IN THE UPPER TRIBUNAL **Appeal No. HS/1520/2020**
(ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM THE FIRST TIER TRIBUNAL (HESC)
(SPECIAL EDUCATIONAL NEEDS & DISABILITY)
Tribunal Ref EH886/19/00384

Between

(1) NS
(2) RS

Appellants

and

KENT COUNTY COUNCIL

Respondent

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing date: 26 August 2021
Decision Date: 10 December 2021

Representation: Mr John Friel, counsel (for the Appellants)

(instructed by SEN Legal)

Mr David Lawson, counsel (for the Respondent)

(instructed by the Council)

DETERMINATION

The appeal against the decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) dated 15 July 2020 under file reference EH886/19/00384 is dismissed. The decision of the First-tier Tribunal does not contain an error of law.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the young person in these proceedings. This order does not apply to (a) the young person's parents (b) any person to whom the young person's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the young person where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

REASONS

Introduction

1. This case concerns the question whether the First-tier Tribunal was wrong in law to have held that the Appellants had failed to show that the Respondent had behaved unreasonably at any juncture and that therefore there was no basis on which an order in respect of costs could be made.

2. In order to preserve his anonymity, and meaning no disrespect to him, I shall refer to the Appellants' son only as "G". G is now 21, but has complex learning and

behavioural disorders. The Appellants appeal to the Upper Tribunal from a decision of the First-tier Tribunal which it made after receiving written submissions on 15 July 2020. The Appellants sought an order in respect of costs in the sum of £32,136.80, primarily on the basis that the Council failed to defend the substantive appeal which was heard on 8 April 2020. In its decision on the substantive appeal, on 28 April 2020 the Tribunal ordered that the Council amend G's EHCP by

(1) in Section E, replacing the existing wording with the amendments set out in the final working document

(2) in Section F, replacing the existing wording with the amendments set out in the final working document

(3) in Section I, naming St John's College (Brighton) as the college on a residential basis for 52 weeks a year.

3. Tribunal Judge McCarthy refused the costs application and held that the Appellants had failed to show that the Council had behaved unreasonably at any juncture and that therefore there was no basis on which an order for costs could be made. Permission to appeal was initially refused by Deputy Chamber President Judge Meleri Tudur on 22 September 2020.

Permission To Appeal

4. The Appellants applied to the Upper Tribunal for permission to appeal on 21 October 2020. On 29 October 2020 I ordered an oral hearing of the application for permission to appeal. The application was heard by me on the afternoon of 25 March 2021. The Appellants (who were both present in court) were represented by Mr John Friel of counsel, who appeared before me in person. The Council did not appear and was not represented. The grounds of appeal to the Upper Tribunal were contained in an attachment to the completed form UT4.

5. It seemed to me that there was an arguable case that (a) the Council acted unreasonably in relation to the naming of the placement in Section I of the EHCP for

the reasons set out in the grounds of appeal and (b) in relation to the absence of provision of any evidence to rebut the Appellants' case, again for the reasons set out in the grounds of appeal.

6. I therefore granted permission to appeal in relation to the Council's conduct of the appeal in relation to the costs incurred in the period prior to the Council's concession of a 52 week residential placement on or around 1 April 2020.

7. By contrast I considered that the costs incurred after the Council had conceded a 52 week residential placement on or around 1 April 2020 were incurred not because the Council acted unreasonably, but because the Appellants were determined to have an oral hearing, notwithstanding that the matter could, and in my judgment should, have been determined on the papers.

8. I did not therefore give permission to appeal in respect of any costs incurred by the Appellant after the Council had conceded a 52 week residential placement on or around 1 April 2020.

9. The Appellants therefore needed to serve an amended schedule of costs to reflect the ambit of the permission to appeal which had been granted.

10. I said that, in the course of my judgment on the appeal, I would deal with the question of the desirability (or otherwise) of costs applications in the First-tier Tribunal being dealt with by a Judge other than the Judge who heard the substantive appeal and/or the interim applications. I deal with that matter (and others) in the Guidance at the end of this decision.

11. As I had directed I was also provided with copies of the following:

(1) the order of the First-tier Tribunal on the case management view on 20 March 2020

(2) the response of the parties as to whether they consented to a paper hearing

(3) the order of the First-tier Tribunal of 30 March 2020 listing the matter for a video hearing

(4) the concession of the Council on or about 1 April 2020 concerning the 52 week residential placement at St John's College.

12. As directed, the Appellants served an amended schedule of costs claiming the sum of £29,297.72, split three ways: solicitors' professional fees (including the costs application) of £15,980.72, counsel's fees (including the costs application) of £6,120.00 and expert witness costs of £7,197.00.

13. Also as directed, the Council put in a response to the appeal on 30 April 2021, to which the Appellants replied on 28 May 2021.

14. I heard the appeal on the morning of 26 August 2021. The Appellants were represented by Mr John Friel of counsel (instructed by SEN Legal). The Council was also represented by counsel, Mr David Lawson, who had not appeared below (instructed by the Council itself).

The Decision Under Appeal

15. In his decision dated 15 July 2020 Judge McCarthy stated that

> "2. The appellant alleges the respondent's failures when taken together identify unreasonable conduct in defending the appeal. The key points relate to:
>
> a) The respondent did not initially name a post-16 educational placement in the EHCP under appeal; then it named a placement which could not deliver the special educational provision specified in the plan; then it conceded the issue and named the appellant's preference but only on a 38-week residential placement and not the 52-week placement requested and agreed with Social Care;
>
> b) The respondent did not provide any documentary or other evidence in support of its position despite being given more time by the Tribunal to comply with directions;

c) The respondent did not undertake to update the EHCP, retaining old and no longer relevant words, until the appellant[s] supplied a working document in January 2020;

d) The respondent challenged the need for a waking-day curriculum despite the previous EHCP specifying a 38-week residential placement because of the need for a waking-day curriculum and the other evidence provided in the appeal; and

e) The respondent disputed issues relating to a positive behaviour support plan and a total communication environment despite not having any evidence to support its position.

3. The respondent opposes the application and says it did not act unreasonably during the proceedings. It highlights the following actions, which it says shows its behaviour was reasonable:

a) The respondent agreed to the appellant[s'] request to vary the final hearing date so further reports could be obtained;

b) The respondent agreed to name the appellant's preferred placement in January 2020 based on a 38-week per year residential placement because a 52-week placement could not be secured at St John's College until September 2020;

c) The respondent was content for the remaining issues in dispute to be decided on the papers but the appellant[s] did not consent and requested an oral hearing;

d) The respondent agreed to name the appellant[s'] preference on a 52-week residential basis and informed the appellant and the Tribunal on or around 1 April 2020, a week before the hearing; and

e) The respondent was entitled to argue that the issues relating to waking-day curriculum, a positive behaviour support plan and a total communication environment remained in dispute and would need to be determined by consideration of the evidence.

4. The appellant[s] ha[ve] provided comments on the respondent's submissions. For the most part, the further comments are no more than repetition of the application for costs. The appellant[s] believes the respondent should not have opposed the appeal because of the lack of evidence and by opposing the appeal the respondent acted unreasonably.

…

9. Establishing whether there has been unreasonable conduct in

the proceedings is a pre-condition for making a costs order and therefore I begin by considering if the evidence and arguments reveal the respondent acted unreasonably when defending the appeal.

10. The appellant[s'] arguments are misguided because they fail to consider the respondent's behaviour objectively and thereby fail to examine whether the conduct permits of a reasonable explanation. Instead, the appellant[s'] arguments seek to give a single interpretation to the respondent's conduct and having decided the respondent's behaviour was unreasonable, seek to support that conclusion with examples and as a result suffer from confirmation bias.

11. When looked at objectively, the respondent's behaviour at all stages of the proceedings has a reasonable explanation. The fact the respondent changed its position at several junctures is evidence it was not harassing the appellant[s] or acting in a vexatious manner because the respondent was not fixed with one view and was willing to review its position in light of additional arguments and evidence.

12. The fact the respondent did not agree that [G] continued to require a waking-day curriculum was a legitimate position it could take given that [G] was being assessed for social care and it would be unclear whether the residential placement was required to meet special educational needs or social care needs. As the appeal developed, this became clearer and the respondent changed its position. It was also open to the respondent to maintain its position regarding the behaviour support plan and a total communication environment until the appellant's evidence had been tested, which occurred at the hearing. In this context, I recall that the Tribunal admitted the appellant[s'] late evidence only at the hearing, including the evidence regarding the Pathway Plan.

13. In reaching this conclusion, I mention that the appellant[s] ha[ve] relied on a common misconception that where one party provides evidence and there is no rebuttal evidence, that the Tribunal will be bound to find in favour of the party that provided the evidence. That is misconceived because the Tribunal must assess the evidence and decide if it is reliable. It also fails to appreciate that a party is entitled to defend a weak position and it would be contrary to justice for that principle to be undermined.

14. The only concern I have regarding the respondent's conduct was when it named a college that was unable to deliver the

> special educational provision specified in [G]'s EHCP. But even that appears to have a reasonable explanation, in that the respondent was expected to name a placement. The fact it chose poorly is not sufficient to conclude that its conduct reached the high threshold necessary to be considered unreasonable.
>
> 15. Having considered all the arguments and evidence, I am satisfied the appellant[s] ha[ve] failed to show the respondent behaved unreasonably at any juncture and therefore there is no basis on which an order in respect of costs can be made."

The Costs Jurisdiction

16. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") provides that:

> "(1) The costs of and incidental to–
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) "wasted costs" means any costs incurred by a party–

> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred,
>
> the relevant Tribunal considers it is unreasonable to expect that party to pay.
>
> (6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf".

17. By virtue of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the 2008 Rules"), it is provided that

> "10(1) Subject to paragraph (2), the Tribunal may make an order in respect of costs only—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or
>
> (b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.
>
> …
>
> (3) The Tribunal may make an order in respect of costs on an application or on its own initiative.
>
> (4) A person making an application for an order under this rule must—
>
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
>
> (b) send or deliver a schedule of the costs claimed with the application.
>
> (5) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends—

> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
>
> (b) notice under rule 17(6) that a withdrawal which ends the proceedings has taken effect.
>
> (6) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—
>
> (a) giving that person an opportunity to make representations; and
>
> (b) if the paying person is an individual, considering that person's financial means.
>
> (7) The amount of costs to be paid under an order under paragraph (1) may be ascertained by—
>
> (a) summary assessment by the Tribunal;
>
> (b) agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person"); or
>
> (c) assessment of the whole or a specified part of the costs, including the costs of the assessment, incurred by the receiving person, if not agreed.
>
> (8) Following an order for assessment under paragraph (7)(c), the paying person or the receiving person may apply to a county court for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis.
>
> (9) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed".

The Authorities

18. The parties cited a number of authorities to me. Some of them are merely fact-specific illustrations of the general principles on which adverse costs are made in the SEND jurisdiction and raise no point of principle. Some are contained in citations of them in other cases and do not need to be repeated. Others do not fall for further consideration in the light of the conclusions which I have reached and I have not therefore cited all of them in this decision, but only those which are germane to my decision.

19. In ***HJ v. Brent LBC (SEN)*** [2011] UKUT 191 (AAC) Upper Tribunal Judge Jacobs said of the jurisdiction under rule 10 of the 2008 Rules

> "6. Three issues arise: Did the local authority or its representative act unreasonably in defending or conducting the proceedings? If so, should the Upper Tribunal make a costs order against the authority? If so, in what amount?
>
> *The caselaw*
> 7. The meaning of 'unreasonable' was discussed by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 232:
>
> > '"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
> >
> > [The term "negligent" was the most controversial of the three. It was argued that the 1990 Act, in this context as in others, used "negligent" as a term of art involving the well-known ingredients of duty, breach, causation and damage.
> >
> > Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach:
> >
> > (1) As already noted, the predecessor of the present Order 62 rule 11 made reference to "reasonable competence". That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders.
> >
> > (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the

> latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.
>
> We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.][1]
>
> …
>
> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."[2]

The Court was there concerned with wasted costs, but the reasoning is equally applicable to unreasonable conduct.

8. The Court of Appeal considered an equivalent provision to rule 10(1)(b) in *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398. The case concerned a claim for unfair dismissal and breach of contract before an employment tribunal. Having secured a postponement of the hearing on the ground of ill health, the claimant then withdrew his claim. The tribunal ordered him to pay the whole of the employer's costs on the ground that he had acted unreasonably. Mummery LJ discussed a number of points of general relevance.

9. First, the proper issue was the conduct of the proceedings, not the decision to withdraw:

[1] These paragraphs were not cited by Judge Jacobs, but for the sake of completeness it is convenient to cite them here as part of the quotation.
[2] This paragraph does not appear in ***HJ***, but was cited by Judge Jacobs when he repeated his exposition of the law in ***Buckinghamshire CC v. ST (SEN)*** [2013] UKUT 939 (AAC).

> ’30. … The crucial question is whether, in all the circumstances of the case, the claimant withdrawing his claim has conducted the proceedings reasonably. It is not whether the withdrawal of the claim is in itself reasonable …’

10. Second, the costs that may be awarded are not limited to those that are attributable to the unreasonable conduct:

> ‘40. … The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion [whether to order costs], but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred.’

11. Third, costs must not be punitive:

> ‘41. … the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct.’

12. Fourth, the unreasonable conduct is relevant at three stages:

> ‘41. … As I have explained, the unreasonable conduct is a precondition to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.’

13. The decision of the Court of Appeal in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919 is also relevant. The court decided that: (i) a party’s ability to pay is not a relevant factor; and (ii) an award should cover as a minimum the costs attributable to the unreasonable behaviour.

…

16. I cannot award costs just because the father effectively won his case. That would undermine the restricted basis of the power under rule 10(1)(b). It is always possible to look at matters after the event with the benefit of hindsight. I must not do that.

17. In making my assessment, it is not proper to second guess a party’s decisions in the course of litigation. Merely because particular evidence in the end secured a particular outcome, it does not follow that it was unreasonable to defend the case or

> that it was unreasonably conducted … The significance of individual reports have to be considered in the context of the way the evidence unfolded, as well as in the developing circumstances of the availability of school places and other factors. The reasonableness of a party's conduct has to take into account the ongoing and evolving nature of the proceedings.
>
> …
>
> 20. As to the last minute decision to concede, the authority did ask for a postponement. That would have avoided the costs of attendance, but the First-tier Tribunal refused the application. Moreover, a hearing was probably necessary in order to ensure that the disposal of the case was formally correct.
>
> 21. It would be unreasonable if any officers of the authority had acted with any improper motive or for an improper purpose in the handling of the case. However, I do not accept that there is any basis for accusing the officers concerned of doing so. There is no evidence to support such allegations or implications. They may reflect the father's genuine perception, but there is no objective basis for them."

20. In considering the rule 10 jurisdiction in ***MG v. Cambridgeshire CC*** [2017] AACR 35, [2017] UKUT 172 (AAC), Upper Tribunal Judge Rowley stated that

> **"Guidance**
> *The exception rather than the rule*
>
> 26. It is crucially important for me to begin by emphasising that nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs.
>
> 27. Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious cases. In other words, an order for costs will be very much the exception rather than the rule. The observations of Openshaw J in *In the matter of a Wasted Costs Order made against Joseph Hill and Company Solicitors* [2013] EWCA Crim 775, albeit made in the context of wasted costs orders in criminal proceedings, are no less relevant to applications for costs under rule 10:

> "We end with this footnote: there is an ever pressing need to ensure efficiency in the Courts: the judges, the parties and most particularly the practitioners all have a duty to reduce unnecessary delays. We do not doubt that the power to make a wasted costs order can be valuable but this case, and others recently before this Court, demonstrate that it should be reserved only for the clearest cases otherwise more time, effort and cost goes into making and challenging the order than was alleged to have been wasted in the first place."

Three-stage process

28. In considering an application for an order for costs on account of "unreasonable conduct" under rule 10(1)(b), a three-stage process should be followed:

(1) did the party against whom an order for costs is sought act unreasonably in bringing, defending or conducting the proceedings?

(2) if it did, should the tribunal make an order for costs?

(3) if so, what is the quantum of those costs?

29. So, first the tribunal must determine whether there has been relevant unreasonable conduct. There is no element of discretion. Rather, appropriate findings must be made on an objective basis. Any further analysis of the first question is beyond the scope of this decision.

30. In contrast to the first, the second and third questions involve the exercise of a broad discretion. I must emphasise the crucial second question. It is all too easy for a tribunal to fall into the trap of, having found "unreasonable conduct", moving straight to considering the amount of costs which should be awarded, without giving any thought as to whether an order for costs should be made at all. In considering the second question the tribunal will have regard to all the circumstances. It will bear in mind, for example, the nature of the unreasonable conduct, how serious it was, and what the effect of it was. In appropriate cases the tribunal may consider the conduct of the parties more generally, and whether it is proportionate to make an order for costs. In addition, by rule 10(6) the tribunal may not make an order for costs against a party who is an individual without first considering that person's financial means.

> *Summary or detailed assessment?*
>
> 31. By rule 10(7) the amount of costs to be paid under an order may be ascertained by summary assessment, agreement of the parties or detailed assessment. It will be a rare case indeed which necessitates a detailed assessment. A summary assessment will be more proportionate, and there will be far less delay. Naturally, a tribunal must clearly state whether the assessment is to be a summary or detailed one."

21. Finally, with regard to the roles of an EHCP, Judge Ward said in ***East Sussex County Council v KS (SEN)*** [2017] UKUT 273 (AAC)

> "83. … Mr Lawson as noted above submitted that an EHC plan is used to fulfil a number of roles: for instance, as a procedural document for use in the classroom, as a list of what needs to happen and as a form of pleading before tribunals. I accept that it may have that multiplicity of roles and that each may have differing implications for how it is drafted. A document for use by professionals delivering services to a child or young person it may be, yet its statutory underpinning means that it also defines rights and responsibilities. While nobody would wish to see an EHC plan as a "lawyers' playground", nor can its legal implications be ignored."

22. This present decision should also be read in the context of my earlier decision in ***JW v Wirral MBC*** [2021] UKUT 70 (AAC), which I decided on 16 March 2021.

Late Evidence

23. At the hearing Mr Lawson sought to put in a bundle of additional material. Some of it duplicated what was in the First-tier Tribunal bundle. Some of it had not been before the Tribunal and some of it related to the parallel judicial review proceedings. I read it *de bene esse* on the day of the hearing without then ruling on its admissibility. I have in fact put it on one side in reaching my conclusions. The only date which I have relied on, and which is a matter of public record, is that of 13 December 2019, when the Council conceded the naming of St John's College in the acknowledgment of service in the judicial review proceedings, and even that date can be independently verified from the evidence in the original First-tier Tribunal bundle (in paragraph 5.5 of Ms Warman's report).

The Appellants' Submissions

24. The issue, submitted Mr Friel, was the conduct of the Council prior to the concession of the residential 52 week placement on 1 April 2020. There were basically three periods of conduct which the Appellants submitted should be considered:

(1) Period 1 – the Council nominated no post-19 provision whatsoever, in circumstances where there was no social care support for G, who had severe difficulties which would require lifelong support from Adult Social Care, and no educational provision, despite him being in a specialist weekly residential placement until July 2019

(2) Period 2 - in response to the Tribunal's order, the nomination of Brogdale, a college which was non-residential, with no discussion or prior knowledge. It was particularly important that Brogdale was deficient in that:

• it was a 3 day a week provision, not a full-time provision and there was no evidence and had never been any evidence supporting a 3 day week provision.

• this was particularly deficient because there was no social care provision.

• the plan required an occupational therapy assistant to deliver programmes daily. Brogdale did not have an occupational therapy assistant (or occupational therapy available).

• the plan required programmes of speech and language therapy to be delivered daily. Brogdale had no facilities to deliver such a provision.

• G tended to escape and required support so that he did not escape in the community. He could present a danger because of noise to babies or other persons in the community making noise. It was not a secure site and had no ability to support him securely.

• it did not have staff trained in supporting learners with autism or sensory difficulties.

• the plan, although very strangely amended, still provided for an element at least of residential provision, and Brogdale was not a residential provision.

Brogdale continued to be nominated by the authority until 24 January 2020.

(3) Period 3 – 24 January until 1 April: the Council conceded a weekly placement, although not on an education basis, solely on a social care basis.

25. It was an undisputed fact that the Council throughout the process failed to lodge any evidence whatsoever. The sole information lodged in response to the original appeal was simply that the Council would oppose the appeal. No positive case was ever put forward. That was a breach of the 2008 Rules, see rule 21(2)(d) and (e).

26. The plan itself stated only that "A mainstream further educational provision would be nominated". The Tribunal stated "No college was nominated initially although subsequently the LA proposed to name Brogdale Community Interest College, a special post-16 institution in Section I of [G]'s ECH Plan".

27. Although denied in the response and submissions to the appeal, regulation 12 of the Special Educational Needs and Disability Regulations 2014 (as amended) ("the 2014 Regulations"), dealing with the form of an EHCP stated in relation to Section I of the plan:

> "12(1) When preparing an EHC plan a local authority must set out ….
>
> (i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by a child or young person and the type of institution or where the name of the school or other institution is not specified in the ECH plan, the type of school or other institution to be attended by the child or young person (Section I) and
>
> (j) in each section must be separately identified".

28. Even stretching the English as far as it would go, a mainstream further educational provision was not an institution nor was it a type of institution or a college. It was also relevant that the plan was dated 7 May 2019, giving the local authority more than ample time to identify an institution, which was not done even though an appeal was lodged. G had left school on 31 July 2019, and despite his severe needs, there was no social care provision, nor was any college of further education on offer. When the appeal was lodged, a waking day curriculum was requested for St. John's College.

29. The appeal was registered with the Tribunal on 16 August 2019. The local authority was directed to submit a response by noon on 14 October 2019.

30. On 26 November 2019 the Deputy Chamber President ordered the Council to produce the following:

• a response

• to include G's views

• the reasons for opposing the appeal.

31. What was lodged on 10 January 2020 did not comply with that order, so the Council's conduct should be looked at as being in breach of the Tribunal's own order. This was a second breach of the 2008 Rules.

32. It was on record that there were separate judicial review proceedings, which resulted after 5 months in the Council conceding a weekly boarding place, 4 to 5 nights a week, at St. John's College. Despite that concession, the Council did not arrange for a place, and the email from Sarah Giles at Kent.gov.uk on 23 January, plainly made it clear to the parents "I have been advised that until the EHCP is finalised, KCC are not legally accountable for the placement. This is because it is named in the working document only. You need to know if [G] starts. This could leave you liable for costs". This meant that the Appellants would have to pay the fees which they could not afford; thus the Council caused a delay.

33. As a result of further meetings between the Appellants and the Council, two social workers considered that a 52 week residential placement was necessary, but this was decided in January 2020 (about the 24th), but it took until 1 April for the Council to concede even a social care based provision.

34. Brogdale was not formally withdrawn until after all the Appellants' costs were incurred for the preparation of the case. The Council's further information served on 10 January 2020, well before the concession of a weekly boarding place on social care grounds at St. John's College, made it clear that what was being sought was a 52 week, not a 38 week, residential placement. It was only after that date that the Council arranged on 29 January for G to start, but a concession for 52 weeks was conceded on social care grounds only, not in relation to educational provision or needs, although a 52 week placement was conceded on 1 April. It was also relevant that page 10 of the Council's response to the appeal, in its summary where it asked for agreement from the chronology, was therefore quite substantially wrong in that it did not take into account the Appellants' further information and the contents of the further information and was factually wrong when it did not take into account that a 52 week residential provision was sought, contained in the Appellants' further information. No mention was made of that at all, or the reports had simply been misread.

The Authority's Conduct

Period 1

The Situation up to 19 October, Brogdale

35. By s.42 of the Children and Families Act 2014 ("the 2014 Act"), the Council stood under a duty to secure special educational provision and health care provision in accordance with the ECHP:

> "42(1) This section applies where a local authority maintains an EHC plan for a child or young person.
>
> (2) The authority must secure the specified special educational provision for the child or young person …".

36. It was trite law that s.42 applied irrespective of whether a parent appealed or not. It was, however, more important to note that the provision specified in the plan could not be delivered, simply because there was nowhere to deliver the provision. The Council had not named a college or type of institution, and the plan, until 19 October 2019, simply was not delivered, despite this being a case in which an appeal had been lodged, and despite the plan having been issued in May 2019.

Period 2
The Nomination of Brogdale

37. Judge McCarthy plainly had concerns about the conduct of the Council, when he stated "The only concern I have regarding the Respondent's conduct was when it named a college that was unable to deliver the special educational provision specified in [G]'s EHCP. But even that appears to have been a reasonable explanation, in that the Respondent was expected to name a placement. The fact it chose poorly is not sufficient to conclude that the conduct reached the high threshold necessary to be considered unreasonable."

38. In so doing, Judge McCarthy make a mistake of law. Firstly, any nomination of a college which could not deliver the provision was a plain and obvious breach of s.42, the duty to secure.

39. Secondly, the Council's duty under s.42 must also be read together with its duty under s.39, and equally the terms, had there been a parental request (which there was not) of s.40 were relevant:

> **"39. Finalising the ECH plans: Request for particular school or other institution**
> (1) This section applies before the end of a period specified in the notice under Section 38(2)(b), a request is made to a local authority to secure a particular school or other institution is named in an ECH plan.
>
> (2) The authority must consult –
>
> (a) the governing body, proprietor or principal of the school or other institution

> (b) the governing body, proprietor or principal of any other school or other institution the authority is considering having named in the plan, and
>
> (c) if a school or other institution is within paragraph (a) or (b) and is being maintained by another local authority that authority.
>
> (3) The local authority must secure that the EHC plan names the school or other institution specified in the request unless sub-section (4) applies.
>
> (4) This sub-section applies where -
>
> (a) the school or other institution requested is unsuitable for the age, ability, aptitude or other special educational needs for a child or young person concerned, or be the attendance of a child or young person at a requested school or otherwise would be incompatible with –
>
> (i) the provision of efficient education for others, or
>
> (ii) efficient use of resources.
>
> (4) Where sub-section (4) applies, the authority must secure that the plan –
>
> (a) names a school or other institution that the local authority thinks would be appropriate for the child or young person, or
>
> (b) specifies a type of school or other institution which the local authority thinks would be appropriate for the child or young person".

40. Further, s.40 was also relevant, which dealt with the situation where there was no request for a school or other institution and in those circumstances

> "40(2) The authority must secure that the plan –
>
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or
>
> (b) specifies a type of school or other institution which the local authority thinks will be appropriate for the child or young person".

41. In those circumstances, Judge McCarthy plainly erred in law in his decision. Not only was it impossible to secure provision in s.42, which took effect once a local authority named a school or other institution, but more importantly, the conduct of the Council was to deliberately name an institution which it knew or should have known was inappropriate because it could not deliver the provision.

42. The conduct of the Council, which Judge McCarthy plainly saw through, and its conduct in determining that it named any institution which was readily available rather than one which could secure the provision required by G, was not a correct decision in law. Where Judge McCarthy went wrong was to assume that simply naming a provision which could not meet needs and was not appropriate could be lawful in any circumstances.

43. Judge McCarthy was wrong in paragraph 14 in stating that the Council chose poorly. It did not choose poorly; it chose to act unlawfully.

44. Being aware of that situation, and having agreed to make a placement on social care grounds at St. John's College, the Council still nominated Brogdale until on or after 24 January. By 10 January, the Council was well aware, due to the service of the further information, that a 52 week placement was sought. It however maintained Brogdale until 24 January.

Period 3

The Further Element of the Council's Conduct

45. Following 24 January, the Council, having agreed the placement, refused initially to implement the placement. The email of 23 January from Sarah Giles of Kent.gov.uk plainly warned the Appellants that if they put G at the college they would be responsible for the costs. This then had to be sorted out and it ultimately was sorted out by the end of January.

46. Nonetheless, following the meeting in late January, the social workers assessing G agreed that they would recommend a 52 week placement. However, while this went to Panel, it was not conceded until 1 April.

47. Throughout that period there was absolutely no evidence submitted to the Tribunal. Throughout the period the Council remained in breach of Judge Tudur's order. It was relevant that within the judicial review proceedings, as a background fact, even the assurances given to the High Court on judicial review, that a social care assessment would be finalised by 13 January, did not come to pass and it was not served until 19 January. Having then agreed at least a weekly placement, the Appellants were prevented from taking up the placement, due to the threat of having to meet the school fees (see the email Sarah Giles of 23 January). Finally it was only on 1 April, despite agreement by the social workers that a 52 week placement was required, that the Tribunal was informed of that fact, although this was a social care, not an educational, provision.

48. The issues then went to the Tribunal (which the Upper Tribunal had determined could have been decided on the papers). However, all the relevant evidence had been served prior to 24 January when Brogdale was conceded and withdrawn. By this point, virtually all of the Appellants' expenditure had been incurred to prepare the case, with all relevant evidence served by that date.

49. The Council's response did not address the point that the Tribunal was evidence-based. Leaving aside the deliberate nomination of Brogdale dealt with above, in breach of its statutory duty the Council provided no evidence to put before the Tribunal on a full hearing, whether on the papers or otherwise. In addition, no grounds of resistance were ever given in breach of the 2008 Rules and Judge Tudur's order.

50. For those reasons it was submitted that the appeal should succeed.

The Council's Submissions

Introduction

51. For the Council Mr Lawson noted that the Appellants had permission to appeal the refusal of their application for a costs order on the basis of the following particular issues:

(a) in relation to naming the placement in Section I of the EHCP. For the period from 14 October 2019 until 13 December 2019 the Council nominated Brogdale College, a third sector provider. By 13 December 2019 the Council agreed to name St John's College, the provision sought by the Appellants (see the Acknowledgment of Service from the High Court in the judicial review proceedings: "R is content to name St John's College in section I of the Working Document", at para 42). The Appellants were clear that St John's College was agreed when they filed their Further Information on 10 January 2020. What remained to be agreed was the number of days and weeks of the residential placement. Judge McCarthy said he considered the naming of Brogdale and concluded that it did not merit a costs order.

Mr Lawson submitted that the Appellants gave the impression that the agreements were later and more limited than they were. For example, "While it is correct, following a CMC on the 20th March 2020, that formal agreement was made for a 38 week placement…". The Appellants might be putting a lot of weight on the word "formal", but a residential placement in term time was agreed more than 3 months before that date (13 December 2019, the same as G's placement at his previous school) and that placement was agreed to include weekends by 24 January 2020.

(b) in relation to the absence of the provision of any evidence to rebut the Appellants' case.

Mr Lawson submitted that first, the documents provided had to be seen in the context of what was in issue. The Council had conceded placement almost 1 month before the evidence deadline – the evidence which it could be expected to serve needed to be seen in that context (recalling also that the question was whether the Tribunal could properly conclude the authority was not behaving unreasonably). The Council provided[3] support plans, annual review documents and a clinical psychology assessment from Helen Allison School and a very thorough Pathway Plan, setting out a basis for domiciliary care (as opposed to a residential placement). That reflected the documents reasonably available to a local authority in that situation and that they were relevant to

[3] The Pathway Plan was filed by the Appellants but, of course, drafted by the Council.

the issue remaining, which was the 14 weeks of the year when G would not be at St John's College. Judge McCarthy, subsequently supported by Judge Tudur, explained that a costs order on this basis would be contrary to the approach in the special educational needs jurisdiction and that (1) the Council's changes of position showed it was responding to the evidence; (2) it was legitimate for the Council to wait for its social care assessment; (3) a party was allowed to test the other's evidence at a hearing.

The Proceedings in the Tribunal

52. Mr Lawson submitted that it was important to see the appeal in the factual context of the case as it was in late 2019 and early 2020. This was one of those cases where the Appellants' points failed when the chronology was clear:

9 October 2019: SEN Legal instructed

21 October 2019: SEN Legal requested an extended timetable

15 November 2019: Tribunal set 10 January 2020 as the evidence deadline

13 December 2019: The Council agreed to name the Appellants' preferred College in the EHCP

31 December 2019: The Council provided a working document confirming a placement at St John's College for 38 weeks excluding weekends (4 nights per week)

10 January 2020: The Appellants' expert reports were served. The reports supported residential provision, but not for a particular number of weeks. The Appellants' submission recorded their awareness that residential provision at St John's College was already agreed

22 January 2020: The report of Ms Warman and addendum report of Professor Beadle-Brown were served. Ms Warman's report supported 52 week provision. This was the first and only evidence for 52 week provision.

24 January 2020: The Council confirmed a 7 day placement for 38 weeks per year with extensive domiciliary care in the remaining 14 weeks. It asked the Appellants for a working document/amendments for sections B and F to facilitate G's placement at the college

31 January 2020: The Pathway Plan confirmed the 38 week placement with care support in the other 14 weeks

January 2020: G started at his preferred college

13 February 2020: Hearing date listed.

53. Thus by 13 December 2019 the Appellants had obtained residential provision at their chosen college. G started at that college in January 2020. By then the Appellants knew that it was a 7 day placement for 38 weeks of the year. The evidence supporting 52 week provision and the working document reflecting it came with the late expert evidence on 22 and 24 January 2020 respectively. There was no direction for that evidence. It was admitted in evidence at the hearing. The Council had relevant evidence on the remaining point in issue, i.e. the 14 weeks of provision outside school terms.

54. The Council relied on (1) the short period in the appeal before St John's College was agreed; (2) that that was over 1 month before the direction for the service of evidence; (3) its detailed Pathway Plan which provided a basis for an alternative to a 52 week placement and which it reasonably offered to implement; (4) the limited evidence in favour of a 52 week placement – there was no evidence at all until Ms Warman's report and then her report was the only evidence; (5) the Council's evidence needed to be seen in the context of the very narrow issues.

55. Much of the appeal to the Upper Tribunal was about ordering a 52 week placement and that was reflected in the Upper Tribunal's request to know when that was conceded. However, the issue of 52 week provision only arose during the appeal – indeed the only evidence for 52 week provision was served just 3 weeks before the

date of the hearing (which the Tribunal then put back for lack of Tribunal availability). It was difficult to see that resisting a point at that stage in a case was a basis for a costs order for the earlier preparation of the case.

56. Much of the evidence did not support a 52 week placement. The eventual request for a 52 week placement was based on a few paragraphs in two reports – only one of which actually said that 52 weeks was required. The position was:

(a) the therapists did not express a view: Ms Horswell, the speech therapist and Ms Eriksen, the occupational therapist did feel able to say that residential provision was required, but did not say it needed to be for 52 weeks.

(b) Ms Long, the social worker, expressly envisaged that G's need beyond term time could be met other than at the College (which was what the Council suggested), although she was against it. She did not say that a 52 week college placement was required.

(c) Professor Beadle-Brown was in favour of residential provision, but again did not express a view about the number of weeks per year.

57. That was the evidence filed according to the directions order. Two weeks later additional reports were served (which were admitted at the hearing: decision paragraph 3):

(a) Professor Beadle-Brown filed an undated addendum report explaining that she considered that 52 weeks "would be appropriate and indeed in G's interest as he transitions to adulthood". Of course that was not the test and the Tribunal had to find that provision is "reasonably required" (***A v. Hertfordshire CC*** [2007] ELR 95).

(b) Ms Warman, the educational psychologist, provided the only evidence that 52 week provision was required (paragraphs 13.2 to 13.4). In places this was put as "A 52 weeks placement will provide opportunities for G to learn…" i.e. terminology suggesting a benefit and not a requirement (and hence outside ***A v. Hertfordshire CC***). It was

really paragraph 13.3 of Ms Warman's report which was relied on by the Appellants: "it is essential for the next three years that he receives a 52 week placement".

58. The Council proposed in the Pathway Plan how needs would be met across the year. The fact that proposal did not proceed did not make the Council's approach unreasonable.

59. A 52 week placement was a significant change of provision for G:

(a) G was at a residential placement until he was 19 for 4 nights of the week during term time. The Council was not unreasonable to consider the evidence relied on in support of a change to 7 nights per week for 52 weeks of the year. After the initial judicial review proceedings, 38 weeks were proposed and there was a social care plan for the remainder of the year.

(b) G had been at the same school since he was 10. A change of school was significant and the appeal was not just seeking a continuation of previous provision. G was coming to the end of his education under an EHCP (at the latest when he was 24, but there was no assumption that provision continued to that age). It was not unreasonable that that was not conceded before 13 December 2019.

60. The costs application to the Tribunal was confused on these points. It sought to present the Council as resisting evidence by referring to an order that an attendance form be submitted and then stated "The Authority had a further chance to reconsider when, on 22 January, late evidence including the report of Stephanie Warman, educational psychologist, and a second one by Professor Julie Beadle-Brown was sent to Kent County Council and the Tribunal". First the link of these points was a non-sequitur. Secondly, this was not a "further chance", but a first chance – this was the first time that the Appellants had set out a case for 52 week provision. It was misleading to call that a "further chance" – the Council had already conceded the key points in the appeal as made by the Appellants before that date (i.e. residential provision at St John's College for 38 weeks per year and more time than G had resided at his previous school). The Council now had a first chance to consider the new point of 52 week

provision. Again, the Tribunal did not make an error of law in finding that the Council was not unreasonable in its approach to that issue.

61. The costs application really came down to arguing that the evidence for a 52 week placement appeal had to lead to a quicker concession – an approach unsupported in any of the earlier cases and, in fact, contrary to them. That principle would have a significant impact on the special needs jurisdiction, particularly if applied to equally to appellants and on the basis that rules applied equally to unrepresented parties as to represented parties.

62. The Appellants' reply (28 May 2021) made a lot of factual assertions, but seemed to come down to the same thing (1) the Appellants asked for 52 week provision on 10 January 2020 and (2) served evidence supporting it on 22 January 2020 (reply paragraph 13). It made no sense to say that the Council was arguing for Brogdale until 24 January 2020 (reply paragraph 14) when (i) that was conceded in the High Court in mid-December 2019 (ii) at the end of December a working document was provided specifying St John's College and (iii) in January the Appellants' own further information stated that St John's College was agreed. Indeed the reply of 28 May 2021 went on to say that the Appellants' own further information confirmed on 10 January 2020 that St John's College was already agreed (reply paragraph 26). The Further Information defined the issues remaining as including the extra 14 weeks of provision and stated that the Appellants would quickly send the Council a working document (without which progress towards settlement could not be made).

Appeals

63. Mr Lawson submitted that many of the points made by the Appellants were about what they said that the Council did wrong in conducting the appeal, rather than arguments that Judge McCarthy's decision erred in law. To the extent that those points about the Council's conduct of the appeal arose, many of them were wrong, but the starting point was to identify the challenge in law to Judge McCarthy's decision.

64. S.11(1) of the 2007 Act allowed an appeal to the Upper Tribunal only "on any point of law arising from a decision". The same principles of permission to appeal applied to

costs appeals as for other appeals, ***R (Nwankwo) v. Secretary of State for the Home Department*** [2018] 1 WLR 2641 at [45], where the Court of Appeal also noted:

> "It is inherent in the nature of a costs decision that it will usually be a discretionary one. Accordingly it may well be difficult in practice for a claimant to succeed in persuading a tribunal or court that there is any real prospect of success in an appeal".

65. That in turn reflected the principle that discretionary decisions

> "… are decisions which involve balancing against one another a variety of relevant considerations upon which opinions of individual judges may reasonably differ as to their relative weight in a particular case. That is why they are said to involve the exercise by the judge of his 'discretion'", ***Birkett v. James*** [1978] AC 297.

66. ***McPherson v. BNP Paribas (London Branch)*** [2004] ICR 1398 stated:

> "Unless the discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong, an appeal against a tribunal's costs order will fail."

67. Discretionary decisions were often challenged by asserting that the reasoning was wrong (although the Appellants had not identified specific points which were unreasoned) or that there were misdirections. In ***Piglowska v. Piglowski*** [1999] 1 WLR 1360 the House of Lords considered an appeal against a judgment of the Court of Appeal which found that a judge had made apparently fundamental errors. Lord Hoffman said:

> "[judicial] reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.

68. The Court of Appeal recently looked at the implications of how cost applications are determined in ***R(RS) v. Brent LBC*** [2020] EWCA Civ 1711:

> "36. The final argument of Mr Johnson, lest he was wrong on his other points, was that this was a case where the Judge received only brief submissions in writing and was asked to make a decision on the papers. He did not have the benefit (that we undoubtedly have had) of detailed written submissions and close oral argument. In *R(Parveen) v Redbridge LB* [2020] EWCA Civ 194 ("*Parveen*"), the Court of Appeal has, in effect, warned this court to be chary of interfering in the exercise of discretion by first instance judges on costs matters. Such judges are often required to take relatively rough and ready decisions, often on the papers only, and it is inimical to an efficient administration of justice if the appeal court pores over the fine details and picks holes in findings. A judge's decision should not be overturned simply because the appellate court, after far fuller argument, might take a different view. In *Parveen* the outcome pivoted upon a variety of non-legal matters. The Court was attracted to certain conclusions that the costs judge, on a relatively rough and ready basis, had not considered persuasive. The Court nonetheless dismissed the appeal and emphasised that, bearing in mind the quite different nature of the hearing before the costs judge and that before the appeal court, the appeal court should only interfere if the conclusion of the costs judge was not " open to him ". The position would have been different had the result been unjust or perverse or had there been an error of law (ibid paragraph [54])."

69. The decision of Judge McCarthy set out the basis of the application made to the Tribunal and gave detailed reasons why he concluded that the Council's approach to the appeal was not unreasonable, dealing with grounds there advanced. The Council submitted that there was no error of approach – Judge McCarthy was right for the reasons he gave and the closer one looked at the detail the less there seemed to be in the costs application. However, the first challenge for the Appellants was identifying an error of approach by Judge McCarthy which allowed the underlying issue to be re-considered[4]. It was difficult to identify challenges to Judge McCarthy in the grounds of appeal in respect of points given permission to proceed.

[4] For the avoidance of doubt, even if an error of approach were identified, the Council said that the decision was right and the same decision – no order as to costs – should be reached again.

Alleged Failure To Follow Procedure

70. The Appellants asserted that the Council was in breach of various technical or procedural points. None of these were included in the grant of permission by the Upper Tribunal and only the first was made in the application to the Tribunal below. They were dealt with briefly, subject to the primary submission that they were not in issue.

71. In any event none of the points should succeed:

(a) the Appellants said that the plan "did not specify a college or type of institution" as required by regulation 12 of the 2014 Regulations. That was simply wrong. The Appellants' own appeal stated "The Local Authority has named a type of placement in Section I of G's EHCP…". The appeal did not say which plan was being criticised, just "its amended EHC Plan". However, it was clear that, before the appeal was commenced, the Appellants had a plan naming a type of placement.

The Appellants might be asserting that only certain descriptions of types of placement were allowed in Section I. That was wrong, but it was certainly contrary to practice. It was wrong because neither regulation 12 nor s.37 of the 2014 Act, both referred to by the Appellants, limited the type of placement which could be specified in Section I. The Appellants might mean s.38, but that listed placements to which certain procedural rights applied and not all possible placements. In any event their assertion was contrary to practice in a jurisdiction where appellants, respondents and tribunals included in Section I short descriptions and long descriptions covering a range of areas[5]. The expert First-tier Tribunal was well placed to consider the costs application in the light of that practice. The terminology used by the Council set out the stage of education and whether the provision was mainstream or special. It was not arguable that that was a default, let alone one meriting a costs sanction. The Tribunal amended Section I of G's plan to include provision which was not within the terms which the Appellants relied on here.

[5] That variably included: (1) stage of education, primary, secondary etc; (2) mainstream or special; (3) residential or day; (4) number of weeks of attendance; (5) ownership: independent or state; and (6) type of SEN provided.

(b) there was no statement of opposition to the case. That is also wrong. The response stated that "The Local Authority continues to oppose this appeal …". The cover letter stated that "I confirm that the LA wishes to oppose the above appeal on the grounds contained in the attached response".

(c) any documents which supported any opposition to the appeal. That point was misconceived. The rule was to provide documents which existed and not to generate documents. It was common that limited documents were provided by local authorities at that stage, other than documents from the current school placement (G was out of school) and it was common that local authorities had few documents where a child or young person had been in independent provision (here there were reports from Helen Allison, the former school, and a clinical psychology report from Helen Allison from 2017). The rule required the Council to lodge what it had, but for a person who had been in private provision since 2010 and then out of school that would be limited. The appeal was commenced with a promise by the Appellants to instruct experts to obtain evidence. That was said in July 2019 and the reports were provided in late January 2020. The Appellants did not have a case until they served evidence during the course of the appeal.

(d) no attempt was made to obtain G's views. That was at best unfair. The response stated "G provided his views in Section A of the EHCP. Unfortunately, these are not detailed and G's parents have confirmed that this is a confirmation of his lack of capacity. The underlying document stated "My name is G. My family is mum, dad" and his parents added "As G's reply indicates, he lacks capacity to complete this form and to make decisions about his educational future". The Council response dealt with that point directly and it was unfair to suggest otherwise.

72. The Council submitted that breaches of the underlying SEN system were not a basis for costs orders in the First-tier Tribunal. Rule 10(1)(b) of the 2008 Rules referred to acting unreasonably in bringing, defending or conducting proceedings. That that did not extend to include steps taken in administering the SEN system or otherwise before proceedings, let alone months before them. Here Section I of the EHCP was from 7 May 2019, the appeal was brought on 31 July 2019 and the Appellants' solicitors

(whose costs were sought) were instructed in October 2019. Acts before proceedings (and so long before proceedings) could not be unreasonable actions in defending the proceedings.

73. Accepting the points made by the Appellants would also have significant implications for parties in appeals to the First-tier Tribunal. The SEN system also put obligations on parents, for example to respond to consultations about plans within a certain time or to nominate proposed schools to the local authority, so that a formal consultation can take place with the school. It would be a significant change to move from a situation where the Tribunal was seen as costs-free, absent special circumstances, to a situation where parties sought costs orders on the basis of alleged defaults arising outside the Tribunal Rules and before either party had indicated there might be Tribunal proceedings. That would also stretch too far the principle that unreasonable behaviour need not be causative of costs in the proceedings.

Lack of Evidence

(i) This Appeal

74. Lack of evidence was not a basis for a costs order (1) in this jurisdiction; (2) where a party conceded the main points of the case[6] early in its course, before any party served evidence; and (3) where the evidence in favour of a new point[7] was really from one witness, served late in the case (just 3 weeks before the hearing date listed at that point), and (4) where what was sought, 52 week provision, is unusual and reasonably requires evidence from the party seeking it.

75. The Council's evidence was limited, but so was the Appellants'. There was no evidence in favour of 52 week provision until 22 January 2021 and then the evidence was in part of one report. Only at that point was there a working document with specific amendments, so only from that point could there be movement towards a settlement.

76. The Tribunal had G's Pathway Plan and the underlying assessment produced by the Council. That included agreeing to weekend residential provision and (before the 52

[6] Residential, the college, 38 weeks, weekends as set out above.
[7] 52 weeks.

week element of the placement was sought and agreed) providing day and night care for G in various ways when he was out of college. The assessment considered many aspects of G's presentation in detail including daily living skills, identity, family, behaviour, education, health and finances. The plan and assessment were together 54 pages long and set out provision for G within and outside college as well as an assessment of his needs. The assessor explained:

> "In my view G's needs would be met by a 38-week termly boarding placement. This would provide a balance between ensuing that G maintains a strong presence both within his college setting and within his home and family life, something that it is clear is valued by both G and his parents and which the local authority has a duty to promote. By staying at college weekend term-time and returning home for college holidays, I also consider that the number of transitions for G would be at a level manageable to him".

(ii) This Jurisdiction

77. Judge McCarthy was also clear that a party did not need evidence on every point because (1) the Tribunal must assess a case and the evidence relied on and decide if it was reliable – evidence was not just accepted because there was no contrary evidence; and (2) a party was entitled to defend a weak position. Those points reflected the practice of this specialist Tribunal, where members were appointed for subject matter expertise and were allowed to use their expertise in determining appeals:

> "A specialist tribunal, such as the SENDIST, can use its expertise in deciding issues [including rejecting expert evidence], but if it rejects expert evidence before it, it should state so specifically …… where the specialist tribunal uses its expertise to decide an issue, it should give the parties an opportunity to comment on its thinking and to challenge it" ***L v Waltham Forest LBC*** [2003] EWHC 2907, [2004] ELR 161.

78. A change would be significant and have wider effects:

(a) both the other party and the Tribunal were entitled and/or required to consider the evidence in support of propositions. For example the Tribunal had to approve settlements and should not just "nod through" agreements

(b) a move for a child or young person into residential provision, particularly for 52 weeks per year, was significant. It changed where the young person would live. It risked institutionalisation. It was expensive (the Appellants estimated the cost at £1 million[8]). Again, the Tribunal and the local authority must be entitled to see the evidence in support of that proposal. The Tribunal could reject a report arguing for waking day provision even in the absence of contrary evidence, if (for example) the proposal did not amount to waking day provision on a proper understanding of the authorities

(c) parties often went to the Tribunal with no evidence of their own either at all (for example parents with limited resources for reports) or in particular areas (for example local authorities without their own therapy services to call on; parents on many issues about schools). They relied on questioning witnesses, often with the help of the Tribunal. There was detailed social care evidence before the Tribunal about 38 and 52 week provision. If a local authority could not proceed in that way, many parents would find that they could not take their case to a hearing

(d) an alternative challenge was that local authorities sometimes faced well-funded appeals on comparatively minor questions[9]. What, for example, could a local authority do where parents served therapy, psychology and specialist teacher reports for an appeal over issuing a plan for a child with limited extra needs? The authority either obtained evidence in each area of expertise, diverting staff from making provision to giving evidence or it went to the hearing hoping to challenge the reports served by the parents (for example to show that the level of provision recommended was in excess of level of difficulty diagnosed – Tribunals might in practice accept that point without a report in response).

[8] A figure supported by paragraph 1 of the Appellants' original reply to the response on costs where the figure of between £750,000 and £1 million for a three year placement is quoted.
[9] Any question was important to the people involved, but it was recognised (e.g. in the overriding objective) that issues did vary.

79. The Council was entitled to continue to the hearing and question Ms Warman about her report or, if she were not called, submit that the evidence overall was not in favour of the exceptional position that G required education all day, every day.

80. The Council also relied on the decision of the Deputy Chamber President as supporting Judge McCarthy's view of common practice in the First-tier Tribunal, in particular paragraph 5 of her decision.

Case Management

81. The Tribunal case managed the case in response to applications from the Appellants. Neither they nor the Tribunal criticised the Council for the points now taken by the Appellants. For example, their solicitors asked for a particular college to be named (and it was), but did not say that no type of placement was named. The Tribunal made an order relating to the response, but not raising any of the points now made by the Appellants. The order set out that the response must include an attendance form, the views of the young person and the reasons for opposing the appeal. The Tribunal concluded that one of these was missing (the attendance form) and ordered that it be provided. It did not suggest that the others were missing. There was a further order on 15 November.

82. The fact that none of the points now taken occurred to the Appellants' solicitors at the time or to the Tribunal told against the idea that the Council was preparing the case in an unreasonable way. That needed to be seen in the light of the parties' knowledge – the judicial review proceedings, the Pathway Plan assessment and the provision plan, the early concession of residential provision and the late and limited evidence for 52 week provision.

83. Finding that the Council was unreasonable in its conduct of the proceedings would encourage more procedural applications to the Tribunal. If the defence were unreasonable, the Council should surely have been debarred from defending the appeal. It was telling that it did not occur to the Appellants' solicitors to apply for that or to the Tribunal to order it. Were it the conclusion of this appeal, there would be more applications, including against appellants.

The Alleged Default: When Did It Occur?

84. The Appellants did not suggest breach of any order. The directions required that parties serve "any further written information … on which they intend to rely". The Tribunal was unusual for still having "party experts" rather than joint experts and there was no breach of an order to serve reports. The terminology of the directions expressly envisaged that evidence might not be served and the order was limited to evidence on which a party intended to rely. The rules and directions supported the approach taken by Judge McCarthy.

85. The costs application to the Tribunal was not put on the basis of criticism of the time to concede a 52 week placement. It was clear why that was. First, it was contrary to Upper Tribunal authority to make an award on that basis. Secondly, the Appellants wanted all their costs and not the costs of some part of March 2020. Third, no significant work took place at that time which did not have to happen anyway (e.g. the working document).

The Drafting of Section F

86. The Appellants argued that Section F was not changed when the plan was issued. That was not responded to in detail as it was understood not to have permission. However, it was denied that Section F as drafted by the Council required waking day provision. Where waking day was in Section F it was usually stated in terms. For example, G's plan now stated G "requires a college which provides a waking day curriculum… The college will offer a 52 week waking day curriculum" [EHCP post hearing page 24].

How Should Costs Applications Be Determined?

87. In giving permission to appeal, I said that I would consider which judge should determine costs applications in the First-tier Tribunal. Rule 10 of the 2008 Rules set out the procedure for applying for costs: applying within 14 days of the disposal of the proceedings and the other party to have a chance to reply. Mr Lawson therefore made submissions in relation to that matter.

88. There were two central decisions in determining costs: liability and quantum. Where judicial review claims settled, liability was dealt with by an application on the papers with submissions limited to 2 sides and the application was usually determined by a judge with no prior connection with the case (See Annexe 5 to the Administrative Court Guide[10]). The judge only determined liability. Quantum was left for detailed assessment. In the current case the application was not based on the hearing itself and so there would be limited benefit of the hearing judge determining the application.

89. In CPR 44.1 summary assessment was defined as "the procedure whereby costs are assessed by the judge who has heard the case or application". However, in ***Transformers and Rectifiers Ltd v Needs Ltd*** [2015] EWHC 1687 (TCC) Coulson J held that this did not preclude the costs being determined by another Judge. Cook on Costs commented at para 27.2 "We confess that we find this interpretation challenging". This might be the basis on which summary assessments were made by the trial Judge in ordinary civil claims, but there was no equivalent to this provision in the 2008 Rules. Furthermore

(a) in an ordinary civil claim, where costs followed the event, the primary issue was which party succeeded on which points. The trial judge was best set to determine that. Complex cases were often case managed by one judge pre-trial, but the trial judge still usually dealt with costs

(b) in a Tribunal claim costs required the claiming party to show unreasonable conduct. The trial judge might not be better placed to determine that than any other judge. If there had been consistent case management before a hearing, that judge might be best placed to determine the case. The trial judge would know how the issues came out at the final hearing, but that was not the key part of an application for costs based on the conduct of an appeal

10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf

(c) the trial judge might be in a minority in the decision. Was the duty to determine the costs application as the two expert members might see it, given their views in the discussion, or as the trial judge himself saw it? If the application were determined by the trial judge, was that on the basis that the parties were getting the same tribunal again or because that person had greater case knowledge?

Authority

90. The point that reports need not be accepted and late concessions were not a basis for a costs order was made by Judge Jacobs in ***HJ v. Brent LBC*** (see above) at [19]-[20] where the authority conceded on the day of the hearing

91. Judge Rowley explained that costs applications involved a 3 stage process (see ***MG v. Cambridgeshire CC*** above) at [28]. The second and third points in that process were discretionary; even if unreasonable conduct were found, that did not necessarily mean that there should be a costs order. The Council denied that there was unreasonable conduct and said that, even if the Tribunal found otherwise, no order should be made.

92. The recent decision in ***JW v. Wirral MBC*** allowing a costs appeal was a very different case, where a local authority had repeatedly changed its position, attempted to bring Section I into the appeal and had failed to comply with directions. Furthermore Judge McCarthy's decision in the instant case did deal with the issues before him, unlike the decision in ***JW*** at [46]. The instant appeal should not be allowed as the second and third grounds of appeal in ***JW*** did not get permission (at [67]).

93. The Appellants' own approach to the appeal included steps which could be criticised, including serving evidence 3 weeks before the date listed for the hearing, not using the Tribunal's social care recommendation power and proceeding to a hearing which the Upper Tribunal considered was unnecessary.

94. The Council therefore supported the decision of Judge McCarthy and the reasons given by him.

Analysis

95. Before I begin the analysis of the position, there are three matters with which I should preface my conclusions. First, this is an appeal against the decision of Judge McCarthy, not against the Deputy Chamber President's refusal of permission to appeal. Although I have read Judge Tudur's refusal of permission, that is only by way of background and I have in effect put her decision to one side and considered the matter afresh in the light of the parties' oral and written submissions.

96. Secondly, this is an appeal against the exercise of a judicial discretion. The cases relied on by Mr Lawson in paragraphs 64 to 68 above are very much in point, particularly those of ***Piglowska*** and ***R(RS).***

97. Thirdly, it follows from that that it does not matter, with whatever degree of certainty, that the appellate court or tribunal considers that it would or might have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable Judge could have reached. The appellate court ought not to interfere unless it is satisfied that the Judge's conclusion lay outside the bounds within which reasonable disagreement is possible.

The Council's Conduct Up To 1 April 2020/The Naming of the Placement in Section I

98. Mr Friel submitted that the repeated breaches of the rules by the Council was indicative of its unreasonable behaviour. I must therefore analyse the alleged defaults to see if a breach of the rules is made out.

99. It is important to remember that the jurisdiction to make an adverse costs order for unreasonable behaviour arises under rule 10(1)(b) which provides (with emphasis added) that

> "10(1) Subject to paragraph (2), the Tribunal may make an order in respect of costs *only*—
>
> …

> (b) if the Tribunal considers that a party or its representative has acted unreasonably *in bringing, defending or conducting the proceedings".*

100. In the first place, Mr Friel submitted that there had been a breach of rule 12 of the 2014 Regulations in the failure to name an institution in Section I of the ECHP in May 2019, a default which was not rectified until October 2019 (and even then improperly by the naming of the unsuitable Brogdale).

101. There are two answers to that submission. As is apparent from the terms of rule 10(1)(b), conduct before the commencement of proceedings cannot fall within the ambit of such a costs application. The fact that the Council did not make any nomination of a school or institution in Section I of the EHCP in May 2019, when the appeal was not brought until 31 July 2019, falls outside the jurisdiction to make an adverse costs order.

102. In addition, however, what the Council did in May 2019 was to state in Section I that

> "[G] will continue to attend Helen Allison School, a specialist provision until July 2019.
> From September 2019 the Local Authority will maintain G within a Mainstream Further Education Provision".

103. What regulation 12 of the 2014 Regulations provides is that

> "**Form of EHC plan**
> 12(1) When preparing an EHC plan a local authority must set out—
>
> …
>
> (i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I) …"

104. In other words it is sufficient either to set out the name and type of the school or institution "or, where the name of a school or other institution is not specified in the

EHC plan, the type of school or other institution". The rubric in Section I of the ECHP suggests that both the name and type "of my setting, school or college" must be set out, but that is not an accurate rendition of the provisions of regulation 12, although it may be a convenient shorthand for the purposes of the EHCP. Mr Friel submitted that the statement that "From September 2019 the Local Authority will maintain G within a Mainstream Further Education Provision" was not an institution or type of institution. I accept that it does not constitute the naming of an institution, but I do not accept that it is not the setting out of a *type* of institution within the ambit of regulation 12. Regulation 12 does not further specify or limit the type of institution which can be set out in Section I. Indeed, the Appellants' own case was conducted on the basis that the Council had named a type of placement in Section I (see paragraph 3 of the original reasons for the appeal).

105. Secondly, Mr Friel submitted that there was a breach of rule 21(2)(d) and (e) of the 2008 Regulations when the Council lodged its opposition to the appeal on 10 October 2019.

106. What the 2008 Regulations provide (with emphasis added) is that

> "21(2) The response must include—
>
> …
>
> (d) a statement as to *whether* the respondent opposes the applicant's case and, if so, any grounds for such opposition *which are not contained in another document provided with the response*;
>
> (e) in a special educational needs case, the views of the child about the issues raised by the proceedings, or the reason why the respondent has not ascertained those views …".

107. The covering letter to the reply submitted on 10 October 2019 by the Council stated that it opposed the appeal on the grounds stated in the attached response. In paragraph 7.1 it stated that the Council continued to oppose the appeal. In paragraph 6.1 of the response it dealt with G's views:

> "G provided his views in Section A of the EHCP. Unfortunately, these are not detailed, and G's parents have indicated that this is a confirmation of his lack of capacity".

(G's own views had previously been set out. He had stated that his name was G and that his family was "mum and dad". The Appellants themselves commented that, as that reply indicated, he lacked capacity to complete the form and make decisions about his own educational future.)

108. Sub-rule (d) only requires a statement as to *whether* the appeal was opposed. That the Council provided. The response must also state "any grounds for such opposition *which are not contained in another document provided with the response*", but there was no other document which was not provided with the response. There was no breach of sub-rule (d). G's views were provided, but were necessarily limited for the reason indicated by his parents. There was no breach of sub-rule (e) either.

109. Thirdly, Mr Friel submitted that there had been a breach of Judge Tudur's directions order of 24 October 2019. What that order stated was that

> "The appeal was registered on 16.08.2019 and a direction was made to the LA directing them to submit a response to the appeal **by 12 noon on the 14.10.2019**. The response must include an attendance form, the child's views and the LA's reasons for opposing the appeal.
> The LA's response was received on 14.10.2019 but no attendance form was submitted.
>
> Only a partial response was submitted to the direction.
>
> **It is ordered:**
>
> 1. The LA are directed to send to the parent and to the Tribunal so that it is received **by 12 noon on the 01.11.2019 the attendance form.**
>
> 2. If the LA does not comply with the order under rule 8 of the Tribunal Rules, this ***will*** result in the LA being barred pursuant to Rule 8(2).
>
> Warning: Failure to comply with this order **will** result in the LA's further participation in the appeal being barred".

110. It is clear from the terms of this order that the default of which the Council was guilty was the failure to return the attendance form by the due date. It was that default which was the subject of what was in effect a peremptory order which required compliance by noon on 1 November 2019. The attendance form was not in fact submitted until 10 January 2020, but there was no move to debar the Council from defending the appeal.

111. In fact the Appellants had on 21 October 2019 submitted a request for an amended timetable and hearing date. The original deadline to submit further evidence was 28 October 2019, but they were obtaining further evidence and had nothing currently to submit. A new information deadline of 10 January 2020 was requested and in fact accepted. There was a further directions order on 15 November 2019 vacating the original hearing date and setting out a new timetable leading up to a hearing on 13 February 2020 (although that hearing date was also subsequently vacated).

112. Although there was a technical breach of the requirement to return the attendance form between 1 November 2019 and 10 January 2020, the breach was not material and was rectified by the time of the submission of the evidence. Any attempt to debar the Council from defending the action in those circumstances would have been wholly disproportionate to the default. In the circumstances such a breach would not have been sufficient to result in an adverse costs order; such an application would in all likelihood fail at stage 1 of the threefold test in ***MG***, but in any event would not pass the second stage.

113. Mr Friel argued that on its true interpretation the order required (a) a response (b) the inclusion of G's views and (c) the inclusion of the reasons for opposing the appeal and that what was lodged on 10 January 2020 did not comply with that order, but that is to misconstrue the order made on 24 October 2019. The default which required to be remedied was the non-production of the attendance form; the order did not have a wider ambit that that. That is clear from the terms of paragraphs 1 and 2 of the order

when read together in context. There was no outstanding breach of the order as at 10 January 2020.

114. The real crux of the matter was the naming of Brogdale on 19 October 2019 and whether it should have been named at all. Judge McCarthy found that the naming of Brogdale was a poor choice; Mr Friel said that it was unreasonable for the reasons set out in his bullet points in paragraph 24 above. In short, the nomination of a college which could not deliver the requisite educational provision was plainly unreasonable. Simply naming a provision which could not meet needs and was not appropriate could not be lawful in any circumstances.

115. At one point in his skeleton argument, Mr Friel submitted that the Council had "deliberately" named an institution which it knew or should have known was inappropriate because it could not deliver the provision. However, at the permission hearing he had eschewed any suggestion of deliberate wrongdoing on the part of the Council and he cannot now resile from that position. In any event, I see no evidence of deliberate wrongdoing or improper motive or improper purpose on the part of the Council.

116. There can be no question that the nomination of Brogdale was a poor one for the reasons given by Mr Friel. I might myself have gone further than Judge McCarthy and held it to have been unreasonable, but that is not the test on an appeal against the exercise of a judicial discretion, as the authorities set out above demonstrate.

117. However, even if I considered that Judge McCarthy was wrong to have held that the choice of placement was only a poor one, but that he should have held that it was an unreasonable one, it does not follow that a costs order should have been made. Assuming that the Appellants could demonstrate that the naming of Brogdale was unreasonable on an objective basis (which involves no element of discretion), the second question - whether or not a costs order should be made - involves the exercise of a broad discretion.

118. Nevertheless, as Judge Rowley explained in ***MG*** at [29]-[30], it is all too easy for a Tribunal to fall into the trap of, having found "unreasonable conduct", then moving straight to considering the amount of costs which should be awarded, without giving any thought as to whether an order for costs should be made at all. In considering the second question the Tribunal must have regard to all the circumstances including the nature of the unreasonable conduct, how serious it was, and what the effect of it was. In appropriate cases the Tribunal may consider the conduct of the parties more generally, and whether it is proportionate to make an order for costs.

119. However, on 13 December 2019 the Council conceded that St John's College should be named in Section I, as is apparent from the acknowledgment of service in the judicial review proceedings. That is also independently apparent from paragraph 5.5 of Ms Warman's report which was in the First-tier Tribunal bundle. I do not accept that Brogdale was in any substantive sense still in play until 24 January 2020, even though its nomination may not have been formally abandoned by that date.[11]

120. On that basis, I am satisfied that, even if the nomination of Brogdale was unreasonable, it would not be appropriate in the light of the chronology of the case for an award of costs to be made in respect of it. On 15 November 2019 the Tribunal set 10 January 2020 as the evidence deadline. Brogdale was named on 19 October 2019 and was effectively out of contention on 13 December 2019 once the nomination of St John's College had been substantively conceded (even if it had not been formally abandoned), almost a month before the evidence deadline. The effect of the naming and then the withdrawal of Brogdale would not justify an adverse order for costs.

121. There then remains the third period from the effective concession of St John's College up to 1 April 2020. I do not accept the proposition that for the Council "to run the case from that point on was in practical terms wasting resources", as Mr Friel invited me to find. My reasons are as follows.

[11] That point seems to be tacitly accepted in paragraph 3.3 of the original costs application which stated that the nomination of Brogdale was "rapidly withdrawn" (and see too paragraph 19 of the reply to the response on costs: the nomination "did not last very long").

122. In the first place, I find the narrative set out by Mr Lawson in his submissions (which I have set out in paragraphs 52 to 61 above) to be accurate and compelling. As he said, the Appellants' points failed when the chronology was clear.

123. Secondly, as Mr Lawson rightly submitted, the Council had conceded the choice of placement (by 13 December 2019) and the placement for 38 weeks (by 31 December 2019) before any party had served evidence. The concession of 7 days was made on 24 January 2020. G had actually started at the College in January 2020. The evidence in favour of a 52 week placement came from one witness (on 22 January 2021), which was served 3 weeks before the then current hearing date. What was sought, in the form of a 52 week provision, was unusual and reasonably required evidence, and indeed the potential testing of evidence, from the Appellants who were seeking it (in which context Mr Lawson's submission as set out in paragraph 56 above has very considerable force).

124. The Tribunal had G's Pathway Plan and the underlying assessment (which were 54 pages long) produced by the Council, which included agreeing to weekend residential provision and (before the 52 week element of the placement was sought and agreed) providing day and night care for G in various ways when he was out of college. The assessment considered many aspects of G's presentation in detail and set out provision for G within and outside college, as well as an assessment of his needs and explained that G's needs would be met by a 38-week termly boarding placement which would provide a balance between ensuing that he maintained a strong presence both within his college setting and within his home and family life. By staying at the College at weekends in term-time and returning home for college holidays, the number of transitions would be at a manageable level.

125. Thirdly, a move for a child or young person into residential provision, particularly for 52 weeks per year, is significant. It changes where the young person would live; it risks institutionalisation; it is also expensive. The local authority and the Tribunal must be entitled to see the evidence in support of that proposal and, if so minded, test it in appropriate cases, even if the authority only puts the parents to proof and does not assert a positive case to the contrary.

126. Finally, the cost of the placement was, as does not appear to be controversial, in the region of £750,00 to £1 million. The idea that the Council should in those circumstances effectively throw in its hand after the third week in January seems to me to be frankly fanciful.

127. I agree with Mr Lawson that ultimately the application comes down to arguing that the evidence for a 52 week placement had to lead to a quicker concession. That may be so, but it would not warrant an adverse costs order.

128. Even that criticism that does not weigh in the Appellants' favour. As Mr Friel had accepted in his skeleton argument (see paragraph 48 above), by 24 January 2020 virtually all of the Appellants' expenditure had been incurred to prepare the case with all relevant evidence served by that date. In that event, any further delay after 24 January 2020 would not have caused loss to the Appellants. The effect of any further delay would count against, rather than for, the making of an adverse costs order after 24 January 2020.

129. I am therefore satisfied that this was a case where Judge McCarthy's conclusions in paragraphs 10 to 12 about the conduct of the Council prior to 1 April 2020 were ones which were open to him. They were not unjust or perverse. His decision in those paragraphs does not betray an error of law.

130. I am also therefore satisfied that this was a case where Judge McCarthy's conclusion in paragraph 14 about the naming of Brogdale in Section I (which must be read in the context of what he said in paragraphs 10 to 13) was one which was open to him. Nor was it unjust or perverse. His decision in that respect does not betray an error of law.

131. Even if it did on that particular point, the error was not material: even if the decision to nominate Brogdale was unreasonable, it would not have been reasonable in the context of the chronology of the case, given that even on the Appellants' own case it was rapidly withdrawn, to make a costs order.

The Provision of Evidence (or Lack Thereof) to Rebut The Appellants' Case

132. What I have said above in large measure in relation to the question of the Council's conduct of the appeal up to 1 April 2020 answers the allegation about the lack of evidence in rebuttal of the Appellants' case.

133. In summary, I agree with Mr Lawson that the lack of evidence was not a basis for a costs order in this case, where the Council conceded the main points of the case before any party served evidence and where the evidence in favour of a 52 week placement came from one witness, served late in the case (just 3 weeks before the hearing date listed at that point) and where what was sought, in the form of 52 week provision, was unusual and reasonably required evidence from the party seeking it.

134. Although Mr Lawson made expansive submissions (which I have cited in paragraph 78 (b) to (d) above) about the wider effect of Mr Friel's submissions, if accepted, they do not arise on the facts of this case and I am satisfied that they should be addressed when such circumstances arise.

135. However, it should be borne in mind that putting a party to proof in litigation without asserting a positive case to the contrary is by no means unheard of e.g. the position of neutral personal representatives in response to a claim under the Inheritance Act 1975 or in response to a claim that a will has not been validly executed, on whose behalf parties will be cross-examined without a positive case to the contrary being put by the estate. Nor is it inevitable, for example, that even an unopposed claim for rectification, where the defendants do not assert a contrary case and do not put in any evidence at all, will pass muster and be accepted by the court (see, for example, ***Allnutt v Wilding*** [2007] EWCA Civ 412) .

136. I am satisfied that Judge McCarthy was right and that the absence of evidence on the facts of this case was not a basis for an adverse costs order. He concluded that a party did not need evidence on every point because the Tribunal must assess a case and the evidence relied on and decide if it was reliable; evidence was not just accepted because there was no contrary evidence (as to which see ***L v Waltham Forest LBC***).

A party was also entitled to defend a weak position. I can see no error of law in those conclusions.

137. I am therefore satisfied that the Council did not act unreasonably on the facts of this case in not providing evidence in order to rebut the Appellants' case, but instead putting them to proof before the Tribunal. That was a conclusion which Judge McCarthy was entitled to reach. It was not unjust or perverse. His decision in that respect again does not betray an error of law.

138. Whether the Council acted entirely wisely in its conduct of the proceedings is another matter. Whether it would be unreasonable in another case on different facts not to put in evidence in rebuttal is also another matter.

Quantum

139. In the light of these conclusions, the third question posed by Judge Rowley in ***MG*** does not arise for decision and the question of quantum does not fall to be addressed. Nor do I need to consider whether it would have been appropriate for the costs to have been summarily assessed had I allowed the appeal and ordered that there should be an adverse costs order.

Conclusion

140. I am satisfied therefore that Judge McCarthy was entitled to reach the conclusions that he did. In order to ground an application for costs the Appellants would have to demonstrate that the conduct of the Council in the course of the proceedings was vexatious and designed to harass them rather than to advance the resolution of the case. I see no element of vexation or design to harass the Appellants in the Council's conduct. The conduct of the proceedings could no doubt have been handled differently, but it could not be described as unreasonable simply because it led in the event to the result which eventuated or because other more proactive legal representatives would have acted differently.

141. In my judgment Judge McCarthy was entitled to say in paragraph 11 of his decision that the fact that the Council changed its position at several junctures was evidence that it was not harassing the Appellants or acting vexatiously because it was not fixed with one view and was willing to review its position in the light of additional arguments and evidence.

142. The sheet anchor of Mr Friel's case on behalf of the Appellants was the comment in paragraph 53 of the First-tier Tribunal's substantive decision of 28 April 2020 that:

> "The position of the LA in purporting to challenge the key issues remaining for determination was made significantly more problematic by the absence of any form of persuasive evidence adduced by them, or indeed by anyone else, which might have been used to properly argue against the well-constructed and fully comprehensive evidence brought by the parents on [G]'s behalf. It left Miss Johnson [counsel for the local authority] in the invidious position of having to simply explore the detail of the main issues remaining in dispute, although such was the quality of the oral evidence then presented that she did not subsequently raise any matters in cross examination."

143. As I have said above, whether the Council acted entirely wisely in its conduct of the proceedings is another matter. Whether it would be unreasonable in another case on different facts not to put in evidence in rebuttal is also another matter. I do not accept, however, that what the Tribunal said in paragraph 53, when it was not considering an application for costs under rule 10 of the 2008 Rules, required or compelled Judge McCarty to reach any decision other than the one which he did.

144. Accordingly the appeal is dismissed.

Guidance

145. I now turn to the question of costs applications in the First-tier Tribunal being dealt with by a Judge other than the Judge who heard the substantive appeal and/or the interim applications. Before doing so, I consider that it would be opportune to reiterate certain matters in relation to the jurisdiction to make an order for costs arising out of unreasonable behaviour.

146. The expression “unreasonable” describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case; 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: ***HJ*** at [7], citing ***Ridehalgh v Horsefield***.

147. The general rule in this jurisdiction is that there should be no order as to costs. Tribunal proceedings should be as brief, straightforward and informal as possible. It is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs: ***MG*** at [26].

148. Tribunals should apply considerable restraint when considering an application under rule 10 of the 2008 Rules, and should make an order only in the most obvious cases. An order for costs will be very much the exception rather than the rule: ***MG*** at [27].

149 Applications for costs should be pithy, succinct and focussed. They should not be prolix, meandering and difficult to follow. The basis of the application should be clearly set out at the outset. It should not be necessary to embark on an elaborate textual exegesis in order to work out what the basis of the application is: ***JW*** at [45]. The onus is on the applicant to make out the case. If such applications do not make it clear what is being sought and on what basis, it should come as no surprise if they are dismissed in short order.

150. In providing reasons for a decision on a costs application, Judges should bear in mind the guidance of the Court of Appeal in ***English v Emery Reimbold & Strick*** [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [14] and [27 – 30]. The reason for an award of costs (or a refusal of an award) should be apparent.

151. Nevertheless, such decisions should not be extensive judicial disquisitions into the minutiae of the case in hand. Whilst the reason for an award of costs (or a refusal of an award) should be apparent, it does not need to be (and should not be) elaborate.

152. When considering whether to seek to appeal an order on costs, applicants should bear in mind the guidance provided in such cases as ***R (Nwankwo) v. Secretary of State for the Home Department, McPherson v. BNP Paribas (London Branch), Piglowska v. Piglowski*** and ***R(RS) v. Brent LBC,*** which I have cited in the body of this decision. To that bede-roll of authority I would add the remarks of the Court of Appeal in ***R(Parveen) v Redbridge LBC:***

> "48. When considering the way in which the judge approached his exercise of discretion, we must remember that in this court we have now had the benefit of detailed written submissions (far exceeding the page limit which applied below) and of counsel's oral submissions over a half day hearing in which we were taken carefully through the history of the matter and the relevant written exchanges which I have set out in summary above. For my part, that has given me a considerably greater understanding of these issues than I would otherwise have had. However, the treatment which we have received bears little resemblance to the summary exercise which the judge was required to undertake.
>
> 49. The result may be that we are in a better position than the judge was to form some views [about why it was that the offer of alternative accommodation was made to the appellant on 22nd February 2019] … None of this, however, was gone into in any detail before the judge. The submissions made to him about causation were as limited as I have described above, consisting of little more than assertion and counter assertion. His task was to exercise his discretion on the basis of those submissions and the material to which they expressly referred him. He was not required, and it would not be reasonable to expect him, to carry out an extensive analysis of the substantial bundle of documents provided to him to see whether there were other points which might be made.
>
> 50. On the basis of the submissions made to the judge, it is not possible for this court to say that his conclusion in this case was not open to him ...
>
> 51. Nor am I persuaded, to the extent if at all that it is relevant, that the position is much clearer in the light of the more detailed

> analysis of the evidence undertaken in this court ... At all events, I am not persuaded that the judge would have reached a different conclusion if these matters had been gone into before him, or that we should do so now.
>
> …
>
> 54. In all these circumstances the judge was entitled to conclude that the appropriate course was to make no order for costs. At all events, it is impossible for us to say that this was an exercise of discretion which was not open to him. His decision involved no error of law which would entitle this court to interfere and was neither unjust nor perverse."

153. In summary, unless the Judge's discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong, an appeal against a Tribunal's costs order made in the exercise of its discretion will be likely to fail.

154. As to the question of costs applications in the First-tier Tribunal being dealt with by a Judge other than the Judge who heard the substantive appeal and/or the interim applications, there is clearly a tension between continuity on the one hand and a fresh pair of eyes on the other. The same Judge determining both the substantive appeal and the costs application will have prior knowledge of the details of the case. He will ordinarily be better placed to understand the issues and to decide whether the conduct in question went so far beyond the pale that it breached the threshold of unreasonable conduct. A different Judge would be potentially less likely to have that detailed knowledge of the case. By contrast, a different Judge coming to the case with fresh eyes would have no preconceptions based on prior involvement with the case and brings to the determination the valuable asset of detachment.

155. Moreover, there is the question of practicality to be considered. If the same Judge has to be brought back on a subsequent occasion to make a further determination of the costs issue, that has obvious budgetary implications. There is the potential knock on effect of substantive appeals being delayed whilst costs applications in other cases are decided. The overriding objective, which includes costs being proportionate to the importance and complexity of the issues involved, must also be factored into the

equation. The definition of the overriding objective in rule 2 of the 2008 Rules is not exhaustively defined: dealing fairly and justly with a case includes the five factors set out in sub-rules (a) to (e), but is not confined to them and in my judgment also involves dealing with a case in ways which are ensure that it is dealt with expeditiously and fairly and by allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases.

156. In my judgment, given the high threshold for an award of costs based on unreasonable conduct and the practical issues which I have mentioned in the last paragraph, in most cases it should be sufficient for another Judge to determine the application for costs and not necessarily the same Judge who heard the substantive appeal and/or the interim applications. If the case is so plain and obvious as to pass the high threshold of unreasonableness, it should be able to be decided by another Judge who has had no prior involvement in the case.

157. However, there may be exceptional cases where the intricacies of the procedural evolution of the case or the difficulties of the issues involved require the same Judge, with prior knowledge of and involvement in the case, to determine the costs application. If it appears to the applicant that the case in question is potentially such an exceptional one, which may not be suitable for decision by another Judge who was not completely conversant with the proceedings, that should be flagged up prominently and at an early paragraph in the application so that the question is clearly live for consideration by the Judge who is presented with the application. Whether that Judge should then deal with the matter or whether the matter should be remitted to the previous Judge for decision is a matter of judicial discretion based on the facts of the individual case. In deciding that question the Judge will obviously have regard to the submissions of the parties, but is not bound by them.

158. If the application is to be remitted back to the Judge who heard the substantive appeal as part of a panel of two or three members, can that Judge alone determine the costs application or must the panel as a whole be reconvened? According to the Practice Statement on the Composition of Tribunals in relation to matters that fall to be

decided by the Health, Education and Social Care Chamber on or after 16 December 2015:

> "**Special Educational Needs Or Disability Discrimination In Schools Case**
>
> 6. A decision that disposes of proceedings made at, or following, a hearing must be made by one judge and:
>
> a. one specialist member where the member has substantial experience of special educational needs and/or disability and both have sat on at least 25 hearings within the jurisdiction, or
>
> b. in complex appeals, designated as such by a SEND judge, two other members with substantial experience of special educational needs and/or disability, and where the content of the appeal demands, specialism in health and/or social care matters. Where there is a clear disagreement (other than in respect of a matter of law) between a judge and a member sitting as a two person panel, then the judge must direct a hearing before a newly appointed three-person panel.
>
> …
>
> **All Cases**
>
> 8. Where the Tribunal is constituted under paragraph 3, 5, or 6 the "presiding member" for the purposes of article 7 of the 2008 Order will be the judge. Where the Tribunal is constituted under paragraph 7(b) which judge is to be the "presiding member" will be determined by the Chamber President.
>
> 9. Where the Tribunal has given a decision that disposes of proceedings ("the substantive decision"), any matter decided under, or in accordance with, Rule 5(3)(l) or Part 5 of the 2008 Rules or section 9 of the Tribunals, Courts and Enforcement Act 2007 must be decided by one judge, unless the Chamber President considers it appropriate that it is decided either by:-
>
> a. the same members of the Tribunal as gave the substantive decision; or
>
> b. a Tribunal, constituted in accordance with paragraph 3, 5, or 6, comprised of different members of the Tribunal to that which gave the substantive decision.

> 10. Any other decision, including striking out a case under Rule 8 of the 2008 Rules (except at, or following, a hearing) or giving directions under Rule 5 of the 2008 Rules (whether or not at a hearing) must be made by one judge".

159. Paragraph 6 obviously does not apply to an application for costs since it is not a decision which disposes of proceedings i.e. it is not a substantive decision. Nor does paragraph 8 apply because it is not a matter decided under, or in accordance with, Rule 5(3)(l) (suspension of a decision) or Part 5 of the 2008 Rules (correcting, setting side, reviewing and appealing Tribunal decisions) or section 9 of the Tribunals, Courts and Enforcement Act 2007[12] (review of decisions of the First-tier Tribunal). The applicable paragraph is paragraph 10 which provides that any other decision *must* be made by one Judge.

160. Thus, if the application is to be remitted back, it is the Judge alone who can determine the costs application. It is not necessary to reconvene the panel as a whole. There is no equivalent in the SEND jurisdiction of s. 4 of the Employment Tribunals Act 1996 or the Employment Tribunals Rules of Procedure 2013 (as to which see ***Riley v Secretary of State for Justice*** [2016] ICR 172).

Mark West
Judge of the Upper Tribunal

Signed on the original 10 December 2021

[12] As to which see ***Essex CC v TB (SEN)*** [2014] UKUT 559 (AAC) at [40]-[43].