UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 108 (LC) **UTLC Case Number: LC-2022-438**

Venue - Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – costs under rule 13(1)(b) – unreasonable conduct of a management company and its representative and agent

BETWEEN

KATHRYN ANNE LEA AND OTHER LONG LEASEHOLDERS (1)

Appellants

-and-

GP ILFRACOMBE MANAGEMENT COMPANY LIMITED (1)
MICHAEL GUBBAY (2)
EPWORTH SW LTD (3)

Respondents

Re: Ilfracombe Holiday Park,
Marlborough Road,
Ilfracombe,
EX34 8PF

Judge Elizabeth Cooke
24 April 2023

Decision Date: 30 May 2023

Mr Anthony Verduyn for the appellants, instructed by Trowers & Hamlins LLP
Mr Simon Allison for the second respondent, instructed by Property Management Legal Services Limited

The following cases are referred to in this decision:

23 Dollis Avenue (1998) Limited v Vejdani and Echraghi [2016] UKUT 365

Assethold Limited v Adam ad other leaseholders of Corben Mews [2022] UKUT 282 (LC)

London Borough of Hounslow v Waaler [2017] EWCA Civ 45

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

Introduction

1. This is an appeal from a decision of the FTT on an application for costs following its determination about the service charges payable for 2021 by leaseholders of Ilfracombe Holiday Park, which comprises 273 holiday apartments held on long leases and a number of commercial leasehold units.

2. The FTT decided that none of the service charges demanded were payable. 195 of the lessees of the holiday units, whose names are set out in the Schedule to this decision, then applied to the FTT for a costs order under rule 13(1)(b). There were three respondents to that application, as there are to this appeal: first, GP Ilfracombe Management Company Limited ("GPIMCL"), the management company under the leases and the applicant for the decision about the service charges, second Mr Michael Gubbay who represented the management company before the FTT, and third Epworth SW Ltd, a company controlled by Mr Gubbay which acted as managing agent for the first respondent and sent out the service charge demands. The FTT made an order that small sums were payable by GPIMCL in respect of one aspect of the proceedings but otherwise refused the application, and the appellants appeal that refusal. Permission to appeal was given by the FTT.

3. The appellant leaseholders are represented in the appeal by Mr Anthony Verduyn of counsel who represented them before the FTT; Mr Simon Allison represents the second respondent, Mr Gubbay, whom he represented in the application for costs before the FTT but not in the substantive proceedings – obviously, since Mr Gubbay was not a party to them. The first respondent took no part in the application for costs and has taken no part in the appeal; the third respondent has been dissolved, since the date of the decision now appealed.

The background

The freehold and leasehold ownership of Ilfracombe Holiday Park

4. In 2016 the freehold of Ilfracombe Holiday Park was acquired by Green Parks Holdings Limited ("GPHL"), a company now in liquidation.

5. GPHL granted two long leases, together comprising the whole property, to Tuscola (106) Limited, a company controlled by Mr Michael Gubbay, for whom the leases were an investment purchase.

6. Tuscola (106) Limited granted development leases of the property to Green Park Holdings (Ilfracombe) Limited ("GP Ilfracombe").

7. GP Ilfracombe granted 273 long residential leases of units within the park, most if not all of which either required refurbishment or were to be demolished and rebuilt. 195 of those lessees are the appellants in this appeal. Some commercial units were also leased.

8. The long lessees then each granted sub-leases to Green Park Holidays Limited ("GP Holidays"); the idea was that GP Holidays would then sub-let the holiday units, giving the long leaseholders a guaranteed rental income for ten years. GP Holidays went into

administration in 2019, and in 2020 the administrator disclaimed the underleases of the residential units, leaving the residential leaseholders in a position where if they were going to reap any rental income from their units they would have to grant holiday lets themselves. It appears that at least one of them did so, but the majority have commenced proceedings in the High Court against the freeholder and the shareholders in the freeholder, Mr Spence and Mr Kewley, seeking to have their leases rescinded for fraud.

What happened after GP Holidays went into administration

9. To understand what happened next we have to look at the long residential leases granted by GP Ilfracombe to the appellants and others. They were tripartite, made between a lessor, a lessee and the management company GPIMCL. The lessee in each case covenanted to pay a service charge to GPIMCL, which in turn covenanted to maintain and manage the property.

~~10.~~ Mr Gubbay, the shareholder and director of Tuscola (106) Limited, is an experienced property manager. His company paid around £9 million for its head leases, and expected to receive ground rents by way of a return on investment. Obviously the result of the events described above was that that did not materialise; the long lessees who are seeking to have their leases rescinded are paying no rent. Mr Gubbay's position is that he too, like the residential lessees, has been defrauded by Messrs Spence and Kewley.

11. To summarise Mr Gubbay's evidence to the FTT in the service charge proceedings: he took the view that something had to be done in a situation where, if nothing was done, the property would fall further into disrepair and would not generate any income for anyone, to the detriment both of his company and of the residential long leaseholders (whose interests he saw as aligned with his in this respect). He arranged with Messrs Spence and Kewley, the shareholders of GPIMCL, to be appointed director of GPIMCL and he set to work to get things moving. The holiday park was shut down for most of 2020 because of the pandemic, but in January 2021 he set a budget and arranged for service charge demands to be sent out on behalf of GPIMCL on 12 January 2021. The total demanded by way of service charges from the 273 residential unit holders and the commercial lessees was £2,634,000. GPIMCL then immediately (on 12 January 2021) made an application to the FTT for a determination of the reasonableness and payability of those charges under section 27A of the Landlord and Tenant Act 1985, because Mr Gubbay knew that service charges were going to be contentious.

12. The service charge demands were sent out by Epworth SW Limited, the third respondent in this appeal. Epworth SW is a company wholly owned by Mr Gubbay and he arranged for it to act as the managing agent for GPIMCL. The application to the FTT gave Epworth SW Ltd's postal and email addresses for correspondence with the applicant.

13. On 17 May 2021 Mr Gubbay was removed from his directorship of GPIMCL by its shareholders; being unaware of his removal, on that date he signed and filed the company's Statement of Case in the service charge proceedings.

14. On 1 September 2021 GPIMCL applied to withdraw the proceedings.

15. On 7 September 2021 GPIMCL applied to withdraw the application to withdraw, and on 9 September 2021 the FTT decided that the application should proceed. On 10 September 2021 GPIMCL authorised Mr Gubbay to represent it in the proceedings.

16. There was a hearing on 30 September 2021 and 1 October. Mr Gubbay's submissions included allegations of fraud against Mr Kewley and Mr Spence; he stated that he "would pay nothing to any company controlled by Messrs Spence and Kewley" (paragraph 114), despite representing the applicant management company and therefore asking the FTT to order the respondents to do just that.

17. The FTT gave its decision on 29 November 2021. It found that the service charge demands were invalid because the charges had not been correctly apportioned between the lessees. Moreover, and in case the FTT was wrong about that, it found that the service charge budget for 2021 "was not reasonable in its entirety and was not payable" (paragraph 99 of the decision) because it was not calculated having regard to any reasonable cost (paragraphs 100 – 103), that certain of the items were not payable under the terms of the lease (paragraphs 104 to 109) and that management fees and staff costs were too high (paragraphs 110 – 113).

18. As I said above, following that decision the 195 residential leaseholders made an application for costs under rule 13(1)(b) against the management company, Mr Gubbay, and Epworth SW Limited. The costs sought by the 195 leaseholders were in the region of £164,000. The leaseholders also applied for orders under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 so as to prevent GPIMCL recovering its costs of the service charge proceedings under the terms of the lease.

The costs application and the decision in the FTT

19. Generally the FTT has no power to award costs in proceedings relating to service charges, but rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides:

> "(1) … the Tribunal may make an order in respect of costs …
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings..."

20. In *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC) the Tribunal (Martin Rodger QC, Deputy Chamber President, and Judge Siobhan McGrath) provided guidelines for decisions on applications for costs under rule 13(1)(b). At paragraph 24 it was said:

> ""Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party

have conducted themselves in the manner complained of? …is there a reasonable explanation for the conduct complained of?"

21. The Tribunal in *Willow Court* envisaged a three-stage decision-making process: first, the FTT should decide whether the respondent to the application behaved "unreasonably" in the sense set out above; if it was then, second, the FTT should decide whether it should therefore make a costs order; third, and if so, it should consider what order it should make. At paragraph 28 it was said:

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

22. The application for costs, dated 23 December 2021, made no reference to *Willow Court* but set out the following "aspects of unreasonableness in bringing the proceedings":

    a) The estimated charges has "no discernible or disclosed foundation".

    b) Proceedings were issued on the day the service charges were demanded and before payment was due, therefore prematurely and thus preventing points being debated by the parties in advance of proceedings.

    c) Epworth SW Limited "brought proceedings" as agent for GPIMCL when it had no registered director.

    d) The shareholders of GPIMCL described Mr Gubbay, in correspondence, as "acting on a frolic of his own" in issuing the proceedings, applied to withdraw the proceedings, and then sought to withdraw the application to withdraw.

23. The application went on to detailed "aspects of unreasonableness in pursuing the proceedings":

    e) Proceedings were "shambolic", pursued by Mr Gubbay when he was no longer a director of GPIMCL.

    f) GPIMCL did not notify the registrar of companies when Mr Gubbay was removed from his directorship.

g) Accounts were not disclosed. There was a twelve day delay between the issue of proceedings and their service on the respondent leaseholders. GPIMCL's statement of case was filed late, after an unless order had been made.

h) Mr Gubbay made a "bizarre application" to join Epworth SW Limited and Tuscola (106) to the proceedings, which was dismissed.

i) Mr Gubbay represented GPIMCL at the hearing despite having a conflict of interest with the company.

j) Mr Rowell, formerly a director of Epworth SW Limited, had to be told to leave the proceedings because he attempted to assist Mr Gubbay with his evidence.

k) Mr Gubbay in cross-examining one of the leaseholders "engaged in victim shaming" by asking him if he had inspected the property before purchasing the long lease.

l) Mr Gubbay told the FTT that he would not recommend that anyone pay money to a company controlled by Messrs Spence and Kewley, even though that was what he was inviting the FTT to order the leaseholders to do; he was representing his own interests, and GPIMCL failed to appoint a different representative.

24. That is a lot of points, and it will be helpful later in this decision if I group them together. The behaviours said to have been unreasonable, on the part of the three respondents, can be described as:

(i) Bringing and conducting proceedings to recover charges set without any reasonable basis ((a) above), and prematurely ((b) above);

(ii) Various company law defaults ((c) and (f) above);

(iii) Various procedural defaults ((g) and (h) above);

(iv) GPIMCL's conduct in applying to withdraw the proceedings and then changing its mind ((d) above);

(v) The conflict of interest between Mr Gubbay and GPIMCL ((d), (e) and (l) above);

(vi) The conduct of the hearing ((j) and (k) above).

25. GPIMCL, the first respondent to the application, did not respond and has taken no part in the costs proceedings. A reply was filed for the second and third respondents, represented by Mr Allison; they engaged with the guidance in *Willow Court*, and also argued that since they were not parties to the service charge proceedings the second and third respondents were not "persons" against whom a costs order could be made under rule 13(1)(b).

26. The FTT heard the costs application on 6 May 2022 and gave its decision in writing on 14 June 2022; it is that decision that is now appealed. The FTT made the desired orders under section 20C and paragraph 5A (see paragraph 18 above). Turning to the application under rule 13(1)(b), the FTT dealt first with the argument that Mr Gubbay and Epworth SW Limited were not within the scope of rule 13(1)(b) and decided against them on that point. It said at paragraph 64:

> "We are satisfied that within the context of Rule 13(1)(b) "person" does include those representing, particularly where they are not a legal representative or the like. In our judgment in the context of tribunal proceedings, often conducted by non legal qualified representatives, it must be correct that they may be a "person" within the scope of Rule 13 and against whom an Order for costs may be made in the exceptional circumstances envisaged by the Rule and endorsed in Willow Court."

27. There is no cross-appeal on that point. From paragraphs 65 onwards the FTT considered the application itself.

28. As to the application itself the FTT said at its paragraph 66:

> "We are not satisfied that simply bringing these proceedings, unsuccessful though they were, was of itself unreasonable. We would suggest it is plain the demands were going to be subject to challenge. We make reference in our original decision to what we consider to be the unsatisfactory nature of the leases. This is a classic situation where a management company may well apply to the Tribunal to seek clarity.
>
> 67. We did find that the demands were invalid and so no sums were payable. We also determined on the facts that the sum claimed was not reasonable. We explained why we did not look to determine a reasonable amount, not least given the lack of evidence, but also given it seemed that this would be a pointless exercise.
>
> 68. Standing back we accept that the actual issues for this Tribunal to determine were not unusual and were twofold: was the lease followed and was a reasonable methodology adopted to determine the amounts? We found the answer to both to be "no" but actually much of the information within the bundle and cross examination whilst giving background was not strictly relevant to this determination."

29. We shall have to look again at paragraphs 67-8 in connection with the grounds of appeal. As to Mr Gubbay's conduct the FTT said:

> "69 We accept that Mr Gubbay believed in his own way he was doing the best for everyone. Whether this view is misguided is not a matter we need to determine."

It is worth noting that in making that finding the FTT was well aware of a fact that was mentioned only obliquely in the application for costs, namely that Mr Gubbay had arranged for holiday lettings of residential units, through Ilfracombe Resorts Limited , which received some £1.2 million pounds in rent. The FTT was aware of this because it was the subject of cross-examination in the hearing of the service charge proceedings; Mr Gubbay's position as he explained it on that occasion was that he was entirely willing to account for that rent to the leaseholders, and either to pay it to them as rent or to put it towards service charges.

30. The FTT found that Mr Gubbay had been candid about his position and about his views of Mr Spence and Mr Kewley. It found that Mr Gubbay failed to understand the case he was presenting. It found that his questioning of the leaseholder at the hearing was reasonable. It said at paragraph 75:

> "Overall this Tribunal finds that the conduct of the proceedings, save as dealt with below, was not such that any further order for costs pursuant to Rule 13 should be made against the Applicant, Mr Gubbay or Epworth. We do not find that the overall conduct of these proceedings was unreasonable. The application was in our judgment a reasonable course of action and sadly the "noise" has led to many other matters conflating what essentially was a discreet and relatively straight forward issue to be addressed."

31. The two matters that it went on to deal with were, first, that the FTT had already made an order that GPIMCL should pay the cost of preparation of the bundle for the hearing of the service charge proceedings, which it should have done itself but which the leaseholders did. The FTT declined to extend that order to Mr Gubbay and to Epworth SW Limited. Second, the FTT determined GPIMCL had behaved unreasonably in applying to withdraw its application and then asking to withdraw the application to withdraw, and it ordered GPIMCL to pay the leaseholders' costs in respect of that application, which it summarily assessed in the sum of £864 so far as the 195 leaseholders were concerned.

The FTT's grant of permission to appeal

32. That decision of course left the 195 leaseholders considerably out of pocket so far as costs were concerned, and they asked permission to appeal the decision. The FTT granted permission and said:

> "While some of the submissions made in the request for permission to appeal have already been dealt with within the body of the tribunal's original decision, some others that are new appear to be arguable and the tribunal considers that they have a realistic prospect of success."

33. That is puzzling, because as Mr Verduyn helpfully agrees there is nothing in the grounds of appeal that amounted to a new argument not raised in the initial application. But there it is. There are three grounds of appeal.

Ground 1

34. The first ground of appeal is that the FTT applied the wrong test. It referred in its paragraph 64 to "the exceptional circumstances envisaged by the Rule", but there is no threshold of exceptionality in Rule 13.

35. I regard this ground as unarguable. The FTT in its paragraph 64, quoted at paragraph 26 above, used the word "exceptional" in the context not of defining the test but as a general description of the kind of circumstances where rule 13 is engaged. It was not at that point in its decision assessing the conduct of any of the respondents. From paragraph 66 onwards when it was assessing that conduct it referred consistently to "unreasonable conduct" and there can be no doubt that it applied the correct test.

36. Furthermore, as Mr Allison points out, the FTT's reference to "exceptional circumstances" correctly highlights the fact that it should be unusual for an order for costs to be made at all. In *Willow Court* at paragraph 62 it was said that the FTT " is a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs".

37. The appeal fails on this ground.

Grounds 2 and 3: too narrow a focus

38. Grounds 2 and 3 both begin by making the same point, under ground 2 about the FTT's assessment of the conduct of the respondents in bringing the proceedings and under ground 3 about the FTT's assessment of their conduct in conducting the proceedings. In both cases it is said that the FTT failed to make the necessary assessment of the conduct of the respondents, and instead focused too narrowly on the formal correctness of the application. Thus under ground 2 it is said:

> "There was the assessment (at §§67-8) that it was plain the demands were going to be subject to challenge, because of the unsatisfactory nature of the leases . The lease was not followed and there was not a reasonable methodology adopted to determine the amount. So the application that was brought, in the result, failed. That, however, cannot be an appropriate assessment of the action in bringing the claim: the action must be more than merely using the correct form and raising questions envisaged by and within the Tribunal's jurisdiction. The Tribunal is only engaged at all if a claim is brought and, in practice, costs only arise for consideration if it fails. The assessment of the action of bringing the application cannot be so narrowly focused or the Rule becomes redundant."

39. Again under ground 3 it is said:

> "Once again, the focus of the Tribunal was too narrow. The conduct of the proceedings means more than merely the compliance (or, in this case, frequent non-compliance) with directions, but the broader question of whether GPIMCL, Mr Gubbay and Epworth acted reasonably. The processes by which each acted is

not "noise", but the substance of the complaint and there is no reasonable explanation for them."

40. Having made those points, under ground 2 Mr Verduyn then repeats the arguments made in the original costs application as to why the respondents behaved unreasonably in bringing proceedings, and under ground 3 the arguments as to why they behaved unreasonably in conducting the proceedings.

41. If I have understood correctly, Mr Verduyn in the passages quoted just above is arguing that the FTT in paragraphs 67-68, quoted in my paragraph 27 above, took the view that the test in rule 13 was not met because the application was in correct form, and that the FTT failed to look at the substance of the allegations against the respondents. And having made that argument – I will call it the "narrow focus argument" - he then re-argues the points made in the original application on the basis that they were not properly considered by the FTT. This, he says, is not an attempt to re-open a discretionary decision; the FTT failed to get to the point of exercising its discretion because it failed to conduct an objective assessment of the conduct of the respondents, first in bringing and then in conducting the proceedings.

42. Insofar as I understand the narrow focus argument I find it unsustainable. The FTT in paragraphs 67-8 was not looking simply at procedural correctness. It was making an assessment of whether bringing and conducting the proceedings was reasonable, and it went on in the following paragraphs to explain its view by assessing the conduct of the parties.

43. I see no failure by the FTT to grapple with the arguments raised by Mr Verduyn, and no sign of a narrow focus. Rather, there is an assessment of various aspects of that conduct – quite a succinct analysis it is true, and not picking up on each and every one of the points in the application – and a conclusion that it was not unreasonable in the *Willow Court* sense, as can be seen from the quotation and summary at paragraphs 28 to 31 above.

44. The "noise" to which the FTT referred at its paragraph 75 was not that conduct, but the other matters going on between the parties, in particular the High Court proceedings. The events between the parties have been complicated and this is the sort of case where it is terribly tempting to look through the corporate veil at the individuals behind the various companies, especially given the connections between those companies and their common shareholding. But GPIMCL was not Messrs Spence and Kewley. The FTT carefully and correctly shut out from its consideration of the costs application the High Court proceedings and the allegations of fraud and looked at this without reference to those other disputes.

45. So the appeal must fail on that point. The further points made under grounds 2 and 3 all repeat the arguments in the costs application, and most of the appeal hearing was taken up with those arguments and with the development of the submission that the FTT failed properly to assess the conduct of the respondents. I agree with the appellants that the assessment of that conduct is not a matter of discretion, as the Tribunal said itself in *Willow Court* at paragraph 28; but it is an evaluative decision, where there is no single right answer. As the Tribunal put it at paragraph 24 of *Willow Court, "*An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ". The Tribunal's role on appeal is to consider whether the FTT reached a conclusion that was open

to it, having taken into account relevant matters and without taking into account irrelevant matters.

46. I am going to make use of my summary of the arguments in the costs application, at paragraph 24 above, to structure my consideration of the arguments in the appeal, omitting item (iv) where the appellants were successful.

(i) Bringing and conducting proceedings to recover charges set without any reasonable basis, and prematurely

47. The first point is that the application for a determination of the reasonableness and payability of the service charges was not based on any realistic assessment of the likely charges. In effect the appellants argued, and Mr Verduyn made the point in a number of different ways at the hearing, that the charges were so unreasonable as to bring the respondents into the realm of rule 13(1)(b) costs.

48. The FTT disagreed; what it was saying in paragraphs 67-8 was that this was in essence a straightforward application by the management company for the determination of service charges which were bound to be contentious, and that that did not amount to unreasonable behaviour on the part of GPIMCL or its director Mr Gubbay. The FTT was not swayed by the argument that the application was brought too soon, for the same reasons. And I take the view that those were conclusions to which the FTT was entitled to come. It is worth bearing in mind that there has as yet been no adjudication of the claim that the long residential leases are voidable on the grounds of fraud. If that claim fails, the lessees will remain liable to pay service charges, the holiday park will still need maintenance, and GPIMCL will remain responsible for that maintenance. If one views this as a fraudulent scheme as the lessees do then of course the bringing and conducting of proceedings relating to service charges must appear outrageous, but the FTT carefully and correctly put all that out of its mind when considering the service charge proceedings. And with that background ignored this is, as the FTT put it, "a classic situation where a management company may well apply to the Tribunal to seek clarity" (FTT paragraph 67).

(ii) Company law defaults

49. The FTT did not focus on what one might call the corporate shortcomings of GPIMCL, in particular its removal of a director without telling him and without informing the registrar of companies. But it is unsurprising that it did not regard those matters as relevant to the reasonableness and payability of service charges.

50. Mr Verduyn sought to develop this argument in the appeal, by relying upon the principle that the decision-making process behind a service charge demand must be reasonable, as well as the charge itself. He referred at the hearing to *23 Dollis Avenue (1998) Limited v Vejdani and Echraghi* [2016] UKUT 365, but the point is seen more clearly in *London Borough of Hounslow v Waaler* [2017] EWCA Civ 45, and was discussed by the Tribunal recently in *Assethold Limited v Adam ad other leaseholders of Corben Mews* [2022] UKUT 282 (LC). Mr Verduyn relied upon GPIMCL's failure to record its directorships on the Companies Register after Mr Gubbay's removal, and the fact that Epworth SW Limited had no director when proceedings were commenced; in effect corporate disorganisation and

irregularity is said to indicate that proceedings could not have reasonably brought or conducted. He said that it was "a remarkable fact" that at the time Epworth SW Limited was involved in bringing the FTT proceedings no directors were on register and it had no employees, and that GPIMCL was "never properly directed" but "permitted itself to be a vehicle for Mr Gubbay's agenda".

51. These are to a large extent speculative points about the internal organisation of the two companies. It is not known whether GPIMCL was properly directed. There is little or no information available about the running of Epworth SW Limited. More importantly, the argument misapplies or misuses the two-stage test referred to in *Waaler*. The decision-making process there referred to was the decision to incur the service charge – or, in a case like this where the charges concerned were estimates, the decision to plan ahead, set a budget, make estimates and demand charges the basis of the estimates. It is not about corporate organisation. But insofar as corporate standing is relevant, it is worth noting GPIMCL had a director when it brought proceedings, it had shareholders who made decisions, and it had directors who confirmed Mr Gubbay's authority to represent the company after he ceased to be a director when they decided to go ahead with the service charge proceedings.

52. As for Epworth SW Limited, I have not been told a great deal about the company and certainly nothing that could show that its not having a director in January 2021 – if indeed that was the case – had an impact upon the reasonableness of the bringing or conducting of the proceedings either by GPIMCL or by Mr Gubbay as GPIMCL's representative later on in the proceedings. I would add that I fail to see that Epworth SW Limited brought or conducted proceedings at all. As managing agent for GPIMCL it sent out service charge demands and its address appears on GPIMCL's original application to the FTT. There is nothing that could justify a conclusion that it actually brought or conducted the proceedings itself.

(iii) Procedural defaults

53. Anyone familiar with the FTT's service charge jurisdiction will be aware that procedural defaults of the kind complained of here – late filing of a statement of case, failure of disclosure and so on - are by no means unusual. The FTT would rarely regard the kind of defaults mentioned here as so serious as to bring a party within the rule 13(1)(b) jurisdiction and it is perhaps unsurprising that it did not give separate consideration in its decision to the procedural defaults; they are I think sufficiently summed up in the general conclusion at paragraph 75: "the conduct of the proceedings, save as dealt with below, was not such that any further order for costs pursuant to Rule 13 should be made".

(v) Mr Gubbay's conduct and the conflict of interest

54. Mr Gubbay's conduct was the main focus of the appeal hearing; Mr Verduyn argued that Mr Gubbay acted entirely in his own interests, and that GPIMCL allowed itself to be used for Mr Gubbay's own interests, and that that made the bringing and conducting of the proceedings unreasonable on both their parts.

55. Mr Gubbay's own conduct and the conflict of interest between him and GPIMCL was clearly a matter of concern for the FTT at the hearing, the transcript of which I have read. It

came to the conclusion that Mr Gubbay had really not understood the position he had adopted; his intention was to have service charges paid to Epworth SW Limited as agent for GPIMCL, but he had failed to understand that the GPIMCL was nevertheless entitled to the service charges and that in bringing the application he was asking the FTT to order the leaseholders to make payments to a company controlled by shareholders he did not trust.

56. The FTT concluded, as I said above, that Mr Gubbay believed he was doing the best for everyone, including the appellants. Having read the transcript of the hearing I take the view that that was a view that it was open to the FTT to have taken.

57. At the hearing of the appeal Mr Verduyn placed great emphasis on the receipt of rent by Ilfracombe Resorts Limited for the holiday lettings (see paragraph 29 above). He referred to the £2.1 million as having been "misappropriated", and I note that the £2.1 million was mentioned only obliquely in the appellants' application to the FTT for costs, and was not referred to at all in Mr Verduyn's skeleton argument on that application or in the grounds of appeal to the Tribunal. As Mr Allison said, that was the first time that such an accusation had been made. Mr Gubbay in cross-examination in the hearing of the service charges application made it clear that he was willing to account for it to the long leaseholders; of course, none of the appellants wanted him to do so because they could not put themselves in the position of having affirmed their leases. As I said above, the FTT was aware of the receipt of rent from the holiday lettings when it found that Mr Gubbay was trying to do the best for everyone. The FTT was best placed to make that assessment and I do not see any reason for the Tribunal to interfere with it, especially as this was not one of the grounds for making the costs application in the first place.

(vi) The conduct of the hearing

58. Finally the FTT considered explicitly the conduct of the hearing and the cross-examination, and concluded that Mr Gubbay had behaved properly in cross-examination. Having read the transcript I would say that to describe his questioning as "victim shaming" is exaggerated and unjustified.

Conclusion

59. I conclude that the FTT gave proper consideration to the application before it, applying the right test and looking at the substance of the conduct of the respondents. Moreover, its consideration of that conduct led it to conclusions that were open to it on the evidence. The appeal fails.

Judge Elizabeth Cooke

30 May 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

SCHEDULE

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Kathryn Campbell Wilson	10G
Mukesh Parmar	10M
Anne Shirley McCrea	10T
Lorna Josephine Woodward	11G
Michael Scott Dickson & Patricia Margaret Atalanta Dickson	11M
Thomas James Adam	11T
Stuart Victor Douglas Richard	12G
Greig David Morrish	12M
Anastassios and Nicolete Crassas	12T
Stuart Victor Douglas Richard	13G

B&B Chauhan Limited	13M
Adefunke Omolara Kasali	13T
Carmel Doreen Glanville	14T
Karen Mary Sparkes	15T
Marie Celine Murphy	16T
Maxine Margaret Hopton & Brian Hopton	17T
PPP Properties Ltd	18G
DKV Properties Ltd	18M
Mohammad Naser Imran & Lubna Imran	18T
Abdullah Abdulrahman Alamoudi	19G
Sayeed Mohammed and Haffiza Mohammed	19M
Luigi Terzaga	19T
Joanna Adelajda Kosinska	1G
Shahida Sultana	1M
Roland Charles Sparling	1T
John Brusey Cow (deceased)	20G
Arvindkumar Bhulabhai and Ranjanben Patel	20M
John Brusey Cow (deceased)	21G
Thomas John Winter	21M
Wolfe Solutions Ltd	21T
Yulia Zeevi	22G
Zubair Amin	22M
Pawel Gozdz	22T
Gillian Margaret Aitchison	23G
Lian Properties Limited	23M
Christa and Hans-Guenther Klenk	23T
Kentankumar Rajnikant Shah & Tanviben Ketankumar Shah	24G
Ambreen Faraz	24M
Paul Thomas Lysaght	24T
Ahmad Lutfi Khader and Rabab Nimer	25G
Kathryn Elizabeth Lindley	25M
Konstantinos boulakis and Artemis Boulaki	25T
Lemongold Limited	26G
Konstantinos boulakis and Artemis Boulaki	26M
Jonathan Foster & Helen Foster	29G
K8 Virtua Ltd	2G
Michael and Susan Watson	2M
Gian Carlo Gini	2T
Bel London Ltd	30G
Furat Naser Alabdali	31G
Christa and Hans-Guenther Klenk	32G
Revendran Krisnan Nair & Catherine Ellen Nair	33G
Winkworth Family Homes Ltd	35G
Fiona Elizabeth Janet Folley	36G
Michael Jonathan Mansel Lord & Julie Lord	37G
Silvergate Equestrian Ltd	38G
Gillian Ann Weeks	39G
Lesley Elizabeth Hawkes	3G
Shahida Sultana	3M
Malcolm Tudor Hawkes	3T
Farid Abdelkader Mohamed Farid & Yasmin Abdelkader Mohamed Farid Abdelkader	40G
Kimerie Mapletoft	41G
Wafaa Khaleel Ismael Al-Ani	41T
Virginie Moate	42G
Milada Murray	42M
Ali Omar Zeglam and Anne Elizabeth Zeglam	42T
Navneet Kumar Kohli	43G
Richard & Paula Fay Wiltshire	43M
Ameenah & Haneen Zeglam	43T
Richard & Margaret Pybus	4G
James Ford Mason	4M
Mohammad Naser Imran & Lubna Imran	4T
Eugene Hansram Lakhisaran and Maya Aroenadebie Jadnanansing	5M
Ayden Alan Hipkiss	5T

PB Judd Ltd	61G
PB Judd Ltd	61M
Dominic Paul Sankey and Rosemary Thomson	61T
PB Judd Ltd	62G
Asjad Hameed & Dr Nuzhat H Hameed	62M
Mumtaz Akbar Syeda and Sarah Syeda	62T
Jubair Ali Thottakuruchi Mohamed Ali & Farzana Begum Thottakuruchi	63M
Zaidi	63T
Gecko Documentation Services Ltd	64T
Ziauddin Limited	65G
Susan Jane Merkin	65M
The Nimbus Group Limited	65T
Susan Jane Merkin	66G
Rodger Dister Jensen	66M
Deborah Cutcliffe Carter Clout	66T
PB Judd Ltd	67M
Michael Oladipo Daramola and Yetunde Daramola	67T
Dmitry Lyakutin and Elena Dannikova	68G
Roger Charles Levick	68M
Michael Oladipo Daramola and Yetunde Daramola	68T
Paul Grant	6G
Suleiman Al Brashdy	6M
Waqas Anis and Surayya Amin	7M
Paresh Kumar Jethalal Bharmal Shah & Nilla Paresh Shah	7T
Hua Xiao	8G
Ada Lampert	8M
Ahmed Munir and Rehana Munir	8T
Sarah Merryn Goodwin-Davis	9G
Ahmed Munir and Rehana Munir	9T