IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT ** (LC)**
Case No: LRX/90/2015, LRX/99/2015 and LRX/88/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT procedure – power to award costs for unreasonable conduct of proceedings – s.29, Tribunals, Courts and Enforcement Act 2007 – Rule 13(1)(b) Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 - appeals allowed

BETWEEN: **LRX/90/2015**

WILLOW COURT MANAGEMENT COMPANY (1985) LIMITED **Appellant**

- and -

MRS RATNA ALEXANDER **Respondent**

LRX/99/2015

MS SHELLEY SINCLAIR **Appellant**

- and –

231 SUSSEX GARDENS RIGHT TO MANAGE LIMITED **Respondent**

LRX/88/2015

MR RAYMOND HENRY STONE **Appellant**

- and -

54 HOGARTH ROAD, LONDON SW5 MANAGEMENT LIMITED **Respondent**

Martin Rodger QC, Deputy Chamber President and
Siobhan McGrath, Chamber President, First-tier Tribunal
(Property Chamber)

Royal Courts of Justice, London WC2

22-23 March 2016

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LRX/90/2015
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LRX/99/2015
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Mr Stone, the appellant, appeared on his own behalf
Elizabeth England for the respondent, instructed by SLC, solicitors

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The following cases are referred to in this decision:

Ridehalgh v Horsefield [1994] Ch 205

McPherson v BNP Paribas [2004] EWCA Civ 569

Tinkler v Elliott [2012] EWCA Civ 1289

Cancino v Secretary of State for the Home Department Department [2015] UKFTT 00059 (IAC)

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Introduction

1. Each of these three appeals is against a decision of the First-tier Tribunal (Property Chamber) ("FTT") in which the tribunal used its power under rule 13(1)(b), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, to award costs against a party on account of their unreasonable behaviour in bringing, defending or conducting proceedings before it. The appeals have been listed together to enable the Tribunal to consider, for the first time, the jurisdiction conferred by rule 13(1)(b) and to provide guidance on how it should be exercised.

2. The appeals share a number of features: each arises out of a dispute over service charges payable under the lease of a flat; in each case the dispute is between an individual leaseholder and a management company whose members are themselves leaseholders of flats in the same building; and in each case the sum awarded in costs is greater than the amount of the service charge in issue in the proceedings. Collective enfranchisement and the statutory right to manage mean that lessee-managed blocks of flats are now a firmly established feature of the residential property scene. It is common for leaseholders collectively to assume responsibility for the provision of services and the collection of service charges from their neighbours. These three appeals also illustrate some of the difficulties which can be experienced in these situations.

3. It will be necessary for us to consider the facts of the individual appeals in some detail later in this decision but at this stage it is enough to describe their bare outlines to provide the context for the consideration of issues of principle which follows.

4. In *Willow Court Management Company (1985) Limited v Alexander* the FTT found that the management company had not properly implemented the procedure in Mrs Alexander's lease for determining the service charges which she was liable to pay. Moreover, the FTT concluded that the company had behaved unreasonably in bringing and continuing proceedings for the determination of the service charge without first having complied with that contractual procedure, which had been explained in previous tribunal decisions. The FTT therefore ordered the company to pay Mrs Alexander £13,095 plus VAT as a contribution towards her costs under rule 13(1)(b). The service charges claimed in the proceedings were only £5,702. The company was represented at the hearing of the appeal by Alexander Bastin and Miss Caoimhe McKearney and Mrs Alexander by Tom Carpenter-Leitch.

5. In *Sinclair v 231 Sussex Gardens Right to Manage Ltd* Mrs Sinclair appeals against the decision of the FTT requiring her to pay £16,800 towards the costs incurred by the RTM company in a dispute over a service charge of £9,767. The FTT was critical of Miss Sinclair's conduct in failing to pay her service charges, in defending herself on what it considered to be spurious grounds, unsupported by sufficient evidence, and in generally behaving unreasonably. Miss Sinclair was represented at the hearing of the appeal by Philippa Seal and the respondent company by Simon Allison, both of counsel.

6. In *Stone v 54 Hogarth Road London SW5 Management Limited* Mr Stone's appeal is against the FTT's decision that he should pay £2,260.80 towards the costs incurred by his landlord in a dispute over the company's entitlement to retain a surplus on the service charge account as a reserve against future expenditure. An unusual feature of this appeal is that Mr Stone withdrew his application for the determination of the service charge shortly before it was due to be heard by the FTT so that there was no investigation of the merits of his case. The FTT was satisfied that he had had reasonable grounds for commencing his application but nevertheless considered that he had acted unreasonably in withdrawing it when he did rather than at an earlier stage after concessions had been made by the company and when fewer costs would have been incurred. At the hearing of Mr Stone's case he represented himself, with assistance from his wife, Mrs Su Lien Stone, while the management company was represented by Elizabeth England of counsel.

7. We are grateful to counsel in each case and to Mr Stone for their detailed skeleton arguments and submissions which have provided us with very considerable assistance in the resolution of these appeals.

The FTT's power to award costs

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. O**rders 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 obligation 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) identifies three circumstances in which an order for costs may be made. In all cases rule 13(1)(a) allows the FTT to may 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, 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 (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.

15. In addition to these powers in relation to costs the FTT may also, in any case, make an order under rule 13(2) for the reimbursement of fees. That power is unrestricted, other than by the overriding objective.

Wasted costs

16. None of the decisions under consideration in these appeals included a wasted costs order but it is relevant for us to begin by considering the power conferred by section 29(4) and rule 13(1)(a) because all of the submissions we received on the power to make an order for costs under rule 13(1)(b) where a party has behaved unreasonably referred to the leading case on wasted costs.

17. The power to make an order for wasted costs under rule 13(1)(a) and section 29(4) of the 2007 Act is concerned with the conduct of a "legal or other representative" of a party, and not the conduct of the party themselves. It is a distinct power which should not be confused with the power under rule 13(1)(b).

18. The key characteristic of "wasted costs", as they are defined by section 29(5) is that they are costs incurred by a party "as a result of any improper, unreasonable or negligent act or omission" on the part of a representative. Section 29(5) replicates section 51(7) of the Senior Courts Act 1981 which confers jurisdiction in relation to wasted costs in the civil courts.

19. A legal or other representative, as is explained in section 29(6), is any person exercising a right of audience or a right to conduct proceedings on behalf of a party. Rule 14(1) of the 2013 Rules provides that a party to proceedings in the FTT may appoint a representative "whether legally qualified or not" to represent them in the proceedings. It follows that a wasted costs order may be made either against a legal representative or a lay representative, but never against the party themselves. Section 29(4) of the 2007 Act confers a general discretion where wasted costs have been incurred which is not further restricted by rule 13(1)(a). It goes without saying that the discretion must be exercised judicially and that, when exercising it, the FTT must have regard to the overriding objective.

20. The leading authority on wasted costs is *Ridehalgh v Horsefield* [1994] Ch 205 in which the Court of Appeal examined the origin and exercise of the jurisdiction conferred on civil courts by section 51(7) of the 1981 Act. At page 232 C – 233 F Sir Thomas Bingham MR, giving the judgment of the whole court, considered the expressions "improper, unreasonable or negligent" the meanings of which, he considered, were not open to serious doubt:

> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalties. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious,

> designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
>
> The term "negligent" was the most controversial of the three … We are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.
>
> …
>
> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."

21. The whole of the discussion of wasted costs in *Ridehalgh v Horsefield* is couched in terms of the conduct of professional lawyers. It was also concerned with the construction of the tri-partite expression "improper, unreasonable or negligent". That context has to be borne in mind when considering the different subject matter and language of rule 13(1)(b) which is concerned only with the conduct of the parties, and only with conduct which is "unreasonable".

Unreasonable behaviour

22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in *Ridehalgh.* We therefore restrict ourselves to mentioning *Cancino v Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). *Cancino* provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.

23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in *Ridehalgh* on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that

unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?

25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship.

The element of discretion in rule 13(1)(b)

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal *may* make an order in respect of costs *only* ... *if* a person has acted unreasonably…." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes 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." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.

The position of unrepresented parties

31. One circumstance which may often be relevant is whether the party whose conduct is criticised has had access to legal advice. It was submitted on behalf of the respondents in each appeal that no distinction should be drawn between represented and unrepresented parties in the

context of rule 13(1)(b). In support of those submissions reference was made to the decision of the Court of Appeal in *Tinkler v Elliott* [2012] EWCA Civ 1289 which concerned an application under CPR 39.3(3) to set aside a judgment entered after a party had failed to attend a hearing. Such a judgment may only be set aside if, amongst other things, the applicant has acted promptly. At paragraph 32 Morris Kay LJ considered the relevance of the fact that the applicant was unrepresented:

> "I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that the litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence."

We entirely accept that there is only one set of rules which applies both to represented and to unrepresented parties but we do not consider that *Tinkler v Elliott* has any relevance to these appeals. Whether a person has acted promptly involves a much more limited enquiry than whether a person has acted unreasonably.

32. In the context of rule 13(1)(b) we consider that the fact that a party acts without legal advice is relevant at the first stage of the inquiry. When considering objectively whether a party has acted reasonably or not, the question is whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way in which that party acted. In making that assessment it would be wrong, we consider, to assume a greater degree of legal knowledge or familiarity with the procedures of the tribunal and the conduct of proceedings before it, than is in fact possessed by the party whose conduct is under consideration. The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings.

33. We also consider that the fact a party who has behaved unreasonably does not have the benefit of legal advice may be relevant, though to a lesser extent, at the second and third stages, when considering whether an order for costs should be made and what form that order should take. When exercising the discretion conferred by rule 13(1)(b) the tribunal should have regard to all of the relevant facts known to it, including any mitigating circumstances, but without either "excessive indulgence" or allowing the absence of representation to become an excuse for unreasonable conduct.

34. At paragraph 26 of *Cancino* the tribunal considered the balance which is required to be struck when considering application for costs against unrepresented parties:

> "First, the conduct of litigants in person cannot normally be evaluated by reference to the standards of qualified lawyers. Thus the same standard of reasonableness cannot generally be applied. On the other hand the status of unrepresented litigants cannot be

> permitted to operate as a *carte blanche* to misuse the process of the tribunal. The appropriate balance must be struck in every case. In conducting this exercise, tribunals will be alert to the distinction between pursuing a doomed appeal in the teeth of legal advice and doing likewise without the benefit thereof… Stated succinctly, every unrepresented litigate must, on the one hand be permitted appropriate latitude. On the other hand, no unrepresented litigate can be permitted to misuse the process of the tribunal. The overarching principle of facts sensitivity looms large once again."

We agree with these observations. We also find support in *Cancino* for our view that rule 13(1)(a) and (b) should both be reserved for the clearest cases and that in every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable.

The withdrawal of claims

35. In one of the appeals with which we are now concerned (*Stone*), costs were awarded under rule 13(1)(b) on the grounds that the applicant had delayed in withdrawing proceedings until after a time when it should have been clear to him that he had achieved as much by concession from the management company as he could realistically expect to obtain from the FTT by proceeding to a hearing. It is important that parties in tribunal proceedings, especially unrepresented parties, should be assisted to make sensible concessions and to abandon less important points of contention or even, where appropriate, their entire claim. Such behaviour should be encouraged, not discouraged by the fear that it will be treated as an admission that the abandoned issues were unsustainable and ought never to have been raised, and as a justification for a claim for costs.

36. In this regard our attention was drawn to the decision of the Court of Appeal in *McPherson v BNP Paribas* [2004] EWCA Civ 569, which concerned rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (permitting the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably). Having noted that in civil litigation under the CPR the discontinuance of claims was treated as a concession of defeat or likely defeat, Mummery LJ went on, at paragraph 28:

> "In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for Employment Tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss MacAtherty appearing for the Applicant, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the Tribunal should not adopt a practice on costs which would deter applicants from making sensible litigation decisions."

37. The views of the tribunal in *Cancino* were to similar effect, at paragraph 25(i):

> "Concessions are an important part of contemporary litigation, particularly in the overburdened realm of immigration and asylum appeals…. Occasionally a concession may extend to abandoning an appeal (by the appellant) or withdrawing the impugned decision (by the respondent). We consider that applications for costs against the representative or party should not be routine in these circumstances. Rule 9 cannot be invoked without good reason. To do otherwise would be to abuse this new provision."

Causation

38. Where a tribunal has decided that there has been unreasonable conduct justifying the making of an order for costs under rule 13(1)(b) it must then consider what order to make. In this part of our decision we refer to one relevant consideration, namely causation.

39. *Ridehalgh* highlights (at page 237E) that in the wasted costs jurisdiction it is essential to demonstrate a causal link between the improper, unreasonable or negligent conduct complained of and the costs said to have been wasted. In the tribunal context the need for such a link is apparent from the definition of "wasted costs" in section 29(5) of the 2007 Act i.e. that there are costs incurred by a party "as a result of" the relevant act or omission of the representative.

40. No such explicit causal connection is apparent in the language of rule 13(1)(b). Unreasonable conduct is a condition of the FTT's power to order the payment of costs by a party, but once that condition has been satisfied the exercise of the power is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned.

41. In this respect rule 13(1)(b) more closely resembles rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 which permit the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably. Our attention was drawn once again to the decision of the Court of Appeal in *McPherson* in which the exercise of the rule 14 power was considered. At paragraph 40 Mummery LJ considered the submission that only costs attributable to the unreasonable aspects of the applicant's conduct could be ordered under rule 14:

> *"*In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred."

Mummery LJ then accepted, at paragraph 41, that the wasted costs jurisdiction was not designed to punish unreasonable conduct, but explained that:

> "It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a pre-condition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order."

42. We consider the observations of Mummery LJ in *McPherson* to be equally applicable to rule 13(1)(b). At this stage the unreasonable conduct, its nature, extent and consequences are relevant factors to be taken into account in deciding whether to make an order for costs and the form of the order.

43. The issues we have discussed above are only some of the factors which it will be relevant to take into consideration in determining applications under rule 13(1)(b). We conclude this section of our decision by emphasising that such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. We consider that submissions are likely to be better framed in the light of the tribunal's decision, rather than in anticipation of it, and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation. A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding that it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid.

44. We now turn to consider the detail of the three appeals. In doing so we remind ourselves that an appellate tribunal should exercise restraint when undertaking a review of a discretionary decision of a first-tier tribunal. If that tribunal properly directed itself on the applicable law, took into account all relevant matters and was not swayed by irrelevant matters, and did not reach a conclusion which is irrational, it is not for us to substitute our own assessment.

Willow Court Management Company (1985) Limited v Alexander

45. The facts relevant to the dispute between Mrs Alexander and Willow Court Management Company (1985) Limited are complicated, but the following is a sufficient summary for the purpose of determining the company's appeal.

46. Willow Court is a purpose-built block of ten flats completed in 1985. On 24 October 1985 the management company was granted a lease of the common parts and main structure of the building. The company's articles of association provide that its sole objects are to enter

into that lease and to manage the property demised by it in the general interests of the residents of the flats, each of whom is entitled to be a member. The articles require each member to pay an annual subscription of £25 towards the company's expenses and give power to the directors to increase that subscription with the sanction of the members in a general meeting.

47. Mrs Alexander is the lessee of Flat 4 at Willow Court, which she holds under a lease first granted on 3 January 1986 which was surrendered and re-granted on substantially the same terms (but for a longer term) in 2008. The original lease for a term of 99 years was made between the original developer, the management company and the original lessee. The lease requires the management company to perform certain functions relating to the maintenance of the building and entitles it to collect a management charge. By clause 3(g) the lessee covenanted to pay that charge, which was to be the yearly sum of £100 or such other sum as might be substituted in accordance with the terms of the clause and was to represent one tenth of the costs and expenses of performing the maintenance functions of the company. The difference between the sum of £100 and the costs and expenses incurred was to be certified by the lessor's surveyor and any balance shown by the certificate was to be paid by a single payment on the quarter day following the date of the certificate. The clause was subject to a proviso enabling the initial yearly sum of £100 to be increased each year to an amount that was tenth of the amount the lessor's surveyor certified as being the estimated cost and expense of fulfilling the maintenance obligations for that year.

48. The freehold interest in Willow Court is owned by Willow Court (Harrow) Limited, a company of which Mrs Alexander now owns 50% of the shares. In her capacity as lessee of Flat 4, she also owns one tenth of the shares in the management company. Mrs Alexander was formerly a director of the management company but she ceased to perform that function in about 1998.

49. For very many years, including while Mrs Alexander was one of its directors, the management company did not comply with the strict requirements of the lease concerning the certification of quarterly service charge instalments and balancing charges. Rather than employing a surveyor to estimate the costs and expenses anticipated in any year and to certify a sum in substitution for the original yearly sum of £100, the company determined an appropriate figure from time to time in a general meeting and the lessees were billed accordingly. Similarly, rather than employing a surveyor to certify the difference between the sum collected quarterly and the total expenses incurred at the end of the year the company made use of its own annual accounts, certified by a chartered accountant, as the basis on which any balancing charge or credit was determined.

50. Mrs Alexander was content with these less formal arrangements while she was a director of the management company, and at that time the annual contribution was set by agreement at £600. After she ceased to be a director of the company Mrs Alexander took a different view and a dispute arose. In 2005 proceedings were commenced by the management company to recover the sum of £2,630 said to be due from Mrs Alexander as arrears of maintenance charges dating from 2001. The proceedings were transferred to the leasehold valuation tribunal which found that the management company had not operated in accordance with the terms of

the lease at any time and that the annual maintenance charge had been increased by resolution of the company passed in accordance with its articles of association, rather than in compliance with the lease. Nevertheless Mrs Alexander had been content with this arrangement while she was chairman of the company so the tribunal found that she was estopped from disputing her liability to pay the maintenance charges at the rate at which they had been fixed while she was a director, but that after that date she was not obliged to pay more than the sum of £600 (to which the charge had been raised) until the appropriate annual amount was properly certified by a surveyor. Mrs Alexander's own counsel was recorded as having described the point taken on her behalf as "unattractive" but it nevertheless succeeded to the extent that her liability was limited to £600 per year for each year after June 2000. The LVT described the absence of a surveyor's certificate as a "procedural bar only" and suggested that the management company could rectify the problem and that upon a certificate being granted the amounts stated to be due in it would become payable subject only possibly to the question of any issue of limitation.

51. The LVT's decision did not survive an appeal by Mrs Alexander to the Lands Tribunal (LRX/22/2007). On 14 April 2008 the Tribunal (His Honour Judge Huskinson) allowed her appeal and set aside the decision on the grounds that clause 3(g) provided for a default annual contribution of £100 which could be displaced only by a surveyor's certificate identifying a different amount for each year. In the absence of proper certification the sum payable quarterly on account remained £100 per year and Mrs Alexander was not estopped from denying a liability to pay £600 per year. Nevertheless, in paragraph 20 of its decision the Tribunal agreed with the LVT's conclusion that the absence of a surveyor's certificate could still be rectified as least so far as it concerned the calculation of the final amount payable for each year.

52. Despite the Tribunal's clear guidance the management company did not take the elementary step of procuring a surveyor's certificate increasing the amount of each lessee's annual contribution. Nor did it abandon the practice of relying on the company's annual accounts, certified by an accountant and not by a surveyor, in substitution for certification of the balance due from each lessee. Nine of the ten lessees were content to continue with the former approach and resolved in a general meeting of the company to increase the quarterly sum payable. Mrs Alexander responded as before and continued to limit her contributions to the sum of £100 set by clause 3(g) in 1985 which, in the absence of a surveyor's certificate, she correctly regarded as the limit of her contractual liability.

53. From time to time the management company instructed solicitors and debt collection agencies to write to Mrs Alexander, but without result; in June 2013 solicitors acting for Mrs Alexander reminded the company's solicitors of the formal requirements of the lease by sending them a copy of Judge Huskinson's decision. The company's solicitors responded that they would advise their clients to take the decision into account, but despite that indication proceedings were started in the county court on 9 October 2013 by a different firm of solicitors to recover £5,702 as arrears of maintenance charges said to have accumulated since 2008. Mrs Alexander denied liability for any sum greater than the £100 per year specified in clause 3(g). At an early hearing in the county court the company initially relied on a statement by nine of its members explaining that the maintenance budget was too small to warrant the involvement of a surveyor to provide a certificate and suggesting that if Mrs Alexander was adamant that she

would only pay on certification by a surveyor they would not object to her arranging for certification at her own expense.

54. After these initial exchanges the company seems at last to have given further consideration to the need for certification and focussed on the suggestion made by the LVT and supported by the Tribunal in 2008 that it was not too late to certify expenditure in previous years. On 18 July 2014 a certificate was at last prepared and signed by a surveyor on behalf of the company. It recorded the company's total expenditure in each year since 2007 using information taken from its annual accounts, and certified that the expenditure had been properly and reasonable incurred in maintaining the building. A figure of between £800 and £1,212 was stated for each year as being the sum payable by each lessee.

55. In August 2014 Mrs Alexander appointed new solicitors, Saul Marine & Co, whose client care letter she subsequently produced in support of her application for costs. In that letter Mrs Alexander's solicitors said that they understood that her defence of the claim was "a matter of principle" and pointed out that "normally in a small claim you cannot recover costs even if you win the case unless the court considers that the claim is frivolous or should never have been brought and this is very rare."

56. On 17 September 2014 the county court proceedings were transferred to the FTT by consent of the parties. The Management Company's solicitors explained in their statement of case that they now relied on the surveyor's certificate of 18 July 2014; for her part Mrs Alexander disputed the validity of the retrospective certificate in her own January 2015 statement of case, as well as challenging the authority of the directors and requiring that all service charge expenditure back to 2007 be proved. The battle lines between the parties were therefore clearly drawn well before the substantive hearing on 11 March 2015, with the company acknowledging that clause 3(g) had not been complied with in each year in which demands had been made, but nevertheless relying on retrospective certification which it considered had been sanctioned by the LVT and the Lands Tribunal.

57. In its decision of 11 March 2015 the FTT came down decisively in Mrs Alexander's favour, accepting the submissions of her counsel that, to be effective, a surveyor's certificate had to be produced before a demand could be served and had to specify the amount by which the costs incurred exceeded the sum of £100 payable annually rather than merely stating the total sum payable by each lessee. Having reached that determination the FTT felt that it was unnecessary for it to consider whether any of the sums demanded were reasonable or whether Mrs Alexander's liability might be limited under section 20B, Landlord and Tenant Act 1985. Its decision was simply that no sums greater than £100 a year were payable by Mrs Alexander as the company had not complied with the certification requirements before making demands.

58. On 24 March 2015 Mrs Alexander's solicitors made an application under rule 13(1)(b) for costs of £19,206 on the grounds that the claim ought never to have been commenced without the company first having complied with clause 3(g).

59. The application was determined by the FTT in a further decision given on 9 July 2015. The substance of the decision appears in paragraphs 12 to 14, where the FTT said this:

> "12. The tribunal determines that the applicant was aware or ought to have been aware that the procedural requirements of clause 3(g) had not been complied with prior to commencing the proceedings.
>
> 13. In any event this issue had been raised by the respondent in their response dated 26 January 2015. The Applicant ought after that date to have formed a view or taken detailed advice on whether or not the proceedings ought to have been discontinued.
>
> 14. The Applicant did not do so, and continued with the proceedings. The tribunal consider that to continue with the proceedings without curing the procedural flaws was in the circumstances of this case unreasonable and accordingly the tribunal determines that costs ought to be awarded in accordance with rule 13 of the Rules."

60. The FTT expressed concern at the quantum of the costs incurred by Mrs Alexander; these were more than three times the sum in issue, which the FTT regarded as totally disproportionate. It noted that company was owned by the leaseholders and that its income was limited; it noted that there had been no indication by Mrs Alexander that in the event of her defence of the claim succeeding she would seek her costs. The FTT then gave reasons for reducing the figure of £19,206 to £13,095 plus VAT.

Discussion and Conclusion

61. In reaching its conclusion on costs we consider that the Tribunal erred in two important respects. Firstly, it accorded too much weight to the fact that the Management Company lost at the substantive hearing. Secondly it applied a standard of unreasonableness which fell well below the threshold that we consider to be applicable in these cases.

62. Although in some cases, the fact that a party has been unsuccessful before the Tribunal in a substantive hearing might reinforce a view that there has been unreasonable behaviour, that failure cannot be determinative on its own. The residential property division of the First-tier Tribunal is a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs. In this case, the FTT had decided that the unreasonable behaviour was the applicant's failure to form a view or take detailed advice on whether or not the proceedings ought to have been discontinued and that "to continue with the proceedings without curing the procedural flaws was in the circumstances of this case unreasonable."

63. The first problem with this analysis is that it assumes that legal advice was not taken either before the proceedings were first commenced or after 26th January 2015 when the issue of procedural deficiency was highlighted in Mrs Alexander's response. This is clearly an unjustified assumption and the contrary inference is more appropriate. The Management Company was represented from the outset. In 2014 it arranged for a certificate to be prepared by a surveyor and its solicitors engaged in correspondence about the issue of procedural

requirements under the lease in correspondence *after* 26th January 2015. By clear inference proceedings were continued on the basis of advice.

64. The second problem is that up until the date of the substantive hearing in March 2015, neither the Tribunal nor the parties had conducted the proceedings on the basis that the determination of the procedural issue under clause 3(g) of the lease in favour of the respondent might be conclusive of the case. It is clear from its decision that at the hearing it was the FTT which raised this possibility and informed the parties: "that prior to determining whether the service charges were reasonable and payable, it was necessary to determine a preliminary issue, concerning whether the Applicant had complied with clause 3(g) of the lease…" Up to that time, in accordance with the directions given by the FTT in November 2014, both parties had prepared the case on the basis that the FTT would decide not only the procedural issue but also the reasonableness of the service charge costs and the possible limitation of costs under section 20B of the Landlord and Tenant Act 1985. In those circumstances we cannot agree that is was unreasonable to have continued with the proceedings. On the contrary we take the view that the FTT ought to have gone on to determine the reasonableness and section 20B issues in any event because this Tribunal had previously concluded that the absence of a surveyor's certificate could be rectified retrospectively.

65. For these reasons we do not consider that the conduct of the Management Company in bringing or conducting the proceedings was capable of being regarded as unreasonable and conclude that the FTT ought not to have made an order for costs. We therefore allow the Management Company's appeal.

66. We also consider that the decision of the FTT in this case illustrates why a staged approach to awarding rule 13 costs is required. Here the FTT decided that there had been unreasonable behaviour (stage 1) but did not then go on to consider whether, in its discretion, it ought to make an order or not (stage 2). Instead it appears that having found unreasonable behaviour the FTT moved straight to considering the quantum of the costs which should be awarded. If it had paused to consider matters such as proportionality and the conduct of the parties more generally, even if it remained of the view that the Management Company's conduct could be characterised as "unreasonable", the FTT may have decided in all of the circumstances not to make an award at all. In this case the FTT made an award (stage 3) of £13,095 plus VAT in respect of a dispute about arrears of service charge in the sum of £5,702. Although the FTT did not award the full sum claimed (£19,206), even the lower amount may be regarded as disproportionate and as inconsistent with the overriding objective.

Sinclair v 231 Sussex Gardens Right to Manage Ltd

67. The Tribunal gave Ms Sinclair permission to appeal on two issues. The first is the costs issue common to all three appeals, while the second is a discrete issue of interpretation of the lease in this case.

The facts

68. Ms Shelley Sinclair is the Lessee of the ground floor flat at 229 Sussex Gardens, London W2. Her flat is one of 13 flats in three converted Victorian houses at 229-231 Sussex Gardens ("the Building"). The freehold of the Building is owned by 231 Sussex Gardens Freehold Limited ("the Company") which acquired it from the Church Commissioners in 2005.

69. Ms Sinclair's flat had originally been the subject of a lease for a term of 99 years granted by the Church Commissioners in 1984, which was assigned to Ms Sinclair and her husband in 2001.

70. Ms Sinclair's current lease was granted to her on 12 June 2010 by the Company for a term of 999 years. The respondent, 231 Sussex Gardens Right to Manage Limited ("the Management Company") (which, despite its name, is not an RTM company for the purpose of the Commonhold and Leasehold Reform Act 2002) joined as a party to the leases of individual flats in the Building granted by the Company, including Ms Sinclair's, with the intention that it would be responsible for providing the necessary services to the building.

71. Both the Company and the Management Company are owned by the leaseholders of seven of the flats in the Building, including Ms Sinclair.

72. Ms Sinclair's flat has its own entrance and does not share common parts with other flats in the Building. Nor is the flat provided with heating from the communal heating system which serves both the Building and other buildings on the Church Commissioner's former estate. Before 2012 hot water, but not heating, was supplied to Ms Sinclair's flat from the communal boiler but this service was discontinued in 2012 when she upgraded her own boiler to provide hot water as well as heating.

73. Under the terms of the 1984 Lease the Lessee was obliged to contribute 10.97% of the costs incurred by the Lessor for whom after 2005, the Management Company acted as agent in connection with the provision of services to the Building. Those services included the cost of maintaining and operating the plant, equipment and other apparatus necessary for the provision of common services and the provision of a supply of hot water in the taps of the flat; there was also a boiler sinking fund for the replacement of the boiler when required. Ms Sinclair was liable to contribute towards the costs of maintaining the communal boiler and supplying hot water for heating notwithstanding the fact that her flat, unlike others in the Building, was not heated by that boiler.

74. Different provisions are made for the expense of heating and hot water in the lease granted to Ms Sinclair by the Company in 2010.

75. By paragraph 2 of Schedule 3 to the 2010 lease Ms Sinclair covenanted to pay 10.97% of the expenses estimated by the Management Company as likely to be incurred in the

forthcoming service charge year in connection with services specified in clauses 1 to 10 of Part C of Schedule 7. Those services did not include the supply of hot water to the taps but did include the maintenance, repair and replacement of the "Reserved Property" (an expression defined in clause 1 as including "the house equipment or apparatus used for providing services"). The services also included the repair, maintenance and operation of plant, equipment and other apparatus which the Management Company might consider necessary for the provision of common services.

76. The cost of hot water was dealt with in clause 11 of Part C of Schedule 7; there the Management Company covenanted to:

> "Provide a supply of hot water to the taps in the demised premises until the Lessee has installed an individual boiler for providing hot water to the Premises."

In respect of that service Ms Sinclair, as Lessee, covenanted by clause 2 of Schedule 3 to pay:

> "A fair proportion of the expenses outgoings and costs of supplying hot water to the demised premises determined by the Management Company acting reasonably based on the demised premises estimated share of usage likely to be incurred for the ensuing year up to 24 March in connection with the matters mentioned in clause 11 Part C, Schedule 7."

The obligation to contribute "a fair proportion" was itself subject to the following proviso:

> "PROVIDED THAT if the Lessee or a Lessee in the Building installs their own hot water boiler and separates from the Building's communal hot water supply such fair proportion in respect of the Lessee or such Lessee in the Building shall reduce to zero from the start of the following quarterly period after such installation and separation and the cost of the Management Company supplying such hot water to the Building will be shared equally between the Lessees of the premises in the Building who are still supplied with hot water by the Management Company".

77. The dispute between Ms Sinclair and the Management Company over service charges appears to have begun before 2010, but arrears which had built up by that time were cleared by her as a condition of the grant of her new lease. After 12 June 2010 Ms Sinclair paid no service charges and arrears of £11,098 built up before payments resumed in April 2013. It was those arrears which gave rise to the proceedings which are the subject of Ms Sinclair's appeal.

78. In March 2012 Ms Sinclair separated her hot water supply from the communal boiler, but the Management Company continued to charge her both for hot water and for boiler repairs and maintenance in the same proportions (10.97%) as for other services. She objected to this practice. She also took issue with other elements of the service charge including professional fees, the cost of proposed works and the provision of services to the common parts, and protested at what she considered to be an absence of proper information provided by the Company and the Management Company. Her concerns and the issues she was unhappy about were summarised in an e-mail which she sent to the directors of the Management Company on

18 July 2012; a number of these had nothing to do with the service charge, but concerned the affairs of the Company and its dealings with parts of the Building.

79. Early in 2014 the Management Company acknowledged that it had not properly applied the terms of the 2010 lease concerning the supply of hot water to Ms Sinclair's flat after she had disconnected entirely from the communal boiler in 2012. It credited £3,795 to her service charge account as the excess contribution to the gas bill and boiler repairs for the period from 1 April 2012 to 31 March 2014. At that point Ms Sinclair offered to pay one third of the sum she had been charged for the period prior to 2012, but that offer was not acceptable to the Management Company.

The proceedings

80. On 12 May 2014 the Management Company issued county court proceedings against Ms Sinclair claiming £11,903.13 as unpaid service charges. Those proceedings were eventually transferred to the FTT on 13 November 2014. Ms Sinclair responded by issuing an application of her own under section 20C of the Landlord and Tenant Act 1985 seeking an order that the Management Company's costs of the proceedings should not be added to the service charge.

81. The FTT gave directions at a hearing on 11 December 2014 at which Ms Sinclair made it clear that she also wanted to contest her liability for service charges pre-dating the grant of her current lease in 2010 (when the Management Company had acted as agent in the management of the Building on behalf of the Company). Ms Sinclair was advised that if she wished to widen the service charge dispute it would be necessary for her to make her own application under section 27A, Landlord and Tenant Act 1985, which she then duly did on 22 December 2014. In that application Ms Sinclair referred to her email of 18 July 2012 in which she had explained the issues which concerned her; these included questions about the governance and dealings of the Company which were beyond the jurisdiction of the FTT.

82. One matter which was considered at this first case management hearing was the possibility of mediation. In its subsequent directions the FTT recorded that Ms Sinclair had been happy to pursue mediation but that counsel for the Management Company had no instructions on her client's attitude to that suggestion. In its directions the FTT included details of its own mediation scheme and invited the parties to give further consideration to making use of it.

83. The parties were also directed to exchange statements of case. In her statement, which is undated, Ms Sinclair recounted in some detail what she described as a breakdown in trust between herself (and, she claimed, other lessees) and the former chairman of the Management Company, whom she accused of being a bully who had been aggressive in tenants' meetings. She raised a number of specific issues about payments from a sinking fund, credits for ground rent after lease extensions, the completion statement from the purchase of the freehold by the Company in 2005, repairs to the interior of the Building for which she considered she ought not

to be charged and other matters on which she said she had been attempting without success to obtain answers for a number of years.

84. At a further case management hearing on 10 February 2015 the Management Company applied to strike out Ms Sinclair's section 27A application and sought an order for the costs of the application under rule 13(1)(b). Both applications were refused by the procedural judge. The application for costs was supported by counsel's skeleton argument, and was made on the grounds that the payments under the previous lease had not been made to the Management Company, but to a predecessor, and that Ms Sinclair had conducted herself unreasonably in bringing her application at all and in failing to make payment of service charges since June 2010. In rejecting the application the judge reminded himself that there was a high onus on any party seeking a costs order on the grounds of unreasonable behaviour, and found that the Management Company "fell far short of establishing that threshold."

85. It is not apparent whether the subject of mediation was touched on again at the second case management hearing, but we assume not. On 19 December the Management Company's solicitors had written to the FTT in response to the directions of 11 December noting that the parties had been encouraged to engage in mediation but explaining that, while Ms Sinclair's case was that none of the service charges were payable, its own client's case was that all of them were reasonable, due and payable. In those circumstances the solicitors did not believe that there was any real merit in mediation.

The FTT's decision

86. At the substantive hearing on 6 and 7 May 2015 Ms Sinclair was unrepresented while the Management Company was represented by counsel and solicitors. In its decision of 17 June 2015 the FTT determined that the full sum claimed by the Management Company (which had been reduced to £9,767 by payments) was payable by her for the service charge years 2010-2014. Ms Sinclair's claims for the reduction of service charges and reimbursements of sums previously paid (which totalled a little over £10,000) were rejected in their entirety.

87. In the same decision the FTT said that when the procedural judge had dismissed the Management Company's application under rule 13(1)(b) at the case management hearing on 10 February 2015 he had done so only on the basis of the material which was then in front of him "and did not intend it to be definitive or to exclude a similar application being made at the final hearing". There is no statement to that effect in the decision given on 10 February 2015 and the renewal of the rule 13(1)(b) application was not listed by the procedural judge as one of the matters in issue. For our part we would regard the dismissal of the original application as a determination by the FTT that the conduct of Ms Sinclair relied on in support of the Management Company's application "fell far short" of being unreasonable. In our judgment, it was not open to the Management Company to rely on the same conduct as providing grounds for a further application.

88. Nevertheless, in paragraph 50 of its decision the FTT recorded that the Management Company had indeed made a further application for costs under rule 13; no formal notice of application seems to have been given to Ms Sinclair, but the intention to make the application had been foreshadowed in the Management Company's statement of case of 13 March 2015 and in a skeleton argument of 18 pages which had been e-mailed to Ms Sinclair on the evening before the hearing. The statement of case asserted, without giving examples, that Ms Sinclair had been unreasonable throughout the proceedings, and that her defence had been vague and confused. The skeleton argument went further, in that it included two short paragraphs stating that the application for costs was similar to the application made at the first case management hearing, the grounds of which were relied on. Four further grounds were identified, namely, that Ms Sinclair had brought up irrelevant issues at case management hearings, had failed to particularise her case or provide her evidence in a coherent way, had made a large number of irrelevant or unarguable claims and had presented the Management Company's legal representatives with unreasonable demands for information.

89. The FTT's decision on the rule 13(1)(b) application is comprised in paragraphs 52 and 53 of its decision of 17 June 2015, and comprises the following:

> "Instead, the tribunal is satisfied that it is appropriate to make a Rule 13 Order against the respondent. Apart from her recent payments which she intended to pay for current and ongoing service charges, the Respondent has never paid her service charges unless and until required to do so in order to participate in the enfranchisement and to obtain her new lease. She has sought to defend herself on spurious grounds unsupported by anything like sufficient evidence, as set out in detail above. Her behaviour has clearly passed the high threshold of "unreasonable".
>
> The applicant submitted a statement of costs providing a breakdown of their legal costs which total £19,860.40 (£16,582 plus VAT). The schedule of work done on documents wrongly included the compilation of the statement of costs for the application which Judge Latham rejected. The tribunal accepts that the respondent has been difficult to deal with but the costs nevertheless appear to be on the high side proportionate to the amount in dispute. In the circumstances, the tribunal allows costs of £16,800 (£14,000 plus vat)."

90. Earlier in its decision the FTT had referred to Ms Sinclair having produced a statement of her case, usefully cross-referenced to her own bundle of documents, and had rejected the Management Company's complaint that she had failed to identify the issues she wished to raise. Nevertheless at various points in its decision it was critical of her conduct of the proceedings: her evidence was "thin at best" and her case was based on confident assertion on which she appeared to expect the tribunal to take her word; there had been "no rational basis" for her compromise offer to pay one-third of the disputed boiler maintenance charges; "despite the tribunal making efforts to explain it to her" she had failed to appreciate how the reserve fund operated; it was "clearly unreasonable" for her to assert that the chairman of the management company had been bullying without "a single shred of evidence to support her assertion"; her version of events was not reliable and was contradicted by documents. We take these to be the conduct which the FTT found clearly passed the threshold of unreasonableness.

The issues on the appeal

91. The FTT refused the applicant's request for permission to appeal, but it was granted by this Tribunal on two issues. The first was whether the FTT had been correct to dismiss Ms Sinclair's case that she had been over-charged for heating and hot water. The second was whether the FTT had been entitled to make the order for costs against her. We will consider the appeal on the costs issue first.

The costs issue: discussion and determination

92. We can deal with the costs appeal in this case quite shortly.

93. We are satisfied that the FTT's decision was procedurally unfair in two respects and must be set aside on that basis alone. First, the appellant appears to have been given no adequate notice of the allegations by the Management Company on which the application was based; the Management Company's statement of case was entirely unparticularised and we do not regard the eve-of-hearing skeleton argument delivered to an unrepresented party as providing appropriate notice of the grounds of a claim for £18,860. Secondly, the grounds on which the FTT itself relied in coming to its determination (involving its assessment of her evidence and its almost wholesale rejection of her case) were comprised in the tribunal's substantive decision, in which the FTT also made its decision on costs; those grounds could not have been known to the appellant so as to enable her effectively to answer them. It follows that the appellant had no proper opportunity to respond to the case against her, and no proper opportunity to defend the reasonableness of her conduct. That was unfair to her.

94. Apart from the procedural unfairness of the costs decision we do not believe that the grounds relied on by the FTT were capable of amounting to unreasonable conduct.

95. The first ground did not relate to the conduct of the proceedings at all. The FTT was entitled to be critical of Ms Sinclair's failure to pay her service charges unless and until she was required to do so in order to participate in the enfranchisement and to obtain her new lease, but it was not entitled to rely on that conduct as supporting the charge that she had "acted unreasonably in bringing, defending or conducting proceedings." Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis. We qualify that statement in two respects. We do not intend to draw this limitation too strictly (it may, for example, sometimes be relevant to consider a party's motive in bringing proceedings, and not just their conduct after the commencement of the proceedings) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct. Secondly, once unreasonable conduct has been established, and the threshold condition for making an order has been satisfied, we consider that it will be relevant in an appropriate case to consider the wider conduct of the respondent, including a course of conduct prior to the proceedings, when the tribunal considers how to exercise the discretion vested in it. In this case, however, the FTT inadvertently but impermissibly elided the different stages of the analysis.

96. The second reason given by the FTT was that Ms Sinclair had sought to defend herself on spurious grounds unsupported by anything like sufficient evidence, as it had set out in detail in its decision. We are conscious that the FTT had every opportunity to form an assessment of the appellant's behaviour, and that we have had little or no such opportunity, but nevertheless the catalogue of criticisms which we have extracted from the decision in paragraph [91] above does not seem to us to be a solid foundation for a finding of unreasonable behaviour.

97. The main focus of the FTT's criticisms was the absence of evidence in support of the appellant's contentions, and the availability of evidence to contradict them. But the FTT appears not to have regarded the testimony of Ms Sinclair herself as evidence, in particular in relation to the allegation of bullying by the chairman of the Management Company. Ms Sinclair's statement included her own first hand evidence that tenants' meetings were aggressive and that many leaseholders had stopped attending meetings or questioning the chairman because they felt browbeaten. There was also at least one supportive email from another leaseholder agreeing with Ms Sinclair's contention that the Building was poorly run, and confirmation from a third leaseholder that he was no longer willing to chair residents' meetings following an argument with the chairman of the Management Company. No assessment of that material was made by the FTT when it decided that there was not a shred of evidence to support Ms Sinclair's complaints about the chairman.

98. Nor was any assessment made of Ms Sinclair's honesty. It is one thing to find that a witness with a poor understanding or recollection of events has given an account which is contradicted by contemporaneous documents; it is an entirely different thing to find that a witness has deliberately given false evidence with the intention of misleading the tribunal and has been found out by inconsistencies and contradictions. Lying to a tribunal could be grounds for a finding of unreasonable conduct; having a poor memory or an incomplete or confused understanding of events, management structures, or legal documents could not. In this case the FTT made no evaluation of the appellant's evidence beyond finding that it was often unreliable and insufficient to make her case. If it regarded that aspect of Ms Sinclair's conduct to be unreasonable it was necessary for the FTT to explain why.

99. For these reasons we are satisfied that the FTT's decision to make an award of costs against Ms Sinclair must be set aside. We do not consider that we would be justified in this case in remitting the application for reconsideration by the FTT. The grounds on which the application was advanced in the two skeleton arguments were not the grounds relied on by the FTT when it made its decision. Those grounds were either specifically rejected in the decision (the suggestion that she had failed to particularise her case or provide her evidence in a coherent way), or they could not properly form the subject matter of an application (having been rejected at the first case management hearing) or must be taken by their absence from the decision not to have been regarded by the FTT as grounds for making an order.

100. We therefore allow the appeal on the rule 13(1)(b) order in Ms Sinclair's case.

101. Before leaving the costs appeal we would comment on a submission made by Ms Seal on behalf of the appellant. It will be recalled that Ms Sinclair had expressed her willingness to refer the dispute to mediation but that the Management Company had not considered there was any prospect of a favourable outcome and had declined that suggestion. It was submitted that the FTT ought to have taken the parties' respective stances on mediation into consideration in deciding whether to make an order for costs. We were referred to some well known authorities to the effect that a refusal to mediate, or to participate in other forms of alternative dispute resolution, may provide evidence of unreasonable behaviour in the conduct of civil litigation capable of being taken into account in relation to costs, especially in the context of CPR Part 36 (*Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, and *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288). Having considered submissions on those authorities we would make the following short points.

102. First, and most obviously, the Civil Procedure Rules do not apply to proceedings in tribunals and analogies with them should be drawn with considerable caution. In a relatively modest dispute we do not necessarily regard an unwillingness to mediate by a party which considers themselves to have a strong case as evidence of unreasonableness; depending on the circumstances it may simply be evidence of an entirely reasonable assessment that the effort and expense of a day spent mediating, with no guarantee of success, is not justified when the comparable effort and expense of proceeding to a hearing will produce a much higher chance of a final resolution. That is not to diminish the importance of mediation, which has a proven record of success, and which we consider has a vital role to play in the resolution of disputes of this nature where the protagonists are neighbours who share common property and financial interests; but, especially in modest disputes, it is necessary to be realistic and to encourage rather than compel mediation.

103. Secondly, a genuine willingness to mediate, even if unreciprocated, appears to us to be an example of reasonable behaviour which ought to be encouraged. A party should be entitled in an appropriate case to credit for such behaviour if, by reason of other aspects of their conduct, a tribunal is considering whether to exercise the discretion to make an order under rule 13(1)(b) and what form such an order should take. In this case, for example, had it been appropriate for us to consider making an order for costs against Ms Sinclair, we would have had regard to her offer to mediate, together with her offer to compromise by paying one third of the boiler maintenance charge claimed, as aspects of her conduct relevant to that decision.

The heating and hot water issue

104. This aspect of the appeal raises a short issue on the proper construction of the 2010 lease. On behalf of Ms Sinclair it is contended that she should pay less than 10.97% of the cost of hot water because she had her own independent heating system and therefore used less hot water than a lessee connected to the communal heating system. In assessing a "fair proportion" of those costs, she says, the Management Company should not have charged her the full amount but should have made a reasonable deduction. This she put at 66%.

105. In its decision the FTT decided at paragraph 30(b) that:

"(b) Paragraph 2 of schedule 3 to the 2010 lease appears to allow for a different apportionment for the expenses of the hot water system but the application does not seem to have made any use of this as the respondent has continued to pay the same apportionment of all costs within her service charges. Therefore there might be an argument that the apportionment should have changed to reflect the possibility that the Respondent used less of the hot water, not using it for heating, until she finally disconnected altogether from the system. However, the problem for the respondent is that the Tribunal was presented with no evidence as to the use made by other flats of the communal heating or how that compared to the use made of hot water, for the period 2010-2012 or any other period. There is not even any evidence that it would result in any difference to the respondent's charges."

106. The FTT therefore tentatively accepted Ms Sinclair's construction of the lease but considered that as there was no evidence of any kind to demonstrate what use of the heating system was made by other lessees, they could not make any deduction.

107. Had we agreed with the Tribunal's interpretation of the 2010 lease we would have faced the same evidential difficulty. However, for the following reasons we do not agree that the Management Company had a discretion to charge a different amount for the supply of hot water having regard only to the use (or non-use) of the communal heating system.

108. By clause 2 of the lease, Miss Sinclair is required to pay 10.97% for the matters mentioned in schedule 7 part B clauses 1-10 and part C. Those costs include the cost in part C paragraph 2 for the Management Company to "supply, repair, maintain, renew if necessary and operate the plant equipment and other apparatus as the Management Company shall consider necessary for the provision of common services in or about the Reserved Property." The definition of "Reserved Property" is also found in part C and includes "until each separate flat in the Building has installed an individual boiler for providing hot water to such individual flat and subject to payment by the lessee of its fair proportion of the cost of such supply by the Management Company (if any) pursuant to clause 2 of the Third Schedule of this Lease the central boilers for providing hot water to the building."

109. As already mentioned, clause 2 requires 10.97% of costs to be paid for specified services "and a fair proportion of the expenses outgoings and costs of supplying hot water to the demised premises determined by the Management Company acting reasonably based on the demised premises estimated share of usage likely to be incurred for the ensuing year up to 24 March *in connection with the matters mentioned in clause 11 part C schedule 7*". Clause 11 of part C relates to the "supply of hot water to the *taps* in the demised premises until the Lessee has installed and individual boiler for providing hot water to the Premises"

110. The drafting of these provisions is somewhat opaque but we are satisfied that:

(a) The obligation to pay 10.97% relates to the costs of the central boiler for the heating system and includes its provision, maintenance and operation;

(b) The obligation to pay that 10.97% continues until "each flat" meaning *all* of the flats have installed individual boilers;

(c) The "fair proportion" of costs relates only to the provision of hot water to the taps in individual flats and not to the provision of hot water for the purposes of heating. This is clear because of the specification of "hot water to the taps" in clause 11 of part C and also because of the clear distinction between the proviso in clause 2 (where the obligation to pay for hot water ceases where a lessees gets their own hot water system) and the definition of Reserved Property (where the obligation to pay for maintenance etc. and hot water for heating does not so cease until each flat has its own separate system);

(d) That Miss Sinclair was charged 10.97% of the cost of the provision of hot water to the taps in her flat until 2014 but was reimbursed the cost from 2012 until 2014 to reflect the fact that she had installed her own hot water system in 2012 and that this reflected the lease terms.

111. We therefore dismiss Ms Sinclair's appeal in respect of the hot water issue, although for different reasons from those given by the FTT. Ms Sinclair's complaint was that the Management Company had failed to reduce the heating costs below 10.97% despite the fact that she received no heating. Since we are satisfied that Miss Sinclair was obliged to pay for the heating costs under the terms of the lease despite the fact that she had her own heating system, that claim cannot succeed.

112. As Ms Sinclair was largely unsuccessful before the FTT and has not reversed its substantive decision on the hot water issue, we see no reason in principle which would justify us interfering with the tribunal's decision not to make an order under section 20C of the Landlord and Tenant Act 1985, so that the costs incurred in the proceedings before it could be added to the service charge payable by all leaseholders if their leases included an appropriate contractual term permitting their recovery.

113. Ms Sinclair has been wholly successful in her appeal on the issue of her personal liability to pay rule 13 costs, but has not succeeded in reversing the FTT's decision on the hot water issue. Having seen a draft of this decision Ms Sinclair has raised the issue of her liability to contribute to the costs of the appeal through the service charge. She has, as yet, made no application for the protection of section 20C in respect of the respondent's costs of the appeal. It may be that the parties will be able to reach agreement in relation to that matter, but if they cannot, Ms Sinclair may make an application to the Tribunal and we will consider it. The statute does not impose a time limit for such an application, but if one is to be made it would be convenient if that was done within 28 days.

Stone v 54 Hogarth Road London SW5 Management Limited

114. 54 Hogarth Road is a building comprising 11 flats. The company in which the freehold is vested, 54 Hogarth Road, London SW5 Management Limited ("the Company"), is owned by the tenants of each of the flats.

115. Flat 9 on the third floor of the building is the home of Mr Stone, the appellant, and his wife Mrs Su Lien Stone, who although a joint lessee of the flat is not party to these proceedings. Mr and Mrs Stone occupy Flat 9 under a lease granted to them on 20 June 2005 by the Company.

116. The 2005 lease is for a term of 999 years and was granted in consideration of the surrender of an earlier lease of the flat which had been granted in 1979 for a term of 99 years. The 2005 lease requires the tenant to pay a service charge equal to $1/6^{th}$ of the expenditure estimated by the lessor as likely to be incurred in the provision of services in the forthcoming accounting year.

117. Mr and Mrs Stone acquired the 1979 lease in 2003. At that time Mr Stone became a director of the Company and appears to have been closely involved in the management of the building. That active involvement subsequently ceased and Mr Stone later fell into dispute with the Company over service charge expenditure. In particular he took exception to the retention in the Company's service charge account of surpluses generated by the collection of greater sums on account than were required to meet the Company's annual expenditure. Mr Stone asked that his proportion of the annual surplus be returned to him or credited to his service charge account at the end of each year, but the Company preferred to accumulate it as a reserve. Although the lease allows for the service charge to include contributions towards a reserve fund, it makes no express provision for the retention by the lessor of any unexpended surplus of sums collected for other purposes.

118. A second source of dispute between Mr Stone and the Company concerned the accounting for the proceeds of sale of part of the garden at the rear of the building to the lessees of one of the flats. The Company appears to have credited a proportion of the premium received to the service charge accounts of each of its members, whereas Mr Stone wished to receive payment of his share.

119. In August 2014 Mr Stone applied to the FTT for a determination under section 27A, Landlord and Tenant Act 1985, of his liability to pay service charges in each of the years ending September 2011 to September 2015. After a case management hearing the FTT recorded in directions that there were a number of issues to be resolved. For the years 2011, 2012 and 2013 the only issue was whether the Company should have re-paid or credited the surplus found to have been collected at the end of those years. There was then a further dispute about the Company's compliance with the statutory consultation requirements in relation to major works carried out during 2014. It was Mr Stone's case that the budget for the major works was excessive and that the completed works were of a poor standard. Mr Stone also challenged the service charge budget for the year ending September 2015. Finally, he made an application for a direction under section 20C of the Landlord and Tenant Act 1985 that no part of the costs incurred by the Company in connection with the proceedings before the FTT should form part of any service charge payable by him and his wife.

120. In preparation for a final hearing to take place on 19 January 2015 the FTT directed Mr Stone to provide details of his case by 14 October and to prepare a bundle for the hearing by 9 December. If the parties were unable to agree a single bundle they were each directed to prepare their own bundle.

121. In October 2014 negotiations took place between the parties which did not result in a complete settlement of the dispute, but did result in the Company making a payment to Mr Stone of an amount which it considered reflected the surpluses which Mr Stone claimed to be entitled to for the years 2011 to 2013. The FTT explained what happened next in its decision of 23 April which is the subject of this appeal:

> "It appears that at some point in time Mr Stone contacted LEASE [the Leasehold Advisory Service] and received advice from them. It is not clear when. What is clear is that by a letter received at the tribunal offices on 14 January 2015 Mr Stone sought to withdraw the claim. The letter is marked as being copied to the "defendants". In fact the tribunal sent a copy to the solicitors acting for the Management Company and confirmed with Mr Stone on 15 January 2015 that the claim was withdrawn and issued the Tribunal's consent to such withdrawal on the same day. The matter was due for hearing on the following Monday, 19 January 2015."

122. Documents which had been before the FTT allow those bare bones to be fleshed out a little. On 31 October 2014 the Company's solicitors had written to Mr Stone "without prejudice save as to costs" informing him that in order to achieve a swift and amicable conclusion to the dispute the Company was prepared to make certain offers in consideration of him withdrawing his application. Those offers were for the payment of £594.90 in respect of the service charge surpluses in the years 2011 to 2013 together with interest which had been charged to his account in respect of unpaid sums in subsequent years. The Company also offered to pay over the proportion of the proceeds of sale of the garden land to which Mr Stone was entitled. In return, the Company would expect Mr Stone to pay the arrears remaining on his service charge account in full within 3 months. The letter concluded by commending the proposed settlement and drawing attention to the fact that both parties were going to incur substantial costs and time in bringing the matter to a hearing.

123. Mr Stone responded to that overture on 13 November 2014 recording that a payment had already been received into his bank account in respect of the proceeds of sale of the garden land (a sum totalling £1,425.25). He indicated his willingness to discontinue county court proceedings which he had commenced to recover that sum on condition that interest of £97.70 was first paid. He welcomed the offer in relation to the overpayment of service charges but took issue with the Company's calculation of the sum which he suggested should be £1,165.99. He provided further details of his calculations in a letter of 24 November 2014 in response to a request received from the Company's solicitors.

124. It is clear, therefore, that although the gap between the parties had narrowed by the end of November, and the Company had paid what it considered it ought to directly into Mr Stone's bank account, no final agreement had yet been reached. Mr Stone still considered he was

entitled to a larger sum. There was also his challenge in relation to the cost of the major works and his application under section 20C in relation to the costs of the proceedings. We should make it clear that the Company's position is that it was entitled to accumulate the service charge surpluses at the end of each year because it had specifically sought the approval of its members in a general meeting. It also considered that it was entitled to charge interest on arrears of service charges because its members had so resolved (despite there being no provision for interest in the lease itself). As is often the case neither the Company nor Mr Stone drew a clear distinction between the rights of individuals in their capacity as members of the Company and the rights of the same persons as leaseholders.

125. Mr Stone informed the FTT on 14 January 2015 that he wished to withdraw his application. It was implicit in his letter that he was satisfied that the sum credit to his bank account in respect of the previous overpayments of service charge had been correctly calculated ("the defendants have conceded that their withholding of over payments … was not legal and have now made available to leaseholders those monies"). Mr Stone went on:

> "In that context and to not waste the tribunal's time I now withdraw my claim/application for a hearing in the tribunal, and now hope that both parties can work closely to resolving any further disagreements that might arise without recourse to the tribunal."

The FTT gave its consent to the withdrawal on 15 January and the substantive proceedings were at an end.

126. On 11 February the Company applied under rule 13(1)(b) for payment of the costs it had incurred in connection with the proceedings. The focus of the Company's application for costs was on the manner and timing of Mr Stone's withdrawal of his application.

127. Having regard to Mr Stone's grounds of appeal it is necessary to refer to the core of the FTT's reasoning at paragraphs 11 to 13 of its decision of 23 April 2015:

> "11. It does seem to me that [Mr Stone] could have withdrawn the case before he did. The payments had been credited to his account before the end of October. The extract of telephone conversations with LEASE would appear to indicate that he had spoken with them and they had advised him that "there was no benefit to carry on". It should have been apparent to Mr Stone that delaying the withdrawal of the case would mean that costs would continue to be incurred by the respondent, a tenant owned management company, of which Mr Stone appears to be a member. The question is when was his behaviour so unreasonable as to create a liability to pay the respondent's costs under the Rules. I find that he was entitled to some time to consider the offers made. It is not clear that a full settlement is evidenced by the exchanges of correspondence at that time. However, he must have been able to determine whether the proposals were acceptable to him and by his statement of case dated 17 February 2015 it appears clear that he agreed the sums paid as he says "once the Tribunal case was active, again they agreed to repay all the overpayment of service charges to all leaseholders, including themselves. They never repaid this money until recently on a credit to my account." It appears to be accepted that such credit took

> place by the end of October 2014. This still left the issue of section 20 of the 1985 Act and the costs of works.
>
> 12…. Mr Stone speaks of the difficulties in obtaining any evidence to support the allegations made in respect of the section 20 issue. It must have been apparent to him that with the hearing scheduled for 19 January 2015 and the surveyors, who would provide the report, shut for the first two weeks of January that he was not going to get that evidence in time for the hearing. My finding on the conduct of Mr Stone is that in failing to withdraw the case until a day or so before the hearing, he has put the applicant to additional costs and has acted unreasonably within the meaning of the Rules. …
>
> 13. The question is what are the extent of those costs caused by Mr Stone's unreasonable conduct?"

128. In the remaining paragraphs of its decision the FTT carefully considered the extent to which costs could have been avoided if, as the tribunal considered he ought to have done, Mr Stone had withdrawn the case "at the beginning of the year, at the latest". It concluded that these costs, including counsel's fees, totalled £2,260.80 and it ordered that Mr Stone pay that sum to the Company.

129. Finally, and in response to submissions made by Mr Stone about his inability to pay, the FTT ended its decision by saying:

> "I do not consider that the personal circumstances of Mr Stone are relevant to my determination but may be something the applicant will take into account."

The appeal

130. In support of his appeal Mr Stone explained to the Tribunal why he had considered it necessary to make his original applications to the FTT. He had been attempting to recover the annual service charge surpluses and his share of the proceeds of sale of the garden land for three years, without making any progress and he felt he had been left with no alternative other than to apply to the FTT for a determination. As far as the major works had been concerned he had obtained two estimates, which were lower than the tender of the successful contractor, but when he had attempted to raise the issue at meetings of the Company his concerns had been ignored.

131. He explained that he had decided to withdraw his application because he had not been able to obtain evidence in support of his contention that the major works had cost too much; he had attempted to obtain evidence from builders but had been unsuccessful as the firm he tried to approach were closed for two weeks over Christmas and New Year. He had then consulted LEASE who advised that he had little chance of success. For that reason he had decided to withdraw as he had put it in his letter of 14 January 2015 "to not waste the tribunal's time". His original complaints had been justified, as was demonstrated by the reimbursement of the surplus and payment of the proceeds of sale.

132. On behalf of the Company Miss England submitted that the FTT had been entitled to come to the conclusion that Mr Stone had behaved unreasonably by waiting until so late in the day before withdrawing his application. He had been reimbursed his share of the service charge surplus and the proceeds of sale by the end of October 2014 and by the beginning of 2015 it was unreasonable of him still to be putting the Company to expense in pursuit of further claims which he then abandoned. He had been unable to say when he had been advised by LEASE that there was nothing to be gained by pursuing the application, but even if he had received that advice in January 2015 it should have been obvious to Mr Stone much earlier that his position was hopeless. He had been directed by the FTT to file an agreed bundle of documents by 9 December, so he should have been taking steps to collect evidence much earlier than he had. The FTT had been careful in limiting the costs awarded against Mr Stone to those costs which it considered would have been avoided if Mr Stone had acted promptly.

Discussion and conclusion

133. We remind ourselves once again of the restraint which is required of an appellate tribunal when reviewing a discretionary decision of a first-tier tribunal. In this case, however, it is relevant to note that the FTT reached its decision on costs without having heard the substantive dispute, and without the advantage which we have had of hearing Mr Stone's first hand account of his actions. Nevertheless, unless the FTT erred in principle in reaching its conclusion it is not for us to substitute our own view.

134. The FTT's decision contains a careful assessment of the conduct of Mr Stone, reaching the conclusion that it had been unreasonable for him not to withdraw his application "by the beginning of the year, at the latest". There then follows an equally careful assessment of the extent to which costs could have been avoided if Mr Stone had taken that course. Given the premise that Mr Stone's conduct had been unreasonable, the FTT's final conclusion was moderate and proportionate; we would question only the concluding statement that the personal circumstances of Mr Stone were not relevant to the determination, as it appears to us at least arguable that that was a matter which could properly be taken into account in the exercise of the discretion over the amount of the award which it was appropriate to make.

135. Nevertheless we are unable to uphold the decision. The FTT's conclusion that Mr Stone acted unreasonably by not withdrawing the application until a day or so before the hearing is not one which was justified on the material before it.

136. It is not unreasonable to submit genuine claims for determination by the FTT, and the fact that some claims may have a greater chance of success than others makes no difference. It may be unreasonable to bring a claim which is fanciful, which the claimant knows is bound to fail, or which is brought solely for the purpose of causing expense and inconvenience to the respondent; but there is no suggestion that Mr Stone's claims to a greater reimbursement of service charge surpluses than he eventually accepted, to a reduction in his liability for the major works on the grounds that they were too expensive, or to the protection of an order under section 20C of the 1985 Act, were of that nature. On the contrary, the claims related to genuine matters of dispute. The FTT was clearly right, therefore, to proceed on the basis that there had

been nothing unreasonable in bringing the claims. What therefore made it unreasonable not to withdraw them earlier than Mr Stone did?

137. The FTT treated the dispute over reimbursement of surplus service charges as having been concluded by the end of October 2014, when the Company paid the sum which it considered was repayable into Mr Stone's account. That does not seem to be right, as Mr Stone's letters of 13 and 24 November 2014 indicate that he calculated the sum differently. All that can be said is that Mr Stone was subsequently prepared to forego the opportunity to contend for a greater sum. Without an investigation of the merits of the parties' respective positions it is not possible to know whether the withdrawal of this part of the application represented a concession by Mr Stone or a belated recognition that he had received all he was entitled to.

138. The withdrawal of the claim in relation to the cost of the major works was considered by the FTT to have come unreasonably late because "it must have been apparent to him" that he was not going to get the evidence of a surveyor in time for the hearing scheduled for 19 January 2015 as their offices were closed for the first two weeks of January. Having now heard from Mr Stone in person it seems to us to be likely that he only started to approach potential witnesses at the beginning of January 2015 and that it was only after doing so repeatedly that he appreciated that the evidence he hoped to obtain would not be available. That may not have been clear to the FTT which formed the view that Mr Stone should have appreciated "at the beginning of the year, at the latest" that he could not obtain a better outcome than he had already secured. It is also fair to say that Mr Stone left it very late indeed before seeking to support his case with additional evidence.

139. Nevertheless, where we differ from the FTT is in respect of its conclusion that it must have been obvious to Mr Stone not only that he would not have the evidence of a surveyor or a builder, but also that, as a result, his claim in relation to the major works was not going to succeed. Mr Stone was in a position to rely on his own evidence concerning the reasonable cost of the works and concerning the alternative estimates which he had obtained when the Company was undertaking the statutory consultation. It may have been obvious to a person with experience of proceedings before the FTT that the evidential basis of Mr Stone's claim was weak but it is the repeated experience of tribunals that the need for substantial evidence is not well appreciated and that many claims are dismissed on that basis without it being said that they were unreasonable.

140. Mr Stone did not press ahead in pursuit of a hopeless case; had he done so his claim for a reduction in the cost of the major works would have been likely to have been dismissed without the risk of an adverse costs order. Instead he took the entirely reasonable course of seeking advice from an expert source, namely LEASE, which exists to provide advice to leaseholders in Mr Stone's position. He was advised that there would be no benefit in carrying on, and it was in the light of that advice that Mr Stone decided to withdraw his remaining claims. It is not suggested that his action in withdrawing was anything other than reasonable, only that he should have done so sooner. But there is no reason to believe that there was any significant gap between Mr Stone receiving advice from LEASE and informing the FTT of his wish to

withdraw his remaining claims on the grounds that he did not wish to waste the tribunal's time. The FTT said specifically that it was not clear when Mr Stone received advice, and he confirmed to us that he could not remember when he had spoken to LEASE. The exchanges he had with the organisation after the application for costs was made against him, and which are in evidence, do not assist in pinpointing the date of his first relevant contact.

141. Without knowing when Mr Stone received advice that there was nothing to be gained by continuing the application, it is impossible to conclude that he delayed for an unreasonable period before withdrawing his claim in relation to the major works on 14 January 2015. Even then he might quite reasonably have pursued his claim under section 20C for protection against the costs of the dispute being added to the service charge.

142. It therefore seems to us that the FTT's conclusion that it was unreasonable for Mr Stone not to withdraw sooner than he did could only be justified if the withdrawal of his remaining claims is treated as an acknowledgement that they should not have been brought. But, as the Court of Appeal made clear in *McPherson v BNP Paribas,* in tribunal proceedings there is no imputation that a claim which is discontinued was doomed to fail or ought never to have been commenced. Such an imputation is only required where it is necessary to identify a successful party so that liability for the costs which it has incurred may be shifted on to the unsuccessful party. Where, as in tribunal proceedings, there is no general rule that the winner will be entitled to an order for the payment of their costs by the loser, the withdrawal of a claim should not be stigmatised as an admission of defeat or as unreasonable. To allow such a stigma to be attached to withdrawal creates an unhelpful obstacle to the making of sensible concessions.

143. The observation of Mummery LJ, which we have quoted in paragraph 36 above are particularly apt in this case. It is legally erroneous to take the view that it is unreasonable conduct for claimants in the Property Chamber to withdraw claims or that, if they do, they should be made liable to pay the costs of the proceedings. Claimants ought not to be deterred from dropping claims by the prospect of an order for costs on withdrawal, when such an order might well not be made against them if they fight on to a full hearing and fail.

144. We are therefore satisfied that the grounds on which the FTT found Mr Stone to have behaved unreasonably were not capable of justifying that conclusion. As a result, we allow his appeal.

145. In his original application to the FTT Mr Stone included an application under section 20C, Landlord and Tenant Act 1985, seeking an order that no part of the costs incurred in connection with those proceedings by his landlord should be taken into account in determining the amount of any service charge payable by him. That application was withdrawn by Mr Stone along with the remainder of his claims on 14 January 2015 and there is no reason for us to revisit that decision.

146. In a letter dated 30 April 2015 in which Mr Stone sought the permission of the FTT to appeal its costs decision, he referred to a second application under section 20C "reference to

costs application". We have not seen the document in which that application was made, but the letter of 30 April 2015 is a sufficient application in itself for the purpose of the section. The FTT did not refer to the application in its decision or in refusing permission to appeal and it remains undetermined. If the parties are unable to reach agreement, Mr Stone may renew his application to this Tribunal and we will consider it, both in relation to the costs incurred by the respondent before the FTT after 14 January 2015 and in relation to the respondent's costs of the appeal. As we have observed in Ms Sinclair's case, section 20C does not impose a time limit for such an application, which may be made both before or after the conclusion of proceedings, but if the application is to be renewed it would be convenient if that was done within 28 days.

Martin Rodger QC
Deputy Chamber President

Siobhan McGrath
President, First-tier Tribunal (Property Chamber)

21 June 2016