Neutral Citation Number: [2024] EWCA Civ 1241

Case No: CA-2023-001503

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
(Judge Elizabeth Cooke)
LC-2022-438

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE HOLGATE

- -

Between:

Kathryn Anne Lea (And Other Leaseholders)	**Appellants**
- and -	
GP Ilfracombe Management Company Limited	**Respondent**

- -
- -

Martin Hutchings KC (instructed by **Trowers & Hamlins LLP**) for the **Appellants**
Justin Bates KC and Edward Arash Abediah (instructed by **Brethertons LLP**) for the **Respondent**

Hearing Date: 3 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1 INTRODUCTION

1. This is an appeal by Kathryn Lea and other leaseholders of properties at Ilfracombe Holiday Park ("the appellants") against the order of the First Tier Tribunal Property Chamber ("FtT"), subsequently upheld by the Upper Tribunal Lands Chamber ("UT"), refusing them their costs of proceedings in which they defeated in its entirety the claim for £2.4 million by way of service charge brought against them by the managing agents, GP Ilfracombe Management Company Limited ("GPIMC"). Permission to bring a second appeal was granted by my lord, Lord Justice Stuart-Smith, on 26 January 2024.

2. The appeal raises two issues. The first concerns the appropriate test to be applied in circumstances where, as here, one party claims that the other has acted unreasonably and should therefore pay the costs of proceedings which would otherwise be 'costs-neutral'. The second is whether, on an application of the applicable test, the FtT erred in law in concluding that GPIMC did not act unreasonably and were therefore not liable to pay the appellants' costs.

2 THE FIRST ISSUE: THE APPLICABLE TEST

2.1 The Relevant Provisions

3. Section 29(1)-(3) of the Tribunals, Courts and Enforcement Act 2007 provides as follows:

> "**29 Costs or expenses**
>
> (1) The costs of and incidental to—
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> (a) all proceedings in the First-tier Tribunal, and
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> (b) all proceedings in the Upper Tribunal, shall be in the discretion of the Tribunal in which the proceedings take place.
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> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

4. The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 (as amended) provide at Rule 13:

> "**Orders for costs, reimbursement of fees and interest on costs**
>
> **13.**—(1) **[**Subject to paragraph (1ZA), the**]** Tribunal may make an order in respect of costs only—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings ...;

> (c) in a land registration case **[**or**]**
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> (d) in proceedings under Schedule 3A to the Communications Act 2003 (the Electronic Communications Code) including proceedings that have been transferred from the Upper Tribunal."

Although this wording is slightly different to the earlier version of the rule which was in force at the time of the original hearings before the FtT, it is agreed that nothing turns on the changes.

5. In general terms, therefore, the FtT will only make an order for costs against a party if that party has acted unreasonably in bringing, defending or conducting the proceedings.

2.2 The Authorities

6. In *Ridehalgh v Horsefield & Anr* [1994] Ch 205, the Court of Appeal was concerned with wasted costs orders. One of the requirements for such an order is that the conduct must be 'unreasonable'. Sir Thomas Bingham MR (as he then was) said at 232 E-G:

> ""Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

7. In *Willow Court Management Co (1985) Limited v Alexander* [2016] UK UT 290 (LC); [2016] L.&T.R.34, the UT dealt with the same issue as that which arises on this appeal, namely the applicable test for unreasonable conduct in bringing, defending or conducting proceedings. One of the issues was whether or not the guidance in *Ridehalgh* was applicable. The UT decided that it was, saying at [23]-[26]:

> "23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in *Ridehalgh* on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of

> cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.
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> 24. We do not accept these submissions. An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?
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> 25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.
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> 26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship."

8. The UT also gave guidance as to how the *Ridehalgh* test should be applied in practice:

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

9. It is important to note that neither *Ridehalgh* nor *Willow Court* decide that unreasonable conduct *must* involve vexatious conduct or harassment. On the contrary, the UT make clear in *Willow Court* that unreasonable conduct can *include* conduct which is vexatious or designed to harass, but it does not *require* such conduct; that is just one way in which unreasonable conduct may be established. It appears that confusion has arisen from the second sentence of [23] in *Willow Court* (with the recorded submission that unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous), and the first sentence of [24], which did not accept the submissions in [23]. However, on closer analysis, it appears that the submissions that were not accepted were those set out later in [23], a point emphasised in the body of [24], where the UT makes it plain that unreasonable conduct includes conduct which is vexatious and designed to harass, but therefore by definition cannot be elided with it.

10. In any event, such an elision would reverse the effect of s.29 of the Tribunals, Courts and Enforcement Act 2007 (paragraph 3 above). That changed the existing law, where costs were only awardable against a party which had acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with proceedings, and replaced it with a wide provision that "all costs would be at the discretion of the Tribunal." That discretion is subject to the Tribunal Procedure Rules which, as set out above, refer to "unreasonable" conduct, and not to vexatious or oppressive conduct.

11. To that extent, therefore, the UT in *Assethold Limited v Lessees of Flats 1-14 Corben Mews* [2023] UKUT 71 (LC); [2023] L.&T.R.12, at [62], was wrong to suggest that an order for costs under rule 13(1)(b) will only be made where the paying party's behaviour has been vexatious, and designed to harass the other party rather than to advance the resolution of the case. Moreover, although any citation of *Ridehalgh* in this context must bear in mind that there are three overlapping requirements to be met for a wasted costs order, of which unreasonable conduct is only one, that makes no material difference to the applicable test for unreasonable conduct, which is that articulated by Sir Thomas Bingham MR.

12. The *Ridehalgh* approach was expressly approved and applied in *Dammerman v Lanyon Bowdler LLP* [2017] EWCA Civ 269; [2017] CP REP 25, at [30]-[31], which was concerned with the similar jurisdiction under CPR 27.14(2)(g) to award costs in small claims litigation where there had been unreasonable conduct. The Court of

Appeal confirmed at [30] and [31] that the test to be applied when considering unreasonable conduct in the context of small claims was that set out in *Ridehalgh*.

13. *Ridehalgh* and *Willow Court* emphasise the fact-specific nature of the test for unreasonable conduct. It is therefore not appropriate for this court to give more general guidance as to what does or does not constitute unreasonable behaviour, a point also made in *Dammerman*. That is also consistent with the policy that the courts should avoid going beyond the CPR to identify rules, default positions, presumptions, starting points and the like, when addressing costs disputes: see *Excelsior Commercial & Industrial Holdings Ltd v Salisbury* [2002] EWCA Civ 879 at [32] and *Thakkar v Mican* [2024] EWCA Civ 552 at [20].

2.3 Conclusions on the First Issue

14. This court will not normally lay down general guidelines – untethered to the facts - as to what may or may not constitute unreasonable conduct, and I decline to do so here. Instead, I follow the decisions in *Ridehalgh, Willow Court* and *Dammerman* as to the applicable test. As I have said, deciding whether or not there has been unreasonable conduct, and if so, whether an adverse order for costs should be made, is a fact-specific exercise.

15. Subject to what I have said above, sufficient guidance in respect of rule 13(1)(b) is set out in *Ridehalgh* and *Willow Court*. A good practical rule is for the tribunal to ask: would a reasonable person acting reasonably have acted in this way? Is there a reasonable explanation for the conduct in issue?

16. To the extent that the appellants sought to argue that a different or wider test should apply to rule 13(1)(b), I reject that submission. There is no basis for treating this rule in any different way to any other jurisdiction which operates a generally 'costs neutral' regime. To the extent that a party seeking its costs under rule 13(1)(b) might argue that the test in *Ridehalgh* and *Willow Court* for unreasonable conduct (and therefore obtaining a positive costs order in their favour) is unduly restrictive, the answer is that, not only is it the test set out in the authorities, it is also consistent with a generally 'costs neutral' regime. On the other hand, for the reasons I have explained, it is an impermissible gloss on the rule, and potentially much too restrictive, to elide unreasonable conduct with vexatious or harassing behaviour.

17. That then brings us to the second issue on this appeal: whether the FtT erred in law when considering the issue of unreasonableness in the present case. That involves a more detailed consideration of the relevant history.

3 THE SECOND ISSUE: THE RELEVANT HISTORY

3.1 The Companies and Individuals Involved

18. GPIMC is the management company referred to in the leases relating to the Ilfracombe Holiday Park ("the property"). There are 273 residential leasehold units and associated commercial and common areas. The appellants are all residential leaseholders of the property.

19. At the start of 2021, the directors of GPIMC were Mr Gubbay, Mr Spence and Mr Kewley. It was Mr Gubbay who prepared and sent out the service charge demands on 11 January 2021 on behalf of GPIMC. The total of these claims was £2.4 million. It was Mr Gubbay who signed off the relevant claim form when, on 12 January (i.e. the very next day), these proceedings were commenced in the FtT. Although he was removed as a director in May 2021, Mr Gubbay was expressly appointed to act as GPIMC's representative at the hearing. So it was that Mr Gubbay appeared on behalf of GPIMC at the hearing on 30 September and 1 October 2021. He was also their sole witness. Neither of the other directors attended the hearing (although the FtT noted that at certain times both men were observing the hearing remotely). The FtT had repeatedly to remind Mr Gubbay that he was there solely as the representative of GPIMC, although they said that this appeared to represent a conflict of interest. Despite these warnings, Mr Gubbay did not withdraw from the hearing.

3.2 The FtT's Determination on the Service Charges

20. The FtT's Determination was dated 29 November 2021. The Determination repeatedly referred to the unusual nature of the case: see for example [88] and [115]. It had also been conducted in an unusual way: at one point during the hearing, Mr Gubbay's associate Mr Rowell was required to leave the room because he had been holding up documents in an attempt to assist Mr Gubbay, despite having previously been warned not to do so.

21. The FtT noted at [27] that the large amounts claimed by way of service charge were based entirely upon Mr Gubbay's self-professed knowledge and experience. No budgets, estimates or accounts were provided in support of the figures claimed. The FtT's primary findings were as follows:

> "98.We are not satisfied on the case advanced by Mr Gubbay that the budget was apportioned properly. In our determination as a result of this failure to properly apportion the estimated service charge the demands are invalid and so currently nothing falls to be paid.
>
> 99.In any event even if we are wrong on the method of apportionment we would have determined that the budget was not reasonable in its entirety and not payable.
>
> 100. Mr Gubbay in his evidence repeatedly referred to documents such as management accounts and information from professionals who subsequently produced reports. None of this information had been disclosed. Mr Gubbay could not advance, in our determination, any proper reason as to his failure to disclose this information which was plainly within his care and control. Mr Gubbay simply referred to his professional experience.
>
> 101. We are mindful that Mr Gubbay in his evidence acknowledged that the budget figures had been produced to elicit dialogue. He also candidly told us that he felt sure much of the major works could ultimately done in a different manner and for a cheaper cost. In our judgment we find that Mr Gubbay set the budget with no genuine belief that these were the sums required to manage the Property.

> 102. Mr Gubbay could offer no real explanation as to how the costs of the major works had been calculated or how he divided these between individual blocks. He repeatedly referred to his professional experience. We would certainly have expected some evidence of how this was calculated, perhaps by having some discussions with the professionals assisting, calculations or the like.
>
> 103. In our determination on the evidence presented we find that the budget was not calculated having regard to any reasonable cost.
>
> 104. Whilst we do not need to, we also comment that in our determination various heads of expenditure are not recoverable under the service charge provisions of the lease. We set out below our findings on certain heads of expenditure to act as examples and to try and inform the parties moving forward…
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> 108. Mr Gubbay seemed to assert that any and all costs he incurred in ensuring that everything possible was done to maximise the revenue of the site as a holiday park was recoverable. We do not agree. The lease does not allow recovery of such costs of improvements and we were not referred to any clause in the lease which would do so."

22. In conclusion, the FtT said:

> "113. In our judgment the management fees and staff costs claimed are far too high. It would be for the Applicant to demonstrate what costs actually relate to management under the lease as distinct from the holiday letting business. We suspect in practice this amount would be a fraction of the total claimed.
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> 114. Mr Gubbay in his evidence talked of having received (since he effectively took over the park in the Summer of 2020) sums in excess of £2.1 million. He agrees he has not accounted to anyone for such sums. Such sums exceed what has to date actually been spent on the park. He in his evidence stated he would pay nothing to any company controlled by Messrs. Spence and Kewley and he has asked this Tribunal to determine that each Respondent should do just that. If we made a determination that even 1p was due and owing, the Applicant could direct to whom this was paid. This is a company owned by Messrs. Spence and Kewley. It may be that at some point in the future the Applicant company will come under Mr Gubbay's control or the control of others, but that is not the position at the date of this determination.
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> 115. It is unusual for a Tribunal to determine that nothing within a budgeted amount should be reasonably due. On occasion we may reduce the figures, but would still agree some money should be paid. As we have said this case is unusual. The evidence and submissions on behalf of the Applicant were far from satisfactory. Mr Gubbay could not properly explain the basis upon which he, via his various entities, had taken over and was running the site and units. Yet he had received significant sums of money from lettings of holiday units many of which must belong to the Respondents. We are also mindful that we are nearly at the year end and the Applicant will then be able to produce actual accounts of expenditure supported by documentary evidence which the Respondents can consider.

> 116. Having made our findings and considered the totality of the evidence, we reviewed matters and we are satisfied that none of the budgeted amounts are properly payable or reasonable."

3.3 The FtT's Determination on Costs

23. Unsurprisingly perhaps, the appellants sought their costs of the FtT proceedings against GPIMC. They also separately sought costs against Mr Gubbay personally and against one of his companies, Epworth. There was a hearing on 6 May 2022 and a Determination on 14 June. There was no response to the application for costs from GPIMC. Mr Gubbay and Epworth were represented on 6 May, but counsel confirmed that he did not represent GPIMC and that he had no submissions to make in respect of the order sought against them (see [29]). The remainder of his submissions concerned the position of Mr Gubbay and Epworth only.

24. In the Costs Determination dated 14 June 2022, the FtT decided that, save in two immaterial respects, they would not make the costs order sought against GPIMC. However, their principal analysis of the costs position at [62] – [73] was directed at the applications against Mr Gubbay and Epworth (rather than that relating to GPIMC). The FtT said in relation to the claims against Mr Gubbay and Epworth:

> "66. We are not satisfied that simply bringing these proceedings, unsuccessful though they were, was of itself unreasonable. We would suggest it is plain the demands were going to be subject to challenge. We make reference in our original decision to what we consider to be the unsatisfactory nature of the leases. This is a classic situation where a management company may well apply to the Tribunal to seek clarity.
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> 67. We did find that the demands were invalid and so no sums were payable. We also determined on the facts that the sum claimed was not reasonable. We explained why we did not look to determine a reasonable amount, not least given the lack of evidence, but also given it seemed that this would be a pointless exercise.
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> 68. Standing back we accept that the actual issues for this Tribunal to determine were not unusual and were twofold: was the lease followed and was a reasonable methodology adopted to determine the amounts? We found the answer to both to be "no" but actually much of the information within the bundle and cross examination whilst giving background was not strictly relevant to this determination.
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> 69. We have considered whether Mr Gubbay and Epworth have acted unreasonably. Certainly their conduct was unusual and as has been acknowledged Mr Gubbay had a very real conflict. We accept that Mr Gubbay believed in his own way he was doing the best for everyone. Whether this view is misguided is not a matter we need to determine."

25. The only paragraphs specifically relating to GPIMC came later:

> "74. The Applicant did not make any submissions in respect of the application. This is their prerogative. However we are satisfied it remains a matter for the Tribunal to exercise its discretion over whether or not to make any order. Simply because the Applicant took no part it does not automatically follow that an order could or should be made against it pursuant to Rule 13.
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> 75. Overall this Tribunal finds that the conduct of the proceedings, save as dealt with below, was not such that any further order for costs pursuant to Rule 13 should be made against the Applicant, Mr Gubbay or Epworth. We do not find that the overall conduct of these proceedings was unreasonable. The application was in our judgment a reasonable course of action and sadly the "noise" has led to many other matters conflating what essentially was a discreet and relatively straight forward issue to be addressed."

26. On 28 July 2022 the FtT gave permission to appeal in relation to costs noting at paragraph 7 of their reasons that "the facts of this particular case were unusual".

3.4 The UT's Determination

27. The UT's Determination was dated 24 April 2023. The judgment deals with the various specific grounds of appeal that had been raised. The test that was applied was the *Ridehalgh/Willow Court* test. The UT refused the appeal, its reasoning summarised at [48]. It is unnecessary to set out any parts of that Determination.

4 THE SECOND ISSUE: THE RELEVANT LAW

28. The appeal against the finding by the FtT that GPIMC's conduct was not unreasonable is not an appeal against the exercise of discretion. As *Willow Court* makes clear at [28], such a finding is a matter of objective fact. But it remains an appeal against an evaluative decision and, in those circumstances, this court will always allow the original court or tribunal considerable latitude before concluding that its decision cannot be allowed to stand. Ultimately, the test is not whether the appellate court would have come to a different decision on the facts, but whether the judge reached a conclusion which no reasonable tribunal could have reached: see, merely by way of recent example, *Volpi and Another v Volpi* [2022] EWCA Civ 464 at [2(ii)].

29. Furthermore, decisions on costs are notoriously difficult to dislodge on appeal. In *SCT Finance Ltd v Bolton* [2003] 3 All E.R. 434 at [2], Wilson J (as he then was) noted "the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him…For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely". The same point was made by this court in *Hislop v Perde* [2018] EWCA Civ 1726; [2019] 1 W.L.R. 201 at [67] – [68], and *Thakkar v Mican* at [18].

30. Accordingly, this court will only interfere with the Costs Determination of the FtT if the FtT failed to take into account a relevant matter, or took into account an irrelevant matter, or reached a decision no reasonable tribunal could have reached. As he

shrewdly realised, the limited scope for an appeal of this type was Mr Bates' strongest argument in resisting the appeal.

31. I should add that, for the purposes of this appeal, what matters is the decision of the FtT, not the UT. Although the UT's refusal of the first appeal may be of some relevance, the focus must always be on the original decision. That is for the reasons explained by Jacob LJ in *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407 at [7]:

> "Although Mr Christopher Vajda QC for HMRC opened the appeal by attacking the judgment of Warren J rather than concentrating upon the decision of the Tribunal (which of course he contended was correct) in the end counsel were agreed that what really mattered was whether the decision of the Tribunal was wrong in law. For it is the Tribunal which is the primary fact finder. It is also the primary maker of a value judgment based on those primary facts. Unless it has made a legal error in that in so doing (e.g. reached a perverse finding or failed to make a relevant finding) or has misconstrued the statutory test it is not for an appeal court to interfere. This has been said in other contexts e.g *Osmani v Camden LBC* [2007] EWCA Civ 1281 at [34] ("…the main focus of attention on a second appeal such as this should be on the decision of the Council rather than that of the County Court Judge on appeal" *per* Auld LJ and *Waltham Forest LBC v Maloba* [2007] EWCA Civ 1281 at [19] *per* Toulson LJ). The same applies for the same reasons to appeals from this Tribunal."

5 THE SECOND ISSUE: DISCUSSION AND CONCLUSION

32. I have set out at paragraphs [21] – [22] above the substantive conclusions of the FtT. In my view, they speak from themselves. They demonstrate that, to all intents and purposes, the original service charge demand by GPIMC was an abuse of the process: a claim for a huge sum of money that was unsupported by anyone, unjustified by any independent documentation, and known by its creator, Mr Gubbay, to be invalid. Unsurprisingly, the claim failed in its entirety. In such circumstances, the bringing of the claim by GPIMC in the first place, and its conduct throughout the FtT proceedings, would *prima facie* appear to have been unreasonable.

33. There is a lengthy list of reasons which I would identify in support of that conclusion. By reference to the paragraph numbers of the substantive judgment, these include the following:

a) The sum claimed was large. But it was unsupported by a single piece of paper. It was suggested that there were management accounts and reports from professionals which supported the figures, but these were never disclosed: [27], [37] and [100].

b) No explanation was ever given for the absence of any of this supporting material: [100].

c) Mr Gubbay's evidence to the FtT was that, although he had produced the claim, he did not believe that the claimed figure was justified, although he hoped that, it would "elicit dialogue": [101]. In my view, that was an improper use of the service charge claim mechanism and the FtT process. The FtT is intended to deal with bona fide

disputes over proper service charge claims: it is not there to facilitate some sort of horse-trading exercise or bazaar.

d) Mr Gubbay, the only person at the FtT hearing giving evidence in support of the claim, was found to have had "no genuine belief that these were the sums required to manage the property" [101]. In my view, that finding alone means that this claim was an abuse of the process and doomed to fail.

e) Mr Gubbay's evidence was that he would not advise anyone to pay "any monies to any entity controlled by Messrs Kewley and Spence" ([35]) an important piece of evidence repeated by the FtT at [114]. There, they went on to note that Mr Gubbay "has asked this Tribunal to determine that each Respondent should do just that" i.e. pay nothing. On the basis of that evidence too, which the FtT accepted, GPIMC's service charge claim was again doomed to fail: GPIMC was a company controlled by Messrs Kewley and Spence, and its appointed representative, Mr Gubbay, was advising the appellants not to pay any part of its claim.

f) It was found that the budget was "not calculated having regard to any reasonable cost" [103]. It was found that none of the claims "are properly payable or reasonable" [116]. In other words, it was found that the claims were *all* unreasonable.

34. I therefore turn to the test in *Ridehalgh/Willow Court*. The first issue is whether there was or is a reasonable explanation for GPIMC's conduct. As a matter of fact, no explanation of any kind was provided either to the FtT or the UT. GPIMC did not appear at either of the costs hearings and were not represented. That of itself might be regarded as further evidence of unreasonable conduct.

35. Notwithstanding the absence of any explanation at the time, I must ask whether there is in fact a reasonable explanation for GPIMC's conduct? Although there is some oblique consideration of this issue by the FtT, their reasoning appears conclusory rather than analytical, perhaps because it is not a question which they address directly. In my view, that was an error. It means that either the FtT failed directly to ask itself the right question when considering the costs order, or if they did, they failed to take into account any of the relevant matters listed at paragraph 33 above in arriving at an answer. Still further, the FtT appeared to regard the application as a matter of discretion, which was also wrong: *Willow Court* makes clear that whether or not the conduct was unreasonable was a matter of objective fact.

36. In addition, there were specific errors of analysis in the FtT's Costs Determination. First, at [69] there was the reference to Mr Gubbay's belief that "in his own way he was doing the best for everyone. Whether this view is misguided is not a matter we need to determine". That was wrong: the FtT appeared to consider the reasonableness of Mr Gubbay's conduct from his own, subjective point of view. But what mattered is whether his conduct was objectively unreasonable. Thus the question of whether or not Mr Gubbay was "misguided" was a potentially relevant consideration: if he thought he was acting reasonably, but an objective observer would say that he was totally misguided and so was acting irrationally, that would indicate unreasonable conduct.

37. Secondly, the FtT made much of the fact that, in their view, the actual issues were "relatively straightforward" [75], which echoed a submission by counsel for Mr

Gubbay at the hearing before the FtT that the issue as to the payment of the service charge was "straightforward" [32]. But I agree with Mr Hutchings KC that that is an irrelevant consideration. The type of claim may be straightforward, but if the claim itself is hopeless or an abuse of the process, it may well have been unreasonably commenced and pursued. It might be very straightforward to demonstrate that a large service charge claim had been made by a claimant who had no actual interest in the building in question, and could not therefore succeed in any respect, but that would not prevent an order for costs being made against that claimant, as a result of his or her unreasonable conduct in commencing and running with such a hopeless claim.

38. Thirdly, there is a repeated suggestion that, in some way, bringing the proceedings was not unreasonable because "the demands were [always] going to be subject to challenge" [66]. The FtT also said in the same paragraph that it was a classic situation "where a management company may well have applied to the Tribunal to seek clarity". I profoundly disagree with that approach. A service charge can only be the subject of a bona fide dispute when the charge is rendered with adequate supporting explanation and information, and a reasonable period is allowed for the lessees to consider that material. If a landlord or managing agent suspects that a service charge is going to be disputed, he should provide sufficient information to enable the lessees to understand the services to which the charges relate and the justification for and basis of the amounts demanded. It is an abuse of the process to commence proceedings like this, without any justification or supporting material, and hope, like Mr Micawber, that some benefit may eventually turn up. Such an approach may lead – and in this case did lead – to proceedings which the FtT themselves described as "a pointless exercise".

39. For all these reasons, it is necessary for this court to re-do the exercise under rule 13(1)(b) and ask itself the relevant question: Could a reasonable person acting reasonably demand £2.4 million, and take that claim to the FtT, in the circumstances which pertained here? In my judgment, by reason of the matters listed in paragraph 33 above, the answer to that question must be a resounding No.

40. At the hearing of the appeal, Mr Bates KC argued that the commencement of the proceedings, and GPIMC's conduct of those proceedings, was reasonable because the FtT had made a number of findings on issues arising out of the proper interpretation of the leases, and what was and was not recoverable by way of service charge. Accordingly, he argued that these decisions of interpretation were of benefit to all parties, something which he said the FtT themselves had acknowledged. In this way, he submitted that it could not be said that either the commencement or the conduct of these proceedings was unreasonable.

41. It seems to me that that argument must fail at every level. First, if GPIMC had wanted a decision in principle on the scope of the leases, and what might be recoverable and what may not, they could have sought such a determination pursuant to clause 27A(3) of the Landlord and Tenant Act 1985. That expressly allows a landlord or managing agent to apply to the FtT for a determination whether "if costs were incurred of any specified description, a service charge would be payable…". That is a sensible process designed to focus the attention and energies of both landlord and tenant on disputed clauses in the leases. It was not the process adopted by GPIMC.

42. Secondly, the evidence made plain that GPIMC were not really interested in the subsidiary disputes about the interpretation of various parts of the lease. They wanted the money which they claimed, or at least as much of it as the FtT might award. That explains why, having sent out the service charge claims on one day, they commenced the FtT proceedings the next. Indeed, on one view, the proceedings were fundamentally deficient because there had not been time for a dispute to crystalise in respect of the service charges before the proceedings were commenced. That ultimately made no difference, of course, because GPIMC recovered no monies at all.

43. Thirdly, the whole focus of the FtT's Determination was on whether the service charges or any part of them were reasonable and/or payable. Their analysis ended at [103] with the damning conclusion that "the budget was not calculated having regard to *any* reasonable cost" (emphasis supplied). Thereafter, doubtless in a laudable attempt to be helpful, between [104] and [114], the FtT made some comments on various heads of expenditure. It was quite clear that these were comments only: see the express words of introduction of [104], set out at paragraph 21 above ("Whilst we do not need to..."). These comments were miles away from the heart of the case.

44. Fourthly, GPIMC cannot now seek to hide behind the FtT's attempt to be helpful, and to try and salvage something from the total failure of all these claims, in circumstances where [104] – [114] contain comments which are almost all adverse to GPIMC, in that the FtT said that many of the heads of claim were not recoverable under the lease. GPIMC are effectively saying to the appellants: "Well, although these particular heads of claim were never reasonable nor justified, we should not have to pay your costs in defending these claims at a tribunal because most of them were not due under the lease either, and now you know that." It is, with respect, an absurd contention.

45. Finally, I reject the suggestion that the FtT themselves thought they had produced a Determination which was useful to both sides. They do not say so, either expressly or impliedly. And, to the extent that they indicated that commencing the proceedings was reasonable because the service charges were always going to be in issue, they were wrong (see paragraph 38 above).

46. Accordingly, it seems to me that the FtT failed to ask themselves directly the questions identified in *Ridehalgh/Willow Court*, and/or failed to take into account all relevant matters. Had they done so, they would undoubtedly have concluded that the relevant conduct was unreasonable.

47. I must add that, if necessary, I do not shy away from saying that, for precisely the same reasons, the FtT reached a conclusion on costs that no reasonable Tribunal could have reached.

48. I accept that the FtT may have been bamboozled by the blurred lines between GPIMC and Mr Gubbay. The applications involving Mr Gubbay personally and Epworth were a separate matter, and there is no appeal in respect of that part of the FtT's Determination. However, perhaps because of the muddle those applications created, it may be that the FtT failed to consider the position of GPIMC separately and, in particular, failed to identify the matters noted at paragraph 33 above. But that does not affect my conclusion that the refusal of the appellants' costs was a decision which no reasonable tribunal could have reached.

5 DISCRETION AND REMISSION

49. Finally, by reference to the second stage of the approach set out in *Willow Court*, Mr Bates argued that, if this court was against him on the second issue, we should remit the matter to the FtT to exercise their discretion afresh, knowing that this court had found GPIMC's conduct to be unreasonable.

50. Subject to the views of my lords, I would decline that invitation. It is clear to me that, having made the finding of unreasonable conduct, this court should go on to exercise its discretion and make an order for costs in favour of the appellants, to be assessed if not agreed. We asked Mr Bates, if the case was remitted, what other submissions there could be that might lead to the result that, although GPIMC's conduct was unreasonable throughout, the FtT should still exercise its discretion in their favour under r.13(1)(b). No satisfactory answer was identified. Moreover, given the unfortunate delay between the original FtT decision and today, it would be a denial of justice if this court were to avoid reaching a final conclusion and remit the question of discretion back to the FtT. In my view, this court is well able to exercise that discretion, and I would do so in favour of the appellants.

51. For these reasons, if my lords agree, I would allow this appeal, and order GPIMC to pay all the appellants' costs of the FtT proceedings, including the hearing, such costs to be assessed under rule 13(7) of the 2013 Rules if they cannot be agreed. That will therefore include the limited costs already ordered.

LORD JUSTICE STUART-SMITH:

52. I agree.

LORD JUSTICE HOLGATE:

53. I also agree.