UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – COSTS – order for the payment of costs because of unreasonable behaviour – behaviour comprising statements in correspondence and witness statement the substance of which was not considered by FTT – whether conduct objectively unreasonable – rule 13(1)(b), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

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

BETWEEN:

MS RINI LASKAR

Appellant

and

PRESCOT MANAGEMENT COMPANY LTD **Respondent**

Re: Flat 147,
1 Prescot Street,
London, E1 8RL

Martin Rodger QC, Deputy President

Determination on written representations

The following case is referred to in this decision:

Willow Court Management (1985) Limited v Alexander [2016] UKUT 290 (LC)

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Property Chamber) (the FTT) made on 20 September 2019 by which it ordered the appellant, Ms Rini Laskar, to pay £18,500 towards the costs of the respondent, Prescot Management Co Ltd incurred in connection with an earlier hearing before the same tribunal. That earlier hearing had concerned estimated service charges and administration charges totalling a little over £17,000. Permission to appeal the FTT's decision of 20 September 2019 was granted by this Tribunal on 18 December 2019. Both parties indicated that they were content for the appeal to be determined on the basis of their written representations.

2. The application for costs to which the FTT acceded was made under rule 13(1)(b), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 which gives the FTT power to make an order in respect of costs in a residential property case "if a person has acted unreasonably in bringing, defending or conducting proceedings". This Tribunal gave guidance on the exercise of that jurisdiction in *Willow Court Management (1985) Limited v Alexander* [2016] UKUT 290 (LC).

The background facts

3. The appellant holds a long lease of Flat 147, 1 Prescot Street, London E1 which was granted in 1997. Her partner, Mr Zahid Khan, acquired the lease in 2006 and he assigned it to the appellant in December 2014.

4. Under the terms of the lease the appellant is obliged to pay service charges to the respondent, a leaseholder owned management company whose members are the leaseholders of each of the 151 flats in the building. The respondent is a company limited by guarantee and has no share capital.

5. The appellant's obligation to pay service charges is in the Fourth Schedule to the lease at paragraphs 12 and 13. On 1 January each year the appellant is required by paragraph 12(a) to pay the sum which the respondent estimates will be payable for the whole of the forthcoming year. In practice this obligation has been relaxed by the respondent and leaseholders have been allowed to pay by two half yearly instalments. By paragraph 13 a balancing charge is payable, equal to the net amount, if any, certified by the respondent as being due from the leaseholder.

6. The provisions for certification of the service charges are contained in paragraph 3 of the Sixth Schedule in which the respondent covenants to keep proper books of account and in each year during the term:

> "To prepare a certificate of:
>
> (a) the total amount of such costs charges and expenses for the period to which the certificate relates and
>
> (b) the proportionate amount due from the Tenant to the Company under the provisions set out in the fourth schedule after taking into account payments

made in advance under the provisions set out in the same Schedule and forthwith to send a copy of the same to the Tenant."

7. Relations between the appellant's partner, Mr Khan, and the respondent have not been good. While he held the lease Mr Khan and the respondent were in an almost continuous state of litigation. Shortly after acquiring the lease in 2006 Mr Khan commenced proceedings in the High Court in which he sought a determination concerning the respondent's entitlement to recover from him the costs of litigation between it and other leaseholders. In 2006 he also applied to the Residential Property Tribunal (the predecessor of the FTT) for the appointment of a manager to take over the running of the building from the respondent. His application was dismissed summarily on the basis that his complaints were either trivial or ought to be resolved in the Companies Court or in more limited proceedings. In 2009 he applied again to the same tribunal for a determination in relation to the service charges payable since he acquired the lease. One of his main concerns was about the costs incurred by the respondent in the previous litigation between the respondent and Mr Khan himself and in cases involving two other leaseholders. Those costs totalled more than £350,000, a large proportion of which the respondent had recovered through the service charge from all leaseholders. There were further hearings in 2010 in the Senior Courts Costs Office concerning the assessment of the costs of the 2006 High Court proceedings (which Mr Khan had been ordered to pay). The respondent's bill of approximately £75,000 was reduced to £25,000 and Mr Khan, who had made an offer to pay £35,000, recovered his costs of the assessment on an indemnity basis.

8. After the lease was assigned to the appellant in December 2014 she took up the disagreement with the respondent where Mr Khan had left off. Once again, the inclusion in the service charge of the costs of legal advice and representation featured as a significant point of contention.

9. Proceedings between the parties brought by the respondent in the County Court in 2017 to recover disputed service charges were settled by agreement on 23 August 2018. The terms of the agreement are said to have provided for the appellant to pay the outstanding charges as demanded but without interest and with the parties each bearing their own costs.

10. The service charges which ultimately gave rise to this appeal were the estimated service charges payable for 2018 and 2019. The 2018 estimated charge was not paid by the appellant but no action was taken by the respondent to recover it at that stage, perhaps because there were already proceedings ongoing in the County Court over the previous year's charges. Those proceedings were resolved by the consent order of 23 August 2018. Almost immediately, on 10 September 2018, the appellant wrote to the respondent's solicitors saying that despite the consent order the matter was not closed and seeking an assurance that none of the costs incurred by the respondent in connection with the County Court proceedings would be included in service charges demanded from her. The appellant's letter pointed out that she had made an offer to pay the same sum in January 2017 and suggested that the costs of the litigation could have been avoided had that offer been accepted.

11. In her letter of 10 September 2018, the appellant asserted that the 2017 service charge demand was "unlawful", that the directors of the respondent were incompetent and dishonest, and that their previous solicitors had committed perjury. A distinctive feature of the relationship between Mr Khan and the respondents, which persisted when the appellant became leaseholder, has been their readiness to make accusations against the directors of the respondent, its employees, and its professional representatives. On this occasion the suggested "perjury" arose out of a statement in a formal document submitted in the County Court proceedings, a Reply to the appellant's Defence. It is not clear what the appellant thought objectionable about that pleading or why she regarded it as evidence of "perjury", but she considered that it justified the respondent's previous solicitors being reported by her to the Solicitor's Regulation Authority.

12. The assertion that the service charge demand was "unlawful" was a reference to two recurring themes of the correspondence between the appellant (and before her Mr Khan) and the respondent. The first concerned Mr Khan's belief that the respondent was a dormant company which could not lawfully carry on any activity including employing staff, receiving service charge funds, incurring liabilities, and even conducting its own AGM. This, it was suggested, made its attempts to collect service charges "unlawful". The was the absence, as far as the appellant was concerned, of any certificate satisfying the requirements of paragraph 13 of the Sixth Schedule to the lease. In fact, as the FTT later found, the certification requirements related only to the balancing charge payable under paragraph 13 of the Fourth Schedule to the lease, and not to the estimated charge payable under paragraph 12.

13. The other basis on which the appellant considered that she need not pay the 2017 and 2018 service charges was that she believed she was entitled to set off against that liability the costs which she had incurred in the County Court proceedings as well as damages or compensation which considered herself to be entitled to because of behaviour by the respondent and members of its staff which she characterised as "harassment" including in relation to the respondent's company AGMs.

The FTT proceedings

14. On 18 February 2019 the respondent made an application to the FTT for a determination that the appellant was liable to pay the 2017 and 2018 estimated service charges together with interest claimed as an administration charge under the terms of the lease. The charge for each year was a fraction under £8,200.

15. The application submitted by the respondent's solicitors included one notably unattractive feature. In addition to the information required on any application under section 27A of the Landlord and Tenant Act 1985 it included, from the outset, an application under rule 13(1)(b) of the FTT's Rules. That application invited the FTT to consider the history of disputes between Mr Khan and the respondent going back to 2006 and to make an order that the appellant pay the respondent's costs of the current section 27A application. The information supplied in support of the substantive application for determination of the service charges occupied four lines. It was followed by two and a half pages of densely

packed history concerning, for the most part, the proceedings between Mr Khan and the respondent.

16. The objectionable feature of that application was that it was made prospectively, before the proceedings had even been served on the appellant and before she had had an opportunity to act in any way, reasonably or unreasonably, "in bringing, defending or conducting proceedings". Notwithstanding the history of litigation between Mr Khan and the respondent, and latterly between the appellant and the respondent, that application might have been regarded simply as premature and misconceived had it been made by an unrepresented party, but having been made by the respondent's solicitors it is difficult not to regard it additionally as provocative and vexatious.

17. On 20 February 2019 the FTT issued standard directions for the preparation of the application for hearing. In its description of the issues the FTT did not mention the application under rule 13(1)(b).

18. The FTT's order included a standard direction in relation to disclosure which provided that the landlord should send to the tenant "copies of all relevant service charge accounts and estimates for the year in dispute (audited and certified where so required by the lease)".

19. Unfortunately, that direction fuelled the appellant's misunderstanding of the requirements of the lease and later led to a good deal of acrimonious correspondence.

20. When the appellant explained her objection to the charges in a schedule directed by the FTT the only point she took in relation to the sums claimed for 2018 and 2019 was "accounts not certified". The appellant had not grasped the distinction between estimated charges and the requirement for the amount payable to be certified in each year. In answer to the respondent's entry in the same schedule pointing out that the service charges in issue were estimated charges and did not depend on the production of annual accounts, the appellant insisted that certified accounts were a condition precedent to her liability to pay. In her subsequent witness statement she asserted that the respondent had "consistently failed in its obligations to properly account" for the service charge monies it collected "by the preparation of duly certified accounts". She added "in this regard the [respondent] is completely incompetent." Focussing on the FTT's own direction she suggested that the respondent had been asked to provide certified accounts by the FTT itself but had failed to do so.

21. In its decision of 12 August 2019 the FTT found that the disputed charges were all payable. At the hearing, which Mr Khan attended on the appellant's behalf, he had given three reasons why the sums demanded should be reduced. The first was that he and the appellant had a claim for damages which they could set off against their service charge liability, having been "subjected to severe harassment by members and staff of the applicant company, including instances of perjury and breaches of company law." The FTT dismissed this suggestion because the appellant has failed to give proper notice of any such claim. It dismissed the second objection based on the form of the service charge demands. Finally, it gave a number of reasons for rejecting Mr Khan's third ground of objection, that the appellant's liability to pay the estimated service charges was conditional

on the respondent providing certified accounts. It accepted the managing agent's suggestion that, taken together, the annual accounts and the annual service charge demand constituted the requisite certification. The FTT was satisfied that those two documents complied with the terms of the lease although it did not explain in what sense they amounted to a certification. More importantly, and correctly, the FTT agreed with the respondent that the requirement of certification simply did not apply to the liability to pay the estimated service charge.

22. The appellant had also issued her own application under section 20C of the 1985 Act for an order that the respondent should be prohibited from adding its costs of the current proceedings to the service charges and for the same relief in respect of costs incurred by the respondent in pursuing service charges in 2017, 2018 and 2019. This application was refused. It had been advanced by Mr Khan on the basis that there had been no need for the respondent to resort to litigation because he and the appellant had always paid the charges demanded without prejudice to their contention that they were not payable. The FTT pointed out that the only payments offered in respect of the 2018 charge had been of a few hundred pounds (a figure arrived at by deducting costs the appellant had incurred in the County Court proceedings as well as damages for the suggested "harassment").

23. The FTT then gave directions for the determination of the respondent's application for costs under rule 13(1)(b). The respondent had already made submissions in support of its claim in its statement of case for the substantive application but the appellant did not take the opportunity to comment on these and the FTT was left to make its decision on costs without any representations from her.

The FTT's costs decision

24. In its decision of 20 September 2019 the FTT directed itself by reference to paragraphs 24 and 26 of *Willow Court*. The first issue for consideration was whether the appellant had acted unreasonably, meaning vexatiously, or with a design to harass the respondent rather than to advance the resolution of the case, or in a manner in which a reasonable person would not have acted and for which there was no reasonable explanation.

25. The FTT considered the procedural history of the matter at some length in order to deal with suggested defaults by the appellant in complying with its directions, but as it did not ultimately find that she had acted unreasonably in that regard it is not necessary to refer further to those parts of the decision.

26. The FTT then referred to the appellant's fundamental misunderstanding concerning the relevance of certification which had formed the main ground of her challenge to the service charge and which had always been misconceived. The FTT was in no doubt that she had genuinely believed in the validity of that challenge and concluded that her pursuit of it did not constitute unreasonable behaviour for the purpose of rule 13(1)(b).

27. The FTT next turned to the "repeated allegations" made by the appellant against the respondent and its directors, employees and agents in letters and in her witness statement. The respondent relied on statements in three letters written while the parties were in

dispute over the respondent's compliance with the FTT's direction concerning the disclosure of documents. A letter written by the appellant to the respondent's solicitors on 9 May 2019 had suggested they were "trying to mislead the tribunal". A letter to the FTT on 14 May 2020 included a list of the respondent's previous advisers together with "reasons for their demise" suggesting one firm of solicitors had been "removed ostensibly for perjury". A letter of 17 May to the FTT asserted that "threats, intimidation and physical abuse from the applicant's thugs are the common hallmark of these meetings [i.e. the respondent's AGMs] and the police are frequently present".

28. The respondent also relied on extracts from the appellant's witness statement as examples of her unreasonable conduct of the proceedings. In paragraph 2 of that statement she had said this:

> "I have never been provided with certified accounts with the purported service charge demands issued to me. This amounts to 14 years of trustee and corporate maleficence."

In paragraph 7 she wrote:

> "The directors are incompetent and … frequently act unlawfully."

And in paragraph 13 she wrote:

> "The service charge year 2017 has been settled by consent, however if this matter comes to a full hearing I will demonstrate that the [respondent] company has attempted to use interest and costs as a weapon and spectacularly failed, whilst at the same time committing perjury; that is, they have lied under oath and in sworn testimony. This materially affects subsequent service charge years of 2018 and 2019."

29. The determinative parts of the FTT's decision are in paragraphs 18 and 19, as follows:

> "Apart from the allegations of incompetence these are all examples of the pattern of the Respondent's behaviour referred to above, namely making serious allegations of criminal behaviour by the Appellant without a shred of evidence, particulars or follow-through. Even at the hearing, the Respondent's representative, Mr Khan, continued to seek to rely on similar vague allegations (see paragraph 5 of the Tribunal's decision of 12 August 2019). Given the complete lack of evidence or details, despite more than ample time to produce any, the Tribunal can only conclude that this behaviour was solely designed to harass the applicant rather than advance the resolution of the case. The respondent's conduct does not permit of a reasonable explanation. A reasonable person would not have acted in this way."

The FTT therefore concluded:

> "That the respondent acted unreasonably and should pay the applicant's reasonable legal costs in accordance with rule 13."

30. Those costs totalled £36,568 but the FTT regarded that as "disproportionately high" given that the application itself was "fairly simple". Doing the best it could with the material available to it the FTT assessed the applicant's costs at £18,500.

The appeal

31. Both parties made submissions on the appeal which had been prepared by counsel. For the appellant, Ms Amanda Gourley took the following four points:

    - First, that the conduct which provided the basis for the FTT's finding that the appellant had behaved unreasonably was not, on an objective view, unreasonable conduct.

    - Secondly, that the FTT had either failed to address the second stage of the *Willow Court* "test" or had elided the first and second stages, and in any event it had failed to give reasons why it decided to exercise its discretion to make an order.

    - Thirdly, that the FTT failed to consider the scope of the order it proposed to make.

    - Finally, the sum awarded in costs was disproportionate and unsupported by reasons.

32. Submissions were made on behalf of the respondent by Mr Robert Brown.

33. I will begin with Ms Gourley's second and third grounds of appeal, at least so far as they concern the suggested failure of the FTT to follow the "test" in *Willow Court.*

34. Although at paragraph 28 of its decision in *Willow Court* the Tribunal suggested an approach to decision making in claims under rule 13(1)(b) which encouraged tribunals to work through a logical sequence of steps, it does not follow that a tribunal will be in error if it does not do so. The only "test" is laid down by the rule itself, namely that the FTT may make an order if is satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings. The rule requires that there must first have been unreasonable conduct before the discretion to make an order for costs is engaged, and that the relevant tribunal must then exercise that discretion. Whether the discretion has been properly exercised, and adequately explained, is to be determined on an appeal by asking whether everything has been taken into account which ought to have been, and nothing which ought not, and whether the tribunal has explained its reasons and dealt with the main issues in such a way that its conclusion can be understood, rather than by considering whether the *Willow Court* framework has been adhered to. That framework is an aid, not a straightjacket.

35. Having found that the person against whom an order is being sought has acted unreasonably, the FTT will normally wish to consider any points made in mitigation or explanation before deciding whether in all the circumstances it is appropriate to make an order for costs. But in this case nothing was said in the appellant's defence, despite the FTT having given directions for her to respond to the application for costs after she had had the opportunity to consider the substantive decision and the respondent's grounds of application. Before paragraphs 18 and 19 of its decision the FTT had already examined other aspects of the appellant's conduct, in particular her failure to comply with directions

(which she had justified by saying she could not formulate her own case in greater detail until the respondent produced the certificates which, she understood, the FTT had required of it). The FTT had acquitted her of unreasonable conduct in that regard and had then listed the abusive remarks on which the respondent relied. It is clear enough from paragraphs 18 and 19, which followed that list, that not only was the FTT satisfied that the conduct complained of was unreasonable, because it was "solely designed to harass and admitted of no reasonable explanation", but that the same conduct justified the making of an order for costs. The FTT's explanation was concise, but elaborate reasons are not required when it comes to costs. The appellant can have been in no doubt that it was the fact that she had made the serious and repeated allegations against the respondent and its directors and agents in her letters and witness statement that led the FTT to make the order for costs against her.

36. The same can be said of the FTT's consideration of the scope of the costs which should be ordered, the so called "third stage". The reason the FTT considered it appropriate to order payment of the whole of the respondent's reasonable costs was because the appellant had engaged in the behaviour complained of. She had said nothing in her own defence which the FTT needed to weigh in the balance. While it does not automatically follow that a party who has behaved unreasonably will be required to pay all of the other party's costs, it is clear enough from the decision that the FTT regarded the appellant's conduct as sufficiently flagrant and repeated to justify such a draconian order.

37. I therefore agree with Mr Brown's submissions on these aspects of the case and dismiss the second and third grounds of appeal.

38. The more substantial ground of appeal is the first, the complaint that the conduct relied on by the FTT was not objectively unreasonable but instead was susceptible of a reasonable explanation, or at least the FTT's assessment of the conduct was made out of context and was inadequate and insupportable.

39. The FTT referred in paragraph 12(b) of its decision to "a pattern repeated consistently by the [appellant] and discussed further below namely of making serious allegations of criminal behaviour by the [respondent] without a shred of evidence, particulars or follow-through." It returned to that theme in paragraph 18. At least to far as the appellant herself was concerned this "pattern" can only have comprised the three statements in correspondence on 9, 14 and 17 May 2019 and the remarks in her witness statement, also dated 9 May, since those were the only examples of unreasonable behaviour on which the respondent had chosen to rely and which the FTT did not deal with separately and dismiss. They were not the only examples of allegations made by the appellant or Mr Khan, but they were the only relevant examples of objectionable statements made in the course of the proceedings themselves. In this case, however, the respondent itself had deliberately introduced 14 years of previous dealings, mostly between it and Mr Khan, as part of the background to the application for costs at the commencement of the proceedings. That material did not relate to conduct in these proceedings but its introduction by the respondent is part of the context in which the subsequent exchanges took place. The suggestion by the respondent in its statement of case that the appellant had appeared to "adopt" the prior conduct of Mr Khan was not developed in submissions on the appeal and appears to have been introduced before the FTT simply as a justification for reference to

Mr Khan's lack of success in earlier proceedings. A prior history of bad behaviour may well be relevant to an assessment of conduct in the course of proceedings, but I do not see how the conduct of one leaseholder can be relevant to an assessment of the culpability of another. In that context it was important for the FTT to make clear whether it was treating the appellant as fixed with responsibility for Mr Khan's previous behaviour. In paragraph 20, after it had made its decision that the appellant should pay the respondent's costs, the FTT expressly stated that it did not rely on allegations about unreasonable behaviour in previous proceedings. The FTT based its determination on the conduct it identified in paragraph 17 of the decision and on which the respondent itself had relied. That was an important and necessary clarification, given the way the application had been presented

40. There nevertheless remain a number of difficulties with the approach taken by the FTT.

41. Having listed the appellant's seven objectionable statements, which it described as "serious allegations of criminal behaviour" the FTT dismissed them as lacking "a shred of evidence, particulars or follow-through". It was the suggested "complete lack of evidence or details" in support of those statements which drove the FTT to conclude that the appellant's behaviour was "solely designed to harass" and "did not permit of a reasonable explanation" and was therefore unreasonable. But the FTT characterised the appellant's statements in that way without examining them individually, referring to the context in which they were made, or apparently making any attempt to understand what it was that the appellant was complaining about when she made them. That approach risked jumping to an unjustified conclusion or at least, if the FTT had considered the context but omitted to refer to it in the decision, it risked falling short of the requirement to give adequate reasons. In order to determine whether, objectively, the conduct complained of was unreasonable it was essential for the FTT to consider it in its context and not simply, as it appears to have done, to have treated it as the latest examples of a litany of random abuse directed against the respondent and its officers and agents by the appellant and Mr Khan.

42. The FTT was presented with two bundles of correspondence and documents in the application, one prepared by each party. These largely duplicated each other and a significant portion of the respondent's bundle comprised previous tribunal decisions. The dispute itself concerned only two years of estimated charges and the grounds of objection were very narrow. There was one quite short witness statement from the appellant to which a small bundle of material of about twenty-five pages was exhibited, and a statement from the respondent's managing agent exhibiting formal demands and accounts to which the appellant had submitted a two-page reply. The three letters written in May 2019 containing statements which formed the basis of the FTT's decision were part of a relatively short correspondence between the parties and the FTT. The material before the FTT was not, therefore, particularly extensive for a service charge dispute.

43. Nevertheless, the FTT made an important procedural decision in the course of the original hearing which significantly narrowed the material it was required to deal with in its substantive decision of 12 August 2019. As I have already mentioned, one of the grounds on which Mr Khan argued the appellant's liability ought to be reduced was because she was said to have a right to damages which the FTT described in its original decision as arising out of "severe harassment by members and staff of the [respondent] company, including instances of perjury and breaches of company law … which would largely offset

any liability". As the FTT noted, there were references in some of the documents before it to these allegations (including in the appellant's witness statement) but it considered they they had not been formulated in a coherent manner: "neither Mr Khan nor [the appellant] had set out any particulars, including dates, times or details of loss or even that either of them intended to make any such claim within these proceedings." At the original hearing, when these deficiencies were pointed out by the FTT, Mr Khan had requested an adjournment of the hearing to enable him to get proper legal advice to enable the set off to be formulated, but the FTT had rejected that request. It had explained to Mr Khan that its refusal to allow those complaints to be deployed before it did not prevent him from bringing such a claim separately at a later date.

44. The FTT's complaint in paragraph 18 of its costs decision that serious allegations had been made, in correspondence and in the appellant's witness statement, "without a shred of evidence, particulars or follow-through" must therefore be considered in light of its decision to exclude part of the case which the appellant and Mr Khan wished to advance at the hearing but had been prevented from on the grounds that it had not been properly formulated or sufficiently particularised. The FTT reached the conclusion that statements were made with the sole purpose of harassing the respondent without appearing to consider how those statements related to the part of the case on which it had not heard evidence or adjudicated. Nor did it relate the statements to the case which had been presented by Mr Khan on the appellant's behalf. It is impossible to dismiss the statements as having been made with no proper purpose without first undertaking that exercise.

45. The three letters to which the FTT took exception, written in little over a week in May 2019, were concerned with the adequacy of the respondent's disclosure.

46. The FTT had given a standard direction that the respondent produce "copies of all relevant service charge accounts and estimates for the year in dispute (audited and certified where so required by the lease)". The documents provided by the respondent's solicitors on 4 March 2019 were service charge estimates and applications for payment and did not at that stage include the audited accounts. Nor did they include any form of certificate, although the applications for payment for 2018 and 2019 both showed that sums had been credited to the appellant's account from earlier years against her liability to make those payments. Under the scheme of the lease any shortfall and any amount to be credited ought to have been certified, but no document disclosed by the respondent appeared to satisfy that requirement. Its solicitors did not rely at that stage on the argument which eventually found favour with the FTT that the audited accounts could be read together with the demand for payment as a certificate satisfying the respondent's contractual obligation.

47. The appellant did not initially respond to the respondent's disclosure and missed the deadline for submitting her own schedule of items in dispute. When the respondent's solicitors raised her default with the FTT it asked for an explanation and was told that, until she received that request she had been unaware of the original directions and suspected the respondent of interfering with her post. Having been provided with a copy of the directions the appellant wrote to the respondent's solicitors on 7 May pointing out that the FTT's direction had required certified accounts where the lease so provided, that in this case the lease did provide for certification, and that the direction for disclosure therefore remained to be complied with. The solicitor's response of 8 May simply pointed

out that the sums in question were demanded on account. It did not add an explanation of the respondent's position that no certification was required before estimated charges were payable, but simply asserted "your reference to paragraph 3(b) of the sixth schedule is therefore misconceived".

48. It was to that suggestion that the appellant responded on 9 May. Her letter ran to seven paragraphs explaining that no certificates had been supplied in all of the fourteen years of her and Mr Khan's ownership of the lease and calling for those for the last five years now to be produced. The letter began as follows:

> "I refer to your letter of 8 May 2019. I respectfully submit that it is you who are "misconceived". Further you are trying to mislead the tribunal. As an officer of the court, you should be ashamed. You are required by the tribunal to produce the certified accounts, by 6 March 2019. You have not done so. *You have not complied with the directions.*" [emphasis in original]

49. The FTT quoted only the third and fourth sentences of this passage, the allegation of a shameful attempt to mislead the tribunal. Had it considered the correspondence as a whole it would have appreciated that the allegation that the respondent's solicitors were trying to mislead the tribunal was a reference to their claim to have complied with the directions by supplying the required disclosure. The appellant considered that claim to be untrue because the direction demanded the production of certified accounts where the lease so required, as she understood it to in this case. Her understanding may have been misconceived, as the FTT subsequently found it to be, but the FTT also found her belief to be genuine and her pursuit of the challenge based on it not to have been unreasonable. Put in context I do not consider it is possible to suggest that the sole purpose of the statement was to harass the respondent; on the contrary, the appellant was pressing the respondent to do what she considered the FTT had directed it to do, a direction with which she considered it had so far failed to comply.

50. The appellant's letter to the FTT of 14 May included the reference to a previous solicitor for the respondent having been "removed ostensibly for perjury – as alleged by [the appellant]; incontrovertibly provable, through documentation". The FTT understandably regarded an allegation of perjury made against a solicitor as a serious matter, and it is clear from the passage in her witness statement which the FTT also regarded as unreasonable that the appellant understood exactly what she was suggesting ("they have lied under oath and in sworn testimony"). But it is also apparent that, far from the allegation being made "without a shred of evidence, particulars or follow-through", the appellant had identified precisely the sworn statement which she claimed constituted perjury by exhibiting it to her witness statement together with a letter of 11 September 2018 to the respondent's current solicitors explaining what it was she took exception to in their predecessors' conduct. The document in question was a reply to the appellant's defence in the County Court proceedings; she had pleaded a letter which she said the respondent had not responded to, and in its reply (supported by a statement of truth by its solicitor) the respondent had admitted the letter but denied that they had failed to respond to it. It was the denial of a failure to respond which the appellant identified in her letter of 11 September as "some of the dishonesty" to which she objected and as the subject of her accusation of perjury.

51. The appellant raised this matter explicitly in her witness statement and exhibited the relevant documents. Far from there being a lack of "follow-through" she appears also to have made a formal complaint to the Solicitor's Regulatory Authority about the conduct of the solicitor who signed the statement of truth on the County Court pleading. I do not know what became of that complaint, but it is relevant to the FTT's assessment that the appellant made serious allegations without any attempt to justify them. I do not think that is a fair characterisation of this allegation, however improbable it may appear.

52. The letter of 14 May was part of the appellant's response to a letter by the respondent's solicitors to the FTT in which they had explained that they had encouraged the appellant to obtain independent legal advice. The appellant wrote a reasoned letter to the FTT asking it to strike out the application because of the failure to produce the required certification. She concluded that letter with the following passage:

> "Apropos the [respondent's] insistence on me seeking legal advice, with respect, the [respondent] is on their **fifth** set of solicitors (I attach a list of the defunct status of their predecessors at Annex 1). I do not think it is me who needs the legal advice."

The annexure to the letter included the statement that one firm had been "removed ostensibly for perjury – as alleged by [the appellant]; incontrovertibly provable, through documentation."

53. The appellant clearly took umbrage at the suggestion that she did not know what she was doing and would achieve a proper understanding of the case only by seeking the advice of lawyers. In a simple dispute, turning on a point of interpretation of a lease on which the appellant's position was far from unarguable, and in which the appellant's main complaint throughout had been about the amount of money the respondent had spent on lawyers, it is perhaps not difficult to understand why she might have regarded that suggestion as requiring a combative response. As for the facts stated, the respondent *was* on its fifth set of solicitors, the fourth of whom had ceased to act after the appellant had made her complaint of perjury (whether because of that complaint or not is unknown), and the appellant had produced the documents which she said incontrovertibly proved her allegation. Mr Khan had attempted to substantiate that allegation, among others, at the original hearing but had been told by the FTT that it would not permit him to do so; it had then refused his request for an adjournment to formulate the suggested set off and, as a result, had not considered the evidence of the appellant or come to a conclusion on the substance of her allegation.

54. It is also relevant to recall that it was the respondent which had introduced the whole of the previous history of dispute between the parties into its otherwise straightforward service charge application. The FTT had not, in its directions, suggested that the history was irrelevant. In the absence of any such guidance, to expect the appellant to refrain from relying on a part of that history which she considered material to her cross claim for damages for harassment and perjury was unrealistic. Despite the seriousness and apparent implausibility of the allegation, I do not consider the FTT was entitled to dismiss it without investigation as having been made purely with the intention of harassing the respondent

and without any regard for the resolution of the case. On the contrary, it formed part of the appellant's case, presented in her witness statement and explained in the documents attached to it.

55. The third and final letter on which the FTT relied also contained a serious allegation, this time concerning the respondent's annual general meetings, namely that "threats, intimidation and physical abuse are the hallmark of these meetings and the police are frequently present." As Mr Brown pointed out in his submissions on behalf of the respondent, the objectionable part of this allegation concerns the suggested behaviour of the respondent's "thugs", rather than the suggested presence of the police, but the notices of the AGM do suggest that the police would be in attendance.

56. The FTT regarded this as a further example of a serious allegation made without a shred of evidence, particulars or follow-through. Once again, however, it reached that conclusion without referring to the appellant's evidence or to the particulars provided in correspondence contained in the hearing bundle. In her witness statement the appellant referred to the litigation costs arising out of previous disputes which were included in accounts discussed at the respondent's AGMs, and to her non-attendance at those meetings:

> "I was concerned as to my safety, that in the Company meetings (from which I was forcibly excluded with violence) the Applicant's directors would inform the other leaseholders that these costs were my fault. The police were informed at various stages during the proceedings."

The reference to the appellant having been "excluded with violence" was not new. In an open letter offering to settle the 2018 and 2019 service charges written on 21 December 2018, which was referred to by the FTT in its decision, the appellant had stated that her proxy, Mr Khan, had been refused entry to the 2018 AGM "by the concierge, acting as a bouncer" (the concierge was identified by name in a letter of 24 January, also included in the hearing bundle, and his actions were said to have been reported to the police). As for her own experience, she stated:

> "Following the 2007 AGM where I was shoved and kicked and subsequently suffered a miscarriage, I no longer attend the AGMs but appoint a proxy, who is consistently refused entry."

57. Once again, the appellant's allegation concerning the conduct of the respondent's staff at its meetings raised serious issues of which sufficient details were given to contradict the FTT's suggestion that they were unparticularised and made without a shred of evidence, even if only the evidence of the appellant herself in her sworn witness statement. Two specific occasions were identified in correspondence, and the identity of the person said to have been involved in the most recent incident was given and it was said to have been reported to the police. These were the same allegations which the FTT had refused to allow Mr Khan to present at the first hearing, advising him that he could still raise them in separate proceedings. Once again, I do not think it was open to the FTT to base its award of costs on the appellant's suggested unreasonable behaviour in making unsubstantiated

allegations where those same allegations had been presented by her in her written evidence before her representative was prevented from developing them at the hearing.

58. I do not for a moment suggest that the FTT was wrong to exclude the suggested set off of damages for harassment or perjury from consideration at the hearing. Whether or not they were sufficiently particularised to be capable of answer by the respondent, they simply had nothing to do with the estimated service charges for 2018 and 2019 which ought to have been the sole focus of consideration. But the FTT did not make an order for costs because the appellant sought to raise matters which were outside the proper scope of the proceedings, it made the order because the allegations were made "without a shred of evidence, particulars or follow-through" from which the FTT concluded that they were made for an improper purpose. That assessment does not stand up to scrutiny. Nor do I consider it would have been open to the FTT to base an order on the introduction of irrelevant material by the appellant, when a mountain of irrelevant material had been placed at the centre of the respondent's own initial application. More effective case management might perhaps have seen the premature application for costs under rule 13(1)(b), and the material supporting it, struck out by the FTT when it gave its first directions. Having allowed that material to remain in, the FTT could not, and did not, direct the appellant not to respond to it or confine herself to matters directly related to the two service charge years in issue.

59. As for the material in the appellant's witness statement which the FTT regarded as examples of unreasonable conduct, I have already dealt with the allegation of perjury. The FTT treated it, together with the other extracts from the witness statement, as part of a single catalogue of scandalous and unsubstantiated allegations which did not require separate consideration. However, the allegations of incompetence and "corporate maleficence" were directly related to the respondent's failure, as the appellant saw it, to provide the certificates which the lease requires. The FTT found that her mistaken understanding of the respondent's responsibilities was, nevertheless, genuine. Having done so, it ought to have asked itself whether a litigant in person who honestly believed her landlord had systematically disregarded its contractual obligations and whose failings had been repeatedly pointed out and gone uncorrected would be acting unreasonably by describing that landlord, in a witness statement supported by a statement of truth, as incompetent, or even "maleficent". The suggestion that the directors "frequently act unlawfully" was, in context, a reference to the appellant's belief concerning the restrictions on the activities of a company she understood to be dormant, and possibly also to her allegations of mistreatment by the company's staff at annual general meetings, and interference with her post. The FTT did not express any view on whether those allegations were made honestly, with a genuine belief in their truth, or were based on a mistaken understanding of the respondent's obligations or of the facts. It had ruled the allegations of harassment out of consideration altogether, while at the same time advising the appellant that they could be pursued in separate proceedings. In those circumstances I do not consider the FTT was in any position to form the view that the allegations contained in the witness statement were made purely with a view to harassing the respondent and not with the intent of setting out the appellant's grievances against it.

60. If the FTT considered and rejected alternative explanations for the appellant's conduct it did not say so. As the basis of the allegations was identified in the witness statement itself,

and in the supporting documents, the fact that the appellant did not submit a separate response to the application for costs did not relieve the FTT of the need to consider whether the statements were objectively unreasonable. Nor did the FTT give reasons why the material in the witness statement and the documents annexed to it were incapable of providing evidence, particulars and follow-through sufficient to enable the appellant's motives to be judged less critically. A decision to award costs on account of unreasonable behaviour need not be lengthy or elaborate, but the parties and this Tribunal on an appeal must be able to understand why the FTT reached its conclusion.

Disposal and consequential matters

61. For these reasons I allow the appeal on the third ground. Having done so it is unnecessary to consider the fourth ground of appeal, which challenged the FTT's assessment of the amount the appellant should be ordered to pay.

62. Mr Brown suggested that, if I were to allow the appeal, I should remit the application for costs to the FTT for further consideration. I refuse that request. I am satisfied that, viewed in their full context, the statements relied on by the respondent in its application did not amount to unreasonable conduct and I do not consider that it would be open to the FTT to make an order under rule 13(1)(b). I therefore dismiss the application for costs.

63. Finally, the appellant sought orders under section 20C, Landlord and Tenant Act 1985, relieving her of the obligation to contribute through the service charge to the respondent's costs of the appeal, and under paragraph 5A of Schedule 11, Commonhold and Leasehold Reform Act 2002, protecting her from any administration charge in respect of the respondent's costs of the appeal.

64. I refuse the application under section 20C. Although the appellant has succeeded in the appeal, she was entirely unsuccessful in the substantive proceedings. She and Mr Khan have repeatedly, and unsuccessfully, challenged their liability to pay service charges. They have done so knowing that the lease requires all leaseholders to contribute to the respondent's costs of dealing with those challenges. I do not regard it as unjust or inequitable in those circumstances for them to share equally with their fellow leaseholders in meeting the respondent's costs of this appeal.

65. As for the appellant's application for an order under paragraph 5A, the respondent has not had an opportunity to respond to that part of the application (which was made in Ms Gourley's written submissions in reply). It may do so within 21 days of the publication of this decision. If it chooses not to respond I will make an order under paragraph 5A in respect of the costs of the appeal so that they may not be included in any administration charge payable by the appellant alone under the terms of her lease.

Martin Rodger QC,
Deputy Chamber President

10 September 2020