UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 0284 (LC)
Case No: ALT/27/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Costs – appeal against order made by First-tier Tribunal – whether costs of the appeal in the Upper Tribunal to be awarded against the Appellant for unreasonable behaviour in bringing or conducting the appeal – Rule 10(3)(b) of The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 – basis of assessment

BETWEEN :

THE KINGSBRIDGE PENSION FUND TRUST **Appellant**

- and -

DAVID MICHAEL DOWNS **Respondent**

**Re: Milstead Farm, Gilstead,
Bingley, West Yorkshire,
BD16 4QU**

Hearing date: 15 March 2017

Sir David Holgate, President

Royal Courts of Justice, London WC2A 2LL

- -

Stephen Jourdan QC instructed by Michelmores for the **Appellant**
Oliver Radley-Gardner instructed by Loxley for the **Respondent**

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The following cases are referred to in this decision:

Shirley v Crabtree [2008] 1 WLR 18
British-American Tobacco (Holdings) Ltd v HMRC [2017] UK FTT 99 (TC)
Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC)
Market & Opinion Research International Ltd v HMRC [2013] UK FTT 475 (TC)
Market & Opinion Research International Ltd v HMRC [2015] UKUT 12 (TCC)
Catana v HMRC [2012] UKUT 172 (TCC); [2012] STC 2138
Marshall v HMRC [2016] UKUT 0116 (TCC)
Cancino v Secretary of State for the Home Department [2015] UK FTT 59 (IAC)
McPherson v BNP Paribas [2004] ICR 1398

DECISION ON COSTS

Introduction

1. The Respondent makes two applications regarding the costs he has incurred in relation to this appeal. First, he applies under rule 10(3)(b) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rule 2010 ("the 2010 Rules") for an order that the Appellant should pay the Respondent's costs of the appeal, on the grounds that the Appellant behaved unreasonably in bringing or conducting the appeal. Second, if that application succeeds the Respondent asks that any costs awarded be assessed on the indemnity basis (pursuant to rule 10(12)).

2. The application, the Appellant's response and the Respondent's reply were made by written submissions. Neither party asked for the matter to be dealt with at a hearing.

3. The Appellant's submission opposed the application for a costs order, but if that application succeeds, the Appellant did not make any separate submissions on whether costs should be awarded on the indemnity basis.

Legal principles

4. This application for costs relates to the costs of the appeal to this Tribunal. Rule 10(2)(a) of the 2010 Rules restricts the costs orders which may be made by the Tribunal to the circumstances or conditions set out in rule 10(3) to (6). In an appeal from the FTT the Tribunal has no power to award costs except under rule 10(3).

5. Rule 10(3)(a) deals with an application under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 for a "wasted costs" order, that is an order against a legal or other representative (exercising a right of audience or to conduct proceedings on behalf of a party) for costs incurred by a party "as a result of any improper, unreasonable or negligent act or omission" on the part of that representative (section 29(5) and (6)). The Respondent's application is not for a wasted costs order. It is made against the Appellant.

6. Rule 10(3)(b) empowers the Tribunal to order the Appellant to pay the Respondent's costs of the appeal if the Tribunal is satisfied that the Appellant or its representative "acted unreasonably in bringing, defending or conducting the proceedings".

7. Rule 2(3) provides that "the Tribunal must seek to give effect to the overriding objective when it – (a) exercises any power under those Rules; or (b) interprets any rule …". Rule 2(4) provides that:-

   "Parties must –

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally".

The "overriding objective" of the 2010 Rules is "to enable the Tribunal to deal with cases fairly and justly", which 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 "avoiding delay, so far as compatible with proper consideration of the issues".

8. Both parties have relied upon two decisions as showing the main principles for determining whether an award of costs can and should be made under rule 10(3)(b): British-American Tobacco (Holdings) Ltd v HMRC [2017] UK FTT 99 (TC) and Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC). In the British-American Tobacco case Judge Brannan drew upon the principles summarised in an earlier decision: Market & Opinion Research International Ltd v HMRC [2013] UK FTT 475 (TC) at paragraph 8, which had been approved by the Upper Tribunal ([2015] UKUT 12 (TCC) at paragraph 23).

9. "Unreasonable conduct" *includes* "conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case" (Willow Court paragraph 24). It is not enough that the conduct leads 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 is there a reasonable explanation for the conduct complained of? This is an objective standard to be applied by the Tribunal to the facts of the case. It is an essential pre-condition to the power in rule 10(3)(b) being engaged (Willow Court at paragraphs 27-28).

10. In Catana v HMRC [2012] UKUT 172 (TCC); [2012] STC 2138 at paragraphs 8-9 and in Marshall v HMRC [2016] UKUT 0116 (TCC) at paragraph 11 it was held that the phrase "the proceedings" in a provision similar to rule 10(3)(b), relates to proceedings before the tribunal which has jurisdiction on the appeal, whilst it has such jurisdiction. Thus, behaviour of a party which occurred before the appeal to the FTT began cannot constitute unreasonable behaviour which engages this particular power to award costs, nor can costs incurred prior to that appeal be the subject of an order (see to the same effect paragraphs 9 – 10 of the British-American Tobacco case). So, it has been held that costs incurred by a taxpayer in dealing with an HMRC investigation prior to an appeal being made to the FTT against a formal decision could not be recovered. Nonetheless, the behaviour of a party prior to the relevant proceedings is not to be disregarded altogether. Such behaviour "might well inform actions taken during [the relevant] proceedings". It may support a finding that behaviour in bringing or conducting those proceedings was unreasonable. Unlike the cases cited, the appeal in the present case was heard in the Upper Tribunal rather than the FTT. But the same principle must apply and so it is relevant to consider whether the Appellant's behaviour in the FTT proceedings "informs" its behaviour in bringing and conducting the appeal to this Tribunal.

11. The power to award costs, whether under rule 10(3)(a) or 10(3)(b), should be reserved for the clearest of cases. Furthermore, the decision in any case on whether to award costs will be highly sensitive to the facts and circumstances of the instant case, and comparison with other cases in which the power to order costs either has, or has not, been exercised, is unlikely to be informative and, is therefore normally discouraged (Cancino v Secretary of State for the Home Department [2015] UK FTT 59 (IAC) at paragraphs 8 and 27 – per McCloskey J and Judge Clements; Willow Court at paragraph 34).

12. The Appellant also cited the following statement from Willow Court at paragraph 26: a "tribunal ought not to be over-zealous in detecting unreasonable conduct after the event…". But that passage must be read in context, namely the responsibility of tribunals themselves to ensure that proceedings are dealt with fairly and justly. This includes the requirement that they be dealt with in ways which are proportionate to the importance of the case and the resources of the parties. Paragraph 28 ended by stating:-

> "Tribunals should therefore use their case management powers actively to encourage preparedness and co-operation, and to discourage obstruction, pettiness and gamesmanship."

An obvious corollary is that a persistent failure to comply with procedural rules or directions may be relevant to whether a party's behaviour is unreasonable (Catana at paragraph 14).

13. If unreasonable behaviour is established so that rule 10(3)(b) is engaged, the Tribunal moves to the next stage in which it has a discretion as to whether, in the light of the unreasonable conduct it has found to be demonstrated, it considers that an order for costs ought or ought not to be made (Willow Court at paragraph 28).

14. If the Tribunal considers that an order for costs ought to be made, it must then consider what the terms of that order should be. The nature, seriousness, and effect of the unreasonable conduct will be an important factor to take into account (Willow Court paragraphs 28 to 30). However, the exercise of the power under rule 10(3)(b) is not constrained by any requirement to establish a causal nexus between the unreasonable behaviour identified and the costs incurred (Willow Court at paragraph 40). Although the Tribunal must have regard to the "nature, gravity and effect of the unreasonable conduct" as being relevant to the exercise of its discretion, any order it makes need not be confined to the costs caused by, or attributable to, that conduct (McPherson v BNP Paribas [2004] ICR 1398 at paragraphs 40-41).

Complaint of unfairness

15. I should deal firstly with a procedural matter. Paragraph 16-18 of the Appellant's submissions on the Respondent's application for costs stated that it was unfortunate and

unfair that this Tribunal's draft decision on the appeal contained adverse findings about the Appellant's conduct which the Appellant had had no opportunity to address. It was claimed that the Appellant's conduct was in no way relevant to the issue on the appeal, which was solely concerned with the construction of the legislation. I agree with the Respondent that the Appellant's complaint and related submissions are wholly unfounded (paragraphs 6 to 7 of the Respondent's Reply).

16. In an order dated 21 October 2016 I gave the Appellant permission to appeal against the FTT's order of 27 June 2016 striking out paragraph 36 of the Appellant's Statement of Case which had, in effect, challenged the correctness of the decision in Shirley v Crabtree [2008] 1 WLR 18. This was an appeal against the FTT's decision that the pleading of this point amounted to an abuse of process because the Appellant had failed to appeal earlier decisions in which it had applied Shirley. The order referred to various opportunities which the Appellant should have taken, and had failed to take, to deal with the abuse of process point, including the applications for permission to appeal made in both the FTT and this Tribunal. The order pointed out that the Appellant's conduct was unsatisfactory, all the more so because it had resulted in hearing dates for the Respondent's application for a tenancy having to be vacated. The Appellant was warned that this conduct might fall to be taken into account on the issue of costs.

17. It should therefore have been obvious from the very nature of the Appellant's appeal against a striking out for abuse of process, the grounds upon which the Respondent had opposed permission to appeal, and the order of this Tribunal dated 21 October 2016, that the Appellant's conduct in the proceedings before the FTT was indeed a relevant consideration in the appeal to this Tribunal.

18. It was also plain that the discussion on the merits of the rival interpretations of the legislation, in both Shirley (paragraphs 30 and 44 to 46) and this appeal, identified the risk of a landlord seeking to delay a substantive hearing so as to make it more difficult for a tenant to establish eligibility. To demonstrate that point paragraphs 5 to 8 of the Respondent's Notice dated 4 November 2016 relied upon criticisms of the Appellant's conduct resulting in delay to the determination of the Respondent's application for a new tenancy. The Respondent elaborated on this point and its implications for the construction issue in his skeleton argument (eg. paragraphs 2 - 10, 24 and 37) and in oral submissions.

19. Unfortunately, the Appellant's skeleton showed a complete disregard for the fact that the Appellant was seeking to appeal a decision that had struck out part of its case as an abuse of process. The decision to grant permission to appeal so that the issue of construction could be resolved before, rather than after, the determination of the Respondent's application to the FTT, did not involve any decision that the Appellant's conduct had become irrelevant or could be ignored.

20. It is therefore incorrect for the Appellant to suggest that "the matter of the Appellant's conduct only came up in passing during oral submissions" or that the Appellant had no

opportunity to address it. The Tribunal raised the issue during submissions because it was obvious from the papers that it was germane and the Appellant had not dealt with it. Mr Jourdan QC responded that a person who had been present during the morning of the hearing, and who could apparently have given him instructions on the point, had left. He said that he had been given no instructions on the matter (see paragraph 16 of the decision on the appeal). But he did not ask for any additional opportunity to deal with it, whether during or after the hearing. In the circumstances, any inability of the Appellant's counsel to deal with the subject has to be laid fairly and squarely at the Appellant's own door. Although the Appellant considered the matter to be irrelevant, without putting forward any proper justification for that view, relevance would have been a matter for the Tribunal, not the Appellant, to determine. The Appellant never sought a ruling from the Tribunal on the issue. The Appellant's decision not to engage with the Respondent's submissions on its conduct could not prevent the Tribunal from reaching conclusions on the material presented in the appeal. It ill behoves the Appellant now to criticise the Tribunal for doing so. At all events, it is accepted by the Appellant in paragraph 18 of its written submissions on costs that it has now had a sufficient opportunity to deal with the subject.

21. Paragraphs 15 to 20 of this decision are only concerned with the Appellant's complaint of earlier procedural unfairness. The rejection of that complaint in those paragraphs does not form part of my assessment whether the power to award costs under rule 10(3)(b) is engaged and, if so, should be exercised. On the application of rule 10(3)(b), this decision (other than paragraphs 15 to 20) should be read together with the decision on the appeal dated 6 Jun 2017 ("the main decision"), in particular paragraphs 6 to 16 and 104 to 106.

The conduct relevant to Rule 10(3)(b)

22. The issue is whether the Appellant has acted unreasonably in bringing or conducting the appeal before this Tribunal. The Respondent seeks to recover only costs he has incurred in that appeal and not any costs incurred in proceedings before the FTT.

23. The Appellant accepts that its application to the Tribunal for permission to appeal forms part of the relevant conduct to be considered under rule 10(3(b), but disagrees with the Respondent's submission that its conduct in the FTT is also relevant, notably its handling of the procedural issues, including permission to appeal and abuse of process.

24. Rule 10(3)(b) refers to "the proceedings" in the context of the Upper Tribunal's jurisdiction to deal with costs and should therefore be construed so as to accord with the underlying source of its jurisdiction in this instance, section 29 of the Tribunals, Courts and Enforcement Act 2007, in particular sub-section (1). I therefore accept that none of the proceedings in the FTT form part of the appeal before this Tribunal or "the proceedings" referred to in rule 10(3)(b) for the purposes of this application. However, the proceedings in the FTT should not be disregarded in so far as they inform the reasonableness or otherwise of the Appellant's conduct in the appeal before this Tribunal (see the principles

(see the principles set out in paragraph 10 above). Indeed, it would be unrealistic to ignore the relationship between the Appellant's conduct in relation to the appeal before the Tribunal and, for example, the manner in which the Shirley issue and the application for permission to appeal were handled by the Appellant in the FTT.

25. It is important to identify the context for this appeal to the Tribunal:-

(i) The Appellant has been represented by specialists in the law on succession to agricultural holdings throughout the proceedings brought by the Respondent in the FTT and also in this appeal;

(ii) The subject of this appeal had already been dealt with in an authority, Shirley v Crabtree, which was binding on the FTT. It should therefore have been obvious to the Appellant that if it wished to challenge the correctness of Shirley it would have to raise that issue for determination in this Tribunal, not the FTT (see paragraph 8 of main decision);

(iii) There were potentially two options for the Appellant. It could have waited until the Respondent's application for a tenancy was determined at a substantive hearing, and if the Appellant was *unsuccessful on all issues*, sought to appeal the FTT's decision by challenging the correctness of Shirley. Alternatively, it could have appealed against the first interim procedural decision of the FTT which applied Shirley;

(iv) The first option would have the advantage that an appeal on the correct test for the livelihood condition would only be necessary if the Appellant failed to defeat the Respondent's application not only on the *livelihood condition* but also on the *occupancy condition* and *suitability*. If the Appellant were to be successful on any one or more of these issues, an appeal would be unnecessary. The second option would potentially avoid uncertainty following the FTT's substantive decision but could cause delay in the timing of the substantive hearing.

26. It follows that if the Appellant was going to raise a challenge to the correctness of Shirley, the issue as to whether there was unreasonable behaviour in its bringing and conduct of the appeal in this Tribunal can include issues concerned with the *timing* of the *bringing* of that appeal. Part of the context for that assessment is the fact that the appeal was brought while the first instance proceedings were proceeding to a final hearing, rather than as an appeal against the FTT's substantive decision on the Respondent's application following the conclusion of that process.

Unreasonable behaviour

27. I begin by considering the Appellant's conduct during its appeal to this Tribunal. In paragraph 20 of its submissions on costs the Appellant asserts that its failure to explain why the appeal came about as an appeal against the FTT's order of 27 June 2016 (Notice No. 5), rather than an appeal against an earlier order, could not possibly be regarded as unreasonable conduct. This assertion completely ignores the fact that the Appellant's appeal was against a decision to strike out as an abuse of process paragraph 36 of its Statement of Case. To say that the correctness of Shirley only depended upon the construction of the 1996 Act does not amount to any reasonable explanation for the Appellant's failure to deal with the FTT's finding against which the appeal had been brought, namely that an abuse of process had occurred. That finding was based on the Appellant's failure to appeal the earlier decision in which it had applied Shirley v Crabtree. The same criticism applies to the Appellant's grounds in its application to this Tribunal for permission to appeal from the FTT. They made no attempt to deal with the abuse of process point. Instead, they were drafted as if the Appellant was appealing against a decision of the FTT which had simply applied Shirley v Crabtree.

28. I do not accept that a reasonable person in the position of the Appellant could have failed to explain in the application to this Tribunal for permission to appeal (a) why an appeal had not been brought in time against the FTT's decisions which had preceded its Statement of Case dated 1 April 2016 and (b) why the FTT had been wrong to strike out paragraph 36 of that Statement as an abuse of process. This was unreasonable conduct. Moreover, the repeated attempts to "airbrush" these matters and to ignore this Tribunal's analysis of them in the grant of permission to appeal amounts to further unreasonable conduct.

29. My conclusion that the power to order costs under rule 10(3)(b) is engaged in this case is also based upon the Appellant's timing in bringing this appeal and is also "informed by", or has regard to, the Appellant's behaviour before the appeal was begun and the manner in which the Appellant raised the legal issue the subject of this appeal.

30. Given that the FTT was bound by Shirley v Crabtree, it must have been obvious to the Appellant and its advisers from the time when the Respondent made his application to the FTT in April 2011 that the correctness of that decision could only be challenged in an appeal to this Tribunal. No explanation has been given as to why the Appellant did not raise this issue until the letter from its solicitor dated 29 February 2016.

31. However, the Appellant even goes so far as to contend in paragraphs 24 to 32 of its submissions on costs that an appeal against the FTT's Notice No. 5 "was the *only* step that the Appellant could take to enable it to argue that Shirley v Crabtree was wrongly decided, given the procedural history to this point" (emphasis added). The contention involves a gross distortion of what took place. The relevant chronology is summarised in paragraphs 7 to 9 of the main decision. I wholly reject the suggestion now made that the letter of 29

letter of 29 February 2016 merely drew attention to the possibility that the issue whether Shirley v Crabtree was correct "might arise". Instead, it is plain that the letter asked the FTT to extend the scope of the disclosure relating to the livelihood condition ordered on 11 January 2016 (Notice No. 2) to include the period leading up to the Tribunal's consideration of the application for a succession tenancy. That is how the FTT treated the letter in its Notice No. 3 dated 15 March 2016. The Appellant never said anything to the contrary until the submissions of Mr Jourdan QC dated 23 May 2017. Indeed, the grounds of appeal dated 26 July 2016 in the application for permission to appeal made to the FTT expressly relied upon the letter of 29 February 2016 as supporting the appeal.

32. It is also absurd for the Appellant to suggest (paragraph 26 of submissions on costs) that the phrase used by the FTT in its Notice No. 3 "in the absence of any contrary contention on the part of the [Appellant]" amounted to an implicit acceptance by the Tribunal that it remained open to the Appellant to state whether it "wanted" to argue that Shirley had been wrongly decided. The following paragraph in the FTT's order stated that "the Respondent is intent on delaying these proceedings and the listing of the same for a final hearing, given in particular the lack of merit in the preliminary issue [determined in 2013], and the related appeal, *the failure to respond to the [Respondent's] application dated 3 December 2015* [to limit disclosure on the livelihood condition in accordance with Shirley] and the lateness of its current application to vary" (the emphasised words repeated in substance what had already been said by the FTT in its Notice No. 2).

33. Paragraph 22 of Mr Jourdan's submissions relies upon rule 7(7) of the Tribunal Procedure (First-tier Tribunal) (Property Chambers) Rules 2013, which provides that one way in which a party may challenge a direction is to apply for another direction which amends the first. The Appellant then submits that it "is not therefore unreasonable to do that, rather than seeking to appeal a direction". That contention is wholly misconceived, however, where such an application would be doomed to failure because the FTT's first order complied with a decision of a superior Court by which it was bound. In the present case the FTT was not entitled to depart from Shirley v Crabtree.

34. It follows that when the Appellant was faced with the Respondent's application dated 3 December 2015 to amend the directions dated 26 November 2015 (Notice No. 1) so as to bring them into line with Shirley v Crabtree, the only reasonable course for the Appellant to take, if it "wanted" to challenge the correctness of Shirley before the substantive hearing of the Respondent's application for a new tenancy, was (a) to contest the Respondent's application to vary Notice No. 1 and then (b) to apply for permission to appeal against Notice No. 2 dated 11 January 2016 within 28 days (rule 52(2)). The Appellant did neither, even though the order made on 11 January had set a window of June/July 2016 for the final hearing of the case. Instead, some 7 weeks after the relevant direction in Notice No. 2, the Appellant took the unreasonable step of sending the letter of 29 February 2016. Even when Notice No. 3 was issued on 15 March 2016 the Appellant still made no attempt to seek permission to appeal against the FTT's direction.

35. There then followed the wholly unreasonable pleading of a challenge to the correctness of Shirley v Crabtree in paragraph 36 of the Appellant's Statement of Case, defiantly ignoring the FTT's directions in Notices Nos. 2 and 3 and also the doctrine of precedent with which the FTT had to comply. It was only when the FTT made its order on 27 June 2016 (Notice No. 5) striking out paragraph 36, following the Appellant's failure to make any proper response to the order on 2 June 2016 warning that the FTT was minded to strike out the pleading as an abuse of process (Notice No. 4), that the Appellant sought permission to appeal. Even then the Appellant appealed against the strike out without explaining why that decision had been wrong. All of this was unreasonable conduct. No reasonable explanation has been given for it. A party behaving reasonably could not have behaved in this way.

36. By raising a point of law affecting the FTT's jurisdiction the Appellant obtained permission to bring an appeal, the effect of which was to enable it to challenge the FTT's decision on 11 January 2016 without even applying for, or being able to justify, an extension of time for appealing that decision. This sequence of unreasonable conduct on the part of the Appellant in the FTT began with its failure to respond to the Respondent's application to the FTT dated 3 December 2015 and carried on to, and included, the stage when the Appellant applied for permission to appeal against Notice No.5, eventually in this Tribunal. It would have been completely unnecessary for the Appellant to apply to bring that appeal if it had not behaved unreasonably beforehand. The delay between the Appellant's failure to appeal Notice No. 2 and the application for permission to appeal Notice No. 5 was of the order of 6 months.

37. This conduct caused the hearing of the Respondent's application for a new tenancy to be substantially delayed. In its Notice No. 1 issued on 26 November 2015 the FTT had given a target hearing window of 11 to 29 April 2016, with a time estimate of 3 days. In Notice No. 2 dated 11 January 2016 (which corrected the direction in the preceding order which did not comply with Shirley v Crabtree) the target hearing window was given as 13 June to 8 July 2016. In Notice No. 3 dated 15 March 2016 the revised target hearing window was 15 July to 16 September 2016. In its Notice No. 4 (2 June 2016) the FTT fixed a 3 day hearing to start on 18 October 2016. When on 27 June 2016 the FTT ordered that paragraph 36 of the Appellant's case be struck out, the fixture in October 2016 was retained. On 12 September 2016 the FTT refused permission to appeal against Notice No. 5. Then the Respondent applied to vacate the fixture because of difficulties which had arisen regarding those dates. On 28 September 2016 the FTT agreed to adjourn the hearing to a window between 10 December 2016 and 31 January 2017, with a 4 day time estimate. It also appears that issues had emerged between the experts and so a pre-trial review was ordered to be held on 11 November 2016. This Tribunal then granted permission to appeal against Notice No. 5 on 21 October 2016. At the PTR on 11 November 2016 the FTT decided to retain the 4 day hearing for the Respondent's application which had been fixed to start on 28 March 2017. The hearing of the appeal in this Tribunal took place on 15 March 2017, but the FTT granted the Appellant's application to vacate the March 2017 fixture when it became apparent that this Tribunal's decision on the appeal could not be given beforehand.

38. The effect of the Appellant's failure to appeal Notice No. 2 was that the window for the final hearing slipped from June/July 2016 and a fixture was listed for mid-October 2016. The bringing of the appeal against Notice No. 5 then caused a further delay from the hearing window in December/January 2016 to the fixture at the end of March 2017. Thus far, the Appellant's behaviour was responsible for about 7 months of the delay between June/July 2016 and late March 2017. This delay caused the second fixture for the final hearing, in March 2017, to be lost. The hearing of the Respondent's application is now listed to be heard on 18 – 21 September 2017, a further delay of nearly 6 months. If, on the other hand, the Appellant had brought an appeal timeously against Notice No. 2, it is probable that an appeal in this Tribunal could have been heard by the summer of 2016 and the Respondent's application heard in the FTT before the end of 2016.

39. If a party wishes to raise a substantive legal issue which necessitates an appeal to this Tribunal while first instance proceedings in the FTT are still continuing, it is self-evident that he should first ensure that he challenges the appropriate decision or order, comply with the relevant time limit for seeking permission to appeal, and not delay in taking the steps necessary to pursue that application (or the appeal, if permission is granted). The case management of that application (and any subsequent appeal) will then be in the hands of the tribunals. If permission to bring such an appeal is granted, the determination of the proceedings at first instance may to some extent be delayed. But if a party causes significant additional delay to the proceedings, for example, by failing to appeal the correct decision so that the bringing of an appeal is delayed, that delay may well aggravate any unreasonable behaviour in his subsequent conduct of the appeal. This would raise the question why has he behaved in that way? Is there a reasonable explanation? In the present case nothing has been said by the Appellant which could possibly amount to a reasonable explanation for its behaviour as described above.

40. In this context, it is also relevant to consider whether the matters set out in paragraphs 104 to 106 of the main decision also represent previous behaviour which informs actions taken during the appeal to the Tribunal (see paragraph 10 above). At the case management hearing on 19 November 2012 (19 months after the Respondent issued his application for a succession tenancy) the Appellant stated that it wished to contend that the Applicant was not entitled to make the application because there had already been two succession tenancies, which became a preliminary issue for determination by the FTT. The Appellant's case on this matter was rejected by the FTT in trenchant terms in its decision dated 30 November 2013. As set out in paragraphs 104 and 105 of the main decision in this appeal, the FTT decided that the Appellant should never have raised the point and ordered it to pay the costs in connection with the hearing of the preliminary issue on the grounds that it had behaved frivolously, vexatiously or oppressively.

41. Furthermore, the FTT expressed its concern that the succession proceedings should not become a "war of attrition". The Appellant should have understood that this was, in part, a clear warning that it should not engage in further unreasonable behaviour in the conduct of its case. Yet in its Notice No. 3 issued on 15 March 2016 the FTT found it necessary to state that the Appellant was still using tactics to delay the final hearing of the Respondent's application. It also linked this with the FTT's criticism of the Appellant for

its pursuit of the preliminary issue. The Appellant has not advanced anything which could justifiably undermine that conclusion. I accept the views expressed by the FTT.

42. The FTT's view that the Appellant was engaged in delaying tactics is supported by its failure to dispute the Respondent's application dated 3 December 2015, its application to vary the order made on 11 January 2016 rather than appeal it, and the 7 ½ weeks it took to make that application. In addition, several paragraphs in the letter of 29 February 2016 indicated that the Appellant was trying to delay the proceedings (eg. paragraphs 5 and 6 and paragraphs (2) to (5), (9) to (10), and (12) to (16). The FTT therefore found it necessary to make an "unless order" regarding the Appellant's failure to serve a Statement of Case, nearly 5 years after the Respondent's application had been issued.

43. The Appellant's Statement of Case dated 1 April 2016 is rather revealing in this respect. It recorded that the solicitor was authorised to sign the document on the Appellant's behalf. Paragraphs 11 to 17 reverted to the subject matter of the preliminary issue which had been determined against the Appellant. Paragraph 17 stated that the Appellant had submitted in that preliminary issue that the Respondent's father, the current tenant of the agricultural holding, had misrepresented a particular matter. The pleading continued:-

> "This has no direct bearing upon the present application, but it does link to the suspicions that the Landlords have with regard to the farming arrangements of the Downs family, fuelled by the events of 2009".

44. Not surprisingly, in paragraph 6 of his Reply to the Appellant's Statement of Case (dated 14 April 2016) the Respondent stated that the matters pleaded in paragraph 17 of the Appellant's Statement of Case had no bearing, direct or otherwise, on the application for a succession tenancy and were irrelevant. The Respondent also referred to the FTT's warning to the Appellant given in paragraph 49 of its decision dated 30 November 2013. Nonetheless, the Appellant's attitude, revealed by paragraph 17 of its Statement of Case, continued to influence its approach to this litigation as can be seen from a document which has recently come to light.

45. On several occasions it has been pointed out to the Appellant that it failed to respond to the FTT's order in Notice No. 4 to explain why paragraph 36 of its Statement of Case should not be struck out and that the re-sending of its solicitor's letter of 29 February 2016 did not deal with the abuse of process point[1]. Notwithstanding these clear reminders, it was not until its submissions on costs (23 May 2017) that the Appellant suggested that the files of its solicitors contained a *draft* letter dated 16 June 2016 produced by the solicitor then acting for the Appellant and that it was because of a clerical error that the letter of 29 February 2016 was sent to the FTT instead of that draft. In the circumstances, I readily

[1] See the letter from the Respondent's solicitor dated 17 June 2106 and the email reply of the same date from the Appellant's solicitor; Notice No. 5; paragraph 9 of the Respondent's response to the application to the FTT for permission to appeal; the FTT's decision dated 12 September 2016 on that application; section 10 of the application to this Tribunal for permission to appeal; the order of this Tribunal dated 21 October 2016.

In the circumstances, I readily appreciate why the Respondent says that the production of this draft nearly a year later is "troubling".

46. Nonetheless, paragraph 13 of the draft letter dated 16 June 2016 continued to repeat the points made by the Appellant in paragraph 17 of its Statement of Case. The letter referred to the Appellant's wish to challenge the correctness of Shirley v Crabtree and then immediately continued:-

> "*To put this into the context of the present case*, there is a long running history of suspicion as to the circumstances not only of the current applicant, Mr David Downs, but previously his Father, when he succeeded. The issue concerning whether Mr Keith Downs was himself eligible at the time that the Landlords agreed the first succession was a matter considered during the evidence of the Preliminary Issue. It is now irrelevant, but *it remains a background concern for the current Landlords, Pension Fund Trustees*" (emphasis added).

47. It is plain from these documents that in the period leading up to this present appeal against the FTT's Notice No. 5 the Appellant remained dissatisfied with the outcome of the preliminary issue and the FTT's view that this was something which the Appellant should never have raised. The draft letter made it clear that this attitude also formed part of the *context* for the Appellant's wish to challenge the decision in Shirley v Crabtree *at that stage*. Indeed, this was relied upon as part of the Appellant's explanation as to why paragraph 36 of its Statement of Case should not be struck out. The Appellant's attitude towards this part of the litigation (as revealed by paragraph 17 of it Statement of Case and its draft letter of 16 June 2016) further supports the FTT's conclusion that the Appellant was seeking to delay the hearing of the Respondent's application. This formed part of a continuing process of attrition by the Appellant, rather than co-operation in the resolution of the Respondent's application for a succession tenancy.

48. Given also the facts that (i) the Shirley issue could have been raised at any time over the 5 year period between April 2011 and 29 February 2016, (ii) it could also have been raised as a ground of appeal to this Tribunal against a final determination by the FTT that the Respondent was entitled to a succession tenancy and (iii) no explanation has been offered as to why it was to be pursued as an issue in 2016, a year after failing in the previous preliminary issue and only about 3 months before the window for a final hearing in June/July 2016 (set on 11 January 2016), I conclude that the Appellant was throughout 2016 pursuing obstructive tactics, which were designed to harass the Respondent rather than to advance the resolution of his application to the FTT. This unreasonable approach and behaviour informs the Appellant's bringing and conduct of the appeal to this Tribunal, under the cloak of pursuing a jurisdictional error of law. The Appellant did not heed the FTT's warning in November 2013 that it should not engage in a "war of attrition".

Whether an order for costs ought to be made

49. Given the nature, seriousness and effects of the unreasonable behaviour on the resolution of the Respondent's case as described above, I have no hesitation in concluding that an order for costs ought to be made against the Appellant in relation to the appeal to the Tribunal.

The terms of an order for costs

50. The Respondent seeks an order that the Appellant should pay his costs in relation to the appeal to the Tribunal. The Appellant submits that the effect of its appealing Notice No. 5 rather than Notice No. 2 has simply been to delay the hearing of the Respondent's application by a few months and that the costs of the appeal have nothing to do with that delay (paragraph 35 of submissions on costs). But, as I have found, the resultant delay has been greater and is all the more serious because of the delay already suffered by the Respondent through the Appellant's pursuit of the preliminary issue. In any event, the exercise of the power in rule 10(3)(b) is not constrained by any requirement to show a causal nexus between unreasonable behaviour and the costs incurred by the Respondent (see paragraph 14 above).

51. In paragraph 7 of Cancino the Upper Tribunal suggested that where it is shown that a measurable amount of costs has been incurred as a result of the unreasonable behaviour identified, then in general the whole of that amount should be recoverable. However, the Tribunal stated that this conclusion does not automatically follow. It accepted that there may be cases where the Tribunal, reasonably and justifiably, should order a lesser sum. That indeed was the case in McPherson v BNP Paribas. There the Court of Appeal criticised the rationality of the decision by an Employment Tribunal to order that an employer should recover the whole of its costs of resisting a claim for unfair and wrongful dismissal, where the claim had been withdrawn by the employee on medical grounds but there had been no evidence at all of unreasonable behaviour on the part of the employee during the first 11 months of the proceedings (paragraphs 42-43).

52. In this case there was undoubtedly unreasonable behaviour in the Appellant's handling not only of the abuse of process issue and the decision to appeal Notice No. 5 rather than Notice No. 2, but also its decision in 2016 to challenge the correctness of Shirley without having raised the matter at any stage over the preceding 5 years, and to have done so a year after failing in the preliminary issue and only about 3 months before the window for the final hearing in June/July 2016 (set on 11 January 2016). Although the FTT had already decided that the Appellant should never have pursued the preliminary issue, and in doing so had acted frivolously, vexatiously, or oppressively, it brought the appeal on the Shirley issue in 2016 in order to delay the determination of the Respondent's application and to harass him, rather than advance the resolution of the issues in that application. It was one further stage in a process of attrition. The mere fact that in October 2016 the Tribunal decided to grant the Appellant permission to appeal in respect of an arguable point of law potentially affecting the jurisdiction of the FTT does not alter the foregoing analysis one iota, *a fortiori* given that the Tribunal was not then aware of the full picture concerning the Appellant's conduct.

53. In my judgment, if the Appellant had not behaved unreasonably in the various respects described above, the Respondent would not have had to face the appeal to this Tribunal in 2016-17 and incur the costs of that process. I therefore consider that the Respondent ought to be awarded the costs of that appeal. I do not think that the possibility that the Appellant *might* have chosen to raise the Shirley issue as a ground of appeal against any subsequent decision by the FTT to direct the grant of a new tenancy is a good reason not to award the Respondent either the whole or any part of these costs. This possibility is too speculative. For example, if the Respondent were to fail in his application for whatever reason, no appeal by the current Appellant would be necessary, whether to challenge the decision in Shirley v Crabtree or otherwise.

The basis of assessment

54. The Respondent has relied upon the same arguments as he advanced to justify an order under rule 10(3)(b) to support an award of costs on an indemnity basis. The Rules do not suggest that indemnity costs are necessarily appropriate whenever an order is made under rule 10(3)(b). I am not persuaded by the Respondent's submissions that it would be appropriate for the Tribunal to go further and award costs on the indemnity basis in this case.

55. After seeing this decision in draft form, the parties have informed the Tribunal that the Appellant will pay the Respondent's costs of the appeal agreed in the sum of £20,000..

Dated: 7 July 2017

The Hon. Sir David Holgate, President