relation to the obligations imposed upon her by the making of the management order in May 2016 was unreasonable.

32. If the FTT did so conclude then in my view this would amount to a conclusion that the respondent had acted unreasonably in defending or conducting proceedings in a leasehold case. If a tribunal makes an order and the party against whom it is made unreasonably fails or refuses to comply with that order, then in my view this act (namely the act of omission by failing to comply) can properly be described as an act done in defending or conducting proceedings. If a party against whom an order was made subsequently, every time complaint was made that the party had failed to comply with the order, wrote back saying that they refused to comply with the order and thereby generated the need for a further application to be made for the purpose of enforcing the order, then such a party could properly be said to be acting unreasonably in

defending or conducting proceedings. If a party, instead of writing back setting out a refusal to comply, merely ignores the order and does nothing then equally I consider that such party could properly be said to be acting unreasonably in defending or conducting proceedings.

33. Accordingly I conclude that the conduct of the respondent after the making of the management order, being conduct directed towards complying or failing to comply with the management order, can properly be described as conduct in “defending or conducting proceedings” in a leasehold case. If the FTT concludes that the respondent acted unreasonably in this conduct then this would provide jurisdiction for the FTT (if having considered all relevant considerations it decided it was proper to do so) to make a costs order against the respondent.

34. I now turn to the separate argument raised by the appellant, namely the argument that there is a self-standing jurisdiction for the FTT to award costs under the Landlord and Tenant Act 1987 section 24(4).

35. The 2007 Act section 29 provides that the costs of and incidental to all proceedings in the FTT (and in the Upper Tribunal) are to be in the discretion of the tribunal in which the proceedings take place. This is a general provision regarding the costs of and incidental to all proceedings in the FTT. There is then the provision in subsection 29 (3) that this general provision is to have effect subject to Tribunal Procedure Rules. These rules are to be found in rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013. Rule 13 (1) opens with the words “The Tribunal may make an order in respect of costs **only** ...” (emphasis added). In the light of these provisions in the statute and in the rules it would in my view require clear words if some other statutory provision was to be found to give the FTT a wholly self-standing and separate jurisdiction in relation to the costs of and incidental to proceedings in the FTT, being a jurisdiction which was not subject to the limitation in the relevant Tribunal Procedure Rules.

36. In my view the provisions of section 24(4) and (5) of the Landlord and Tenant Act 1987 are not apt to confer any jurisdiction regarding costs of proceedings in the FTT. The provision in subsection (4) (a) allows an order made under section 24 to make provision with respect “such matters relating to the exercise by the manager of his functions under the order” as the FTT thinks fit. This is not directed towards dealing with costs of proceedings in the FTT. The following subparagraph (b) permits an order under section 24 to make provision with respect “such incidental or ancillary matters as the tribunal thinks fit” – these in my view are matters which are incidental or ancillary to the exercise by the manager of his functions under the order rather than being capable of embracing costs of and incidental to proceedings in the FTT.

37. Accordingly I agree with the FTT that there is no self-standing and separate jurisdiction arising under section 24(4) to award costs of and incidental to proceedings before the FTT. I also agree with the FTT that, as found in paragraph 16 of its decision, the management order itself does not give to the FTT a separate power to award the manager costs of and incidental to proceedings in the FTT.

Conclusion

38. In the result I allow the appellant's appeal. I conclude that the FTT was in error in examining whether the conduct of the respondent (which was criticised by the appellant as being unreasonable) was conduct in "defending or conducting" the proceedings started by the application of 24 August 2017. The appropriate question to ask is whether such conduct was conduct in "defending or conducting" the proceedings in which the appellant was appointed manager by the order of FTT made on 5 May 2016. The application dated 24 August 2017 was a step within that continuing set of proceedings.

39. Accordingly there exists jurisdiction for the FTT to make a costs order against the respondent if the FTT concludes the respondent has acted unreasonably in defending or conducting the proceedings in which the appellant was appointed manager by the order of the FTT made on 5 May 2016, being proceedings which were continuing and of which the application dated 24 August 2017 formed part. The merits of the application are not before me and nothing herein is intended to express any views regarding whether the respondent has acted unreasonably in defending or conducting those proceedings. It is entirely for the FTT to consider this matter and (if it considers that the respondent has acted unreasonably in defending or conducting those proceedings) to go on to consider whether any (and if so what) order for costs should be made against the respondent having regard to the approach to such questions laid down in the *Willow Court* case.

40. As regards the costs of and incidental to these proceedings before the Upper Tribunal it is my provisional view that neither party has acted unreasonably in bringing, defending or conducting these proceedings, such that no order regarding the costs of and incidental to these proceedings before the Upper Tribunal should be made. If either party wishes to argue otherwise they must submit written representations (copied to the other party) within 14 days of the date of this decision.

18 October 2018

His Honour Judge Huskinson