UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – enforcement of FTT's order requiring provision of documents and computer records – whether order complied with – whether order should be set aside – jurisdiction of Upper Tribunal in relation to enforcement of final orders of FTT – s.24(4), Landlord and Tenant Act 1987 – s.25, Tribunals Courts and Enforcement Act 2007 – rules 8(5) and 20(2), Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 – application refused

IN THE MATTER OF AN APPLICATION UNDER SECTION 25 OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Between:

MR ALAN COATES

Applicant

and

MARATHON ESTATES LIMITED

Respondent

Martin Rodger QC, Deputy Chamber President

14 December 2017

Royal Courts of Justice

Re: Canary Riverside Estate,
West Ferry Circus,
London E14

Nicholas Isaac, **instructed by Downs Solicitors LLP, for the Applicant**
Daniel Dovar, **instructed by Howard Kennedy Solicitors, for the Respondent**

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The following cases are referred to in this decision:

Coates v Octagon Overseas Limited [2017] EWHC 877 (Ch); [2017] 4 WLR 91

Octagon Overseas Limited v Coates [2017] UKUT 0190 (LC)

Octagon Overseas v Various Leaseholders of Canary Riverside [2016] UKUT 0470 (LC)

PA v CMEC [2009] UKUT 283 (AAC)

Introduction

1. This is the third occasion on which the Tribunal has become involved in the long running dispute over the management of the mixed residential and commercial estate known as Canary Riverside. The applicant, Mr Coates ("the Manager") was appointed as manager under section 24, Landlord and Tenant Act 1987 ("the 1987 Act") by the First-tier Tribunal (Property Chamber) ("the FTT") by an order made on 5 August 2016 ("the Management Order").

2. On 1 November 2016 I refused an application for permission to appeal the Management Order (see *Octagon Overseas v Various Leaseholders of Canary Riverside* [2016] UKUT 0470 (LC)). That decision contains a short review of matters pre-dating Mr Coates appointment which I will not repeat. On 22 March 2017 in *Octagon Overseas Limited v Coates* [2017] UKUT 0190 (LC) I allowed an appeal by Octagon, the owner of the freehold interest in Canary Riverside, and by the head-lessee, Canary Riverside Estate Management Limited ("CREM") against directions given by the FTT concerning the insurance of the building.

3. The current application is made following a reference to the Tribunal by the FTT under rule 8(5), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the FTT Rules"). The parties to the application are the Manager and Marathon Estates Limited. Marathon is a property management company which acted as an agent for CREM in relation to the provision of services and collection of service charges from the residential and commercial leaseholders at Canary Riverside. In circumstances which I will describe the FTT made certain orders against CREM and against Marathon for the production of computer records which the Manager considered necessary to enable him to carry out his functions. The Manager considers that the FTT's directions have not been complied with, but Marathon disputes that. Rather than considering the issue of compliance for itself the FTT referred the dispute to this Tribunal.

4. The particular information which the Manager requires is contained on a computer server maintained by Marathon. That server, and the "Qube" software associated with the service charge records it contains, is used by Marathon in connection with its management of at least one other building. For that reason it has not been prepared simply to hand over the database or the server itself to the Manager but has sought to comply with the FTT's order by printing the records relating to Canary Riverside and providing them in hard copy. The Manager complains that this makes it impractical for him to use the data he requires.

5. The application brought before me by the Manager is that an order made on 26 June 2017, by which the FTT required Marathon to hand over computer records, be endorsed with a penal notice, as a prelude to an application for committal.

6. CREM is not party to the application. After a directions hearing on 22 September 2017 the proceedings between Manager and CREM were also transferred

by the FTT to this Tribunal. That was so that any order which the Manager wished to seek against CREM could be considered at the same time as this application. In the event the Manager has not sought any relief against CREM.

The proceedings and orders in the FTT

7. The Management Order was made on 5 August 2016. In it "the Landlord" is a reference to CREM, which is the immediate landlord of the residential lessees.

8. By paragraph 1 of the Management Order Mr Coates was appointed Manager of Canary Riverside for three years from 1 October 2016. He was given extensive powers and duties including to comply with the Landlord's obligation to provide services and the power to collect service charges. The Manager is entitled under clause 1(h) to an indemnity for his own costs reasonably incurred in legal proceedings in connection with the Management Order and for any adverse costs order.

9. By paragraph 4 CREM was prohibited from demanding any further payment of service charges or other monies after the appointment of the Manager. The paragraph then went on:

> "The Landlord, the Commercial Tenants, other occupiers of the Premises, the Lessees and any agents or servants thereof shall give reasonable assistance and co-operation to the Manager in pursuance of his/her duties and powers under this Order …."

10. Paragraph 5 was in the following terms:

> "Without prejudice to the generality of the foregoing:
>
> (a) …
>
> (b) The Landlord, whether by itself, its agents, servants or employees, or accountants shall by 19 September 2016 deliver to the Manager all such accounts, books, papers, memoranda, records, computer records, minutes, correspondence, emails, facsimile correspondence and other documents as are necessary to the management of the Premises, including without limitation all personnel details (…) as are within its custody, power or control together with any such that are in the custody etc of any of its agents, servants or employees in which last case it shall take all reasonable steps to procure delivery from its agents, servants or employees;"

The same paragraph went on to identify certain specific accounting information which would be required, including all service charge statements of account, up to 31 March 2015, all relevant bank statements, and a detailed general ledger showing all accounting transactions.

11. By paragraph 12 of the Management Order the Manager was given permission to apply to the FTT for further directions including in relation to any failure by any party to comply with any obligation imposed by the Order.

12. In a witness statement dated 25 October 2017, which the FTT directed should be filed, Mr Lambros Hadjiioannou, a director of CREM, provided an account of the steps which CREM had taken to comply with paragraph 5(b) of the Management Order. 26 boxes of documents had been delivered to the Manager by 10 October 2016 including audited accounts for the three years to March 2016. Further accounting information was provided later in October. Information was also provided by means of an electronic "Dropbox" in May 2017. As far as CREM was concerned all of the information requested by the Manager had been provided.

13. The Manager takes a different view, suggesting on 30 September 2016 that a "pile of paper plonked into boxes" did not satisfy the requirements of the Management Order. His solicitors complained to CREM's solicitors on 19 October 2016 that the volume of documents supplied was designed deliberately "to flood our client with paper to delay and interfere with our client's management of the site." That suggestion was refuted by CREM's solicitors.

14. Immediately after taking up his appointment the Manager became embroiled in litigation with CREM. On 4 October 2016 the Manager issued proceedings in the County Court seeking an injunction to enforce the Management Order and on 7 October an order was made by His Honour Judge Madge, to which a penal notice was attached, requiring CREM to provide keys to the building and documents referred to in the Management Order.

15. On 18 April 2017, on appeal to the High Court, the injunction was discharged by Her Honour Judge Walden-Smith, sitting as a High Court Judge, (*Coates v Octagon Overseas Ltd* [2017] EWHC 877 (Ch)). I will refer to Her Honour Judge Walden-Smith's decision in more detail later but in brief, she held that the County Court had no jurisdiction to grant an injunction enforcing an order of the FTT; the Manager ought, the Judge considered, to have sought enforcement by applying to the FTT itself for further directions and orders including, if appropriate, the endorsement of the Management Order with a penal notice.

16. On 28 March (possibly in anticipation of arguments which eventually succeeded in the High Court appeal) the Manager's solicitors asked the FTT to make an order under rule 6(3)(d) of the FTT Rules requiring CREM to provide documents, identified in 12 categories, which were said previously to have been requested but not provided. By that rule the FTT may require "a party or another person to provide or produce documents, information or submissions." The word "document" is defined in Rule 1 as meaning "anything in which information is recorded in any form."

17. After its unsuccessful application for permission to appeal the Management Order in this Tribunal CREM applied to the FTT for it to be varied. That application

was made in the original proceedings and under the original case reference. It came before the FTT on 4 April 2017 together with the Manager's application of 28 March for an order under rule 6(3)(d).

18. In its order of 5 April 2017 the FTT referred to that application and recorded that it had been informed that documents could not be provided by CREM because they were held by the respondent, which was insisting on being paid one months' management fees for its work in the period up until the commencement date of the Order. The management contract provided that, where the contract has come to an end, the respondent was not to be paid a fee for the last month until the transition of responsibility to a new manager had been completed, including by the handing over of all necessary documents. Having noted that the respondent was not yet entitled to be paid the disputed fee, the FTT made the following direction:

> "On the basis that [the respondent] were acting as agents for the landlord at all material times before the end of the Management Agreement, the landlord shall direct [the respondent] to release all of those documents contained within the email of 28 March numbered 1-12 to the [Manager] within 14 days."

19. The respondent was not present or represented at the hearing on 5 April.

20. On 28 April certain computer equipment was handed over to the Manager by CREM. Before it was released all data and software had been removed from the equipment so that it was of no use to the Manager in discharging his functions.

21. The hearing of the application to vary the Management Order resumed on 2 May. The FTT was informed by the Manager that the respondent was still refusing to release the required documents on the basis that they had not been paid. In paragraph 8 of an order made on 4 May the FTT said that it was clear to it that a transition of responsibility from the respondent to the Manager had not yet taken place and that:

> "It is clear from the agreement that [the respondent] is therefore not in a position to withhold release of the documents pending payment of its fees and charges. It also appears from the evidence provided to the Tribunal that [CREM] has no leverage over its agent."

22. Having made those observations the FTT proceeded to make an order under rule 20(1)(b) of the FTT Rules requiring that by 18 May the respondent must release to the Manager all of the documents requested in his email of 28 March, and stating that if the respondent failed to comply the matter would be referred to this Tribunal to exercise its powers under section 25 of the 2007 Act. The FTT considered that a very short timescale was required because the absence of documents was preventing the Manager from carrying out his functions.

23. The order of 4 May 2017 was made in the respondent's absence and in the Management Order proceedings to which it was not a party. The order stated that

Eversheds LLP were the respondent's representatives, which was not the case. No copy of the order was sent to the respondent, but a copy sent to Eversheds was passed on to it. On 11 May the respondent wrote to the FTT asking for further time to comply and requesting that its outstanding fees of £22,300 be placed in escrow with solicitors before additional information was supplied.

24. On 17 May the FTT extended time for compliance until 25 May.

25. On 25 May documents intended to comply with the order of 4 May were placed by the respondent in an electronic Dropbox. On obtaining access to the Dropbox the Manager discovered that the material comprised pdf versions of accounts and other financial information. The documents themselves were said by the Manager not to be identified in any meaningful way and he complained that it was impossible for his accountants to compile a full set of accounts for the year in which he had been appointed. The Manager's solicitors indicated that he intended to invite the FTT to refer the issue of compliance with its order to this Tribunal.

26. Marathon responded to the Manager's criticisms on 19 June, saying (in essence) that it had complied to the best of its ability and was unable to provide any further information. It also complained that its fear that it would not be paid even if it handed over additional documents appeared to be justified and it asked the FTT to order the Manager to pay its outstanding fees.

27. On 20 June a further hearing took place at which the respondent was not present or represented. Counsel for the Manager explained that the information so far provided by Marathon was insufficient, and suggested that the accounting records should be provided in electronic form with the associated Qube software necessary to enable it to be interrogated and worked with. The software was said to have been paid for by through the Canary Riverside service charge.

28. On 26 June the FTT made a further order under rule 20(1)(b) in which it recorded what it had been told about the existence of a computer containing electronic records and ordered that the respondent "must release that computer, the software and all electronic records kept within that system, together with any other electrical or electronic equipment paid for by the service charge funds of the Canary Riverside Estate." The respondent was given until 10 July to apply to vary or set aside the order which, once again, had been made without it having had any opportunity to make representations.

29. On 10 July solicitors acting for Marathon applied to the FTT to set aside the order of 26 June. They explained that all computers used exclusively for the purposes of Canary Riverside had been handed over to the Manager on 28 April, and that all of the electronic records formerly held in those computers had been provided in the Dropbox. The respondent did retain a server containing all the electronic accounting records, on the Qube software system, but those records were mixed with records relating to at least one other property which were confidential and which the

respondent was unable to deliver. It was possible to extract the records concerning Canary Riverside from the server but that this would incur a cost of tens of thousands of pounds which the respondent did not have the resources to meet. The respondent's solicitors expressed a willingness to seek a mutually acceptable solution, but invited the FTT either to set aside its order on the grounds that it had been complied with, or could not be complied with, or to fix a hearing at which the respondent could attend and explain its position.

30. On 12 July the FTT wrote to the parties stating that the difficulty over access to the electronic records appeared to be of the respondent's own creation in that it had mixed the Canary Riverside files with those relating to another property. It did not consider that a hearing would resolve the issue of compliance and informed the parties that it would refer the matter to this Tribunal unless the respondent had complied with its order in full within 7 days.

31. In response to the FTT's ultimatum the respondent's solicitors wrote on 20 July asserting that the cost of the software had been contributed to by at least one other property and repeating that the respondent had supplied all of the information it held. It was happy to undertake the additional work (presumably to separate the electronic records of Canary Riverside from those of other buildings) but only if it would be paid for that service.

32. On 16 August the FTT informed the parties that "the matter of the compliance with the Tribunal's directions in relation to information/data held by Marathon Estates Ltd, has now been referred to the Upper Tribunal."

The application to this Tribunal

33. In advance of a case management hearing on 22 September the Manager was directed to state precisely what order he wished the Tribunal to make. In a witness statement made on 15 September 2017 he explained that his only application was for a penal notice to be attached to the FTT's order of 26 June 2017, on the grounds that the direction to the respondent to release the computer, software and electronic records relevant to Canary Riverside had not been complied with. The Manager was then directed to file points of claim identifying the breaches of the order on which he relied.

34. The Manager's points of claim allege the following breaches of the order of 26 June by the respondent: failure to deliver the server containing the electronic accounting records referred to in its solicitor's letter of 10 July; failure to deliver the Qube software on the server; and failure to release the electronic records kept on the software system relating to Canary Riverside. The Manager also identified nine separate categories of documents, or information, which he believed ought to be contained within the electronic record, and which he did not yet have.

35. On 27 October the respondent replied to the Manager's points of claim. It pointed out again that the Qube software programme on the server contained electronic information relating to other property which the respondent was not at liberty to release but which could be extracted at a significant cost which it could not meet. It complained that its application of 10 July 2017 to set aside the FTT's order remained undetermined and asked that this Tribunal deal with it. All relevant documents on the server had been provided through the Dropbox on 25 May 2017 and the order had therefore been complied with. Detailed points were also made about the individual documents referred to in the Manager's points of claim including, that some of the information requested was entirely new or too vague to be capable of being identified.

36. In support of the application Mr Isaac, who appeared for the Manager, submitted that the FTT's letter of 12 July 2017 had rejected Marathon's application to set aside the order of 26 June. There was no outstanding application to set aside the order and nothing had been done by Marathon to comply with it so there could be no doubt that Marathon was acting in defiance of the FTT's order. The reasons it had given for non-compliance provided no excuse. Whether or not the information contained in the electronic records had been supplied in hard copy (and the Manager's case was that there remained significant gaps) information in that form was of no value to the Manager since it could not be interrogated or used in the preparation of accounts without the same information being manually entered in the Manager's own computer system, which would be a huge task. The leaseholders had already paid for the software package used by the respondent and for the management data to be entered on it. It could not be right, Mr Isaac submitted, for the leaseholders to be required to pay for the same exercise to be undertaken again to enable the Manager to perform the functions conferred on him by the FTT.

37. Responding to the application Mr Dovar submitted that a penal notice should not be attached to the FTT's order because the respondent was not a party to the substantive proceedings, nor had it been present or represented when the orders were made; moreover the rule under which the FTT had purported to require the production of the documents, rule 20(1)(b), conferred powers relating to case management and could not be used for the enforcement of a substantive order, particularly one made against a non-party. In any event, Mr Dovar submitted, the respondent had complied with the requirements of the FTT in relation to the production of documents.

38. I intend first to deal with the question of whether Marathon has complied with the FTT's orders. I will then consider what the Tribunal's appropriate response should be.

Compliance

39. While the parties disagree on matters of detail there is no dispute that most of the information requested by the Manager has been supplied by the respondent, and Mr Isaac did not focus on individual documents in his oral argument.

40. The Manager's real complaint is that the documents supplied in hard copy, and electronically in pdf format through the Dropbox, cannot be questioned electronically to produce the necessary accounting records. Without creating a functioning database of his own from the raw material supplied to him the Manager is therefore unable to ascertain what each leaseholder or service provider has paid, or received, before his appointment. Since his appointment came midway through the service charge year he is unable to complete annual service charge accounts, collect sums due or pay invoices received.

41. The Manager's position is that the FTT's direction to the respondent of 26 June to provide "the computer, the software, and all electronic records kept within that system" is not satisfied by the provision of copies of spreadsheets stored within the system. Possession of the software and the records within it in their digital form will permit the Manager and his accountants to interrogate data actively. The transfer of data in a useable form is a routine activity which ought to be relatively straightforward.

42. The respondent's position is that on 4 May 2017 it was directed by the FTT to provide "documents", and that it complied fully with that order on 25 May 2017 when it supplied document in pdf format. The Qube software system itself was not a document.

43. I have no doubt that the Management Order has not yet fully been complied with. By paragraph 4 of that Order CREM and its agents, who include the respondent, were directed to provide "reasonable assistance and cooperation to the Manager in pursuance of his duties and powers." Those duties include preparing an annual service charge budget, administering the service charge, demanding and collecting service charges and preparing service charge accounts. If, as the Manager complains, as is obviously the case, and as the respondent does not seriously dispute, those tasks are made more difficult, time consuming and expensive by the absence of information in the form of usable electronic data, the Manager is entitled to the reasonable assistance of CREM and the respondent in obtaining access to that data.

44. Paragraph 5(b) of the Management Order is expressed as being without prejudice to the general obligation to provide reasonable assistance, and imposed a specific obligation on CREM, by 19 September 2016, to deliver, amongst other things, all accounts, records, computer records and other documents necessary to the management of Canary Riverside. Where, as is now invariably the case in modern property management, details of demands, invoices, payments and accounts are stored digitally and made use of in conjunction with a functioning software package, compliance with the FTT's order required that all such management records be provided in usable electronic form. I reach that conclusion for a number of reasons. First, as a matter of language the Management Order distinguishes between records and computer records, indicating that the latter expression is not to be understood as meaning simply the information contained in the records, presented in hardcopy or other inert form, but as extending to the associated software and coding the "live" information in usable form. Secondly, if there is doubt about the meaning of

"computer records", the FTT cannot have intended that information be supplied in a form which rendered it unusable, or usable only after the expense of entering the raw data had been incurred by the Manager. Thirdly, the leaseholders have already paid for the software system and the cost of data entry through the respondent's annual management fees collected as part of the service charge, and neither the spirit nor the language of the Management Order contemplate that they should have to do so for a second time. Finally, anything less than the provision of the material required for the discharge of the Manager's responsibilities would not amount to the "reasonable assistance and cooperation" which paragraph 4 of the Management Order demanded of CREM and its agents.

45. In the event that the Tribunal found the respondent to be in breach of the FTT's order, Mr Dovar resisted the making of any order intended to compel compliance on jurisdictional grounds and on the basis that the respondent's application of 10 July to set aside its order of 26 June had not yet been determined.

The respondent's application to set aside the order of 26 June 2017

46. In their letter to the FTT of 10 July 2017 Howard Kennedy, the respondent's solicitors, gave four reasons why the order of 26 June should be set aside. Despite Mr Isaac's attempt to persuade me that the FTT must be taken to have dismissed the application (without reasons), and that this Tribunal should not consider it in the absence of an application for permission to appeal from that implicit refusal, it is clear to me that the application remains undetermined. The FTT's order of 26 June was made in the respondent's absence, and in proceedings to which it was not a party, and the FTT rightly informed the respondent of its right to apply to set the order aside. The application was made within time, and it would not be right to take steps to enforce an order which there are said to be good grounds for setting aside, especially one made against a non-party, where the respondent has not yet had a chance to challenge the making of the order. I will therefore consider the reasons advanced by the respondent's solicitors in their letter of 10 July.

47. First, it was said that by delivering up the computers used exclusively in connection with the management of Canary Riverside in April 2017, and in circumstances where no other computers used exclusively for that purpose were in its custody, that part of the order had been complied with.

48. If factually correct, the first ground advanced for setting aside the order of 26 June would relate only to part of it. Additionally, the computer equipment handed over in April had first been wiped clean of any data of use to the Manager. No explanation has been given why that was done. In his witness statement of 27 October on behalf of the respondent Mr Paul says that the computers were handed over by CREM, but he says nothing about who was responsible for first cleansing them of useful information. Mr Hadjiioannou says nothing in his witness statement of 25 October on behalf of CREM about the handing over of the cleansed computers, including whether it was done by CREM or by the respondent on CREM's instructions. In their letter of 10 July 2017 Howard Kennedy say only that the

computers “held by Marathon were handed over to [the Manager] on 28 April”, which suggests that the equipment remained in the respondent’s possession until it was handed over. Since those computers are said to have been used exclusively for Canary Riverside business, the removal of data cannot have been to avoid disclosing confidential information concerning other buildings. On the state of the evidence before the Tribunal it is difficult to think of an explanation for the condition in which the computers were handed over which does not involve a deliberate decision to flout paragraphs 4 and 5(b) of the Management Order with the intention of obstructing the Manager in carrying out his functions. In any event, partial compliance with an order provides no basis for setting it aside.

49. Secondly, it is said that, as far as the respondent is concerned, it has already provided the electronic records which are the subject of the FTT’s order. For the reasons I have already explained in paragraph 39 to 44 above, that submission is based on a misunderstanding of the Management Order and the order of 26 June 2017.

50. Thirdly, the respondent’s solicitors assert that the electronic records are held on a server which cannot be delivered up since it contains additional electronic information relating to at least one other building which is confidential and from which it cannot be separated except at a cost of tens of thousands of pounds. According to its solicitors the respondent “no longer has staff and in any event does not have the resource which would enable it to cover a fee in this amount or anything like it.” The respondent’s points of reply, verified by Mr Paul, also assert that the expense of extracting the information is one which “the respondent cannot meet and is not prepared to meet in circumstances where it has not been paid and it has already provided all the documentation in the Qube system … via the Dropbox.”

51. In its decision of 15 August 2016 giving its reasons for appointing the Manager, the FTT recorded Mr Paul’s evidence to it that the respondent was formed by CREM “as a special vehicle to manage both Canary Riverside and West India Quay”. The latter property is also owned by CREM and it would therefore appear that the respondent is not a conventional commercial managing agent, but is a company created by CREM for the purpose of managing properties owned by CREM.

52. By paragraph 5(b) of the Management Order CREM was ordered by the FTT to hand over to the Manager the computer records he would require to carry out his task of managing Canary Riverside. If those records were previously held in digital form on the computer hardware handed over by CREM or its agent in April 2017, they were first removed. If they are now held on CREM’s behalf by its agent in a location from which they can only be retrieved at an expense of tens of thousands of pounds, that is no reason why CREM itself should be released from its obligation to supply them.

53. But in these proceedings the only party against whom the Manager currently seeks relief is the respondent, and as no application has been made against CREM it is neither necessary nor appropriate to say anything about its position on compliance.

54. As against the respondent, the suggested expense of extracting the documents from the database is no reason for the FTT's order of 26 June to be set aside. The respondent's solicitors confirm in their letter of 10 July that the server on which all of the Canary Riverside electronic accounting information is stored is retained by its client. If the respondent wishes the Tribunal to accept that it does not have the resources to comply, substantial evidence would be required to make good that assertion. If such evidence is available it may be relied on at the hearing of any application to compel compliance with the FTT's order under threat of committal. At this stage the mere assertion that the respondent does not have the resources to comply is not a reason to release it from its obligation, especially when its plea of poverty is coupled with a defiant protest that "the respondent … is not prepared to meet" the cost.

55. The final reason given by Howard Kennedy in their application to set aside the order of 26 June is that "through cooperation between the parties it should be possible to agree an arrangement which is mutually acceptable, although in any event anything which requires the commitment of expense will need to be supported by a commitment from the Manager or somebody on the Manager's behalf that the expenditure will be covered so that Marathon is in a position to discharge this."

56. The suggestion that the parties ought to be able to reach a satisfactory arrangement through cooperation is not one which there is any evidence to support. By making the prospect of agreement conditional on the Manager paying for the respondent's cooperation, the respondent's solicitors merely emphasise the improbability of a consensual resolution. That prospect is no reason to set aside the FTT's order.

57. In any event, it is difficult to see why the Manager, presumably at the expense of the leaseholders of Canary Riverside, should be expected to indemnify the respondent as a condition of obtaining access to the tools required for the Manager to do the job he has been appointed by the FTT to do. The reason for the Manager's appointment was the failure of the respondent's principal, CREM, to make satisfactory arrangements for the management of the estate. One would therefore expect that, in the first instance at least, the cost of compliance by CREM would fall on CREM, and that CREM would be responsible for costs incurred by its own agents; it would, of course, be open to the FTT to direct that some or all of that cost should be passed on to the leaseholders if it thought fit.

58. The primary obligation to supply the required records in usable format rest with CREM under the Management Order. The FTT made its first order against the respondent (on 4 May 2017) because of CREM's claim that the respondent was refusing to cooperate in the release of information until it was paid. It is not clear why the FTT accepted that as an excuse for non-compliance by CREM (it has never been suggested that CREM is unable to pay the respondent), nor why, instead of insisting on compliance by CREM, the FTT chose to make an order against its agent. It is equally unclear why the Manager has taken no step (or none at least that I am aware of) to enforce paragraphs 4 and 5(b) of the Management Order against CREM.

59. If CREM considers that it should be reimbursed in respect of expense it may incur in providing the necessary accounting and other information in digital form (whether by paying the respondent to secure its cooperation, or paying a consultant to remove the records) CREM may apply to the FTT under section 24(9) of the 1987 Act for paragraphs 4 and 5(b) of the Management Order to be varied to make appropriate provision for its costs. On such an application the FTT will consider whether it is just and convenient in all the circumstances of the case to make the requested variation (see section 24(9A)(b), 1987 Act).

Enforcement of the Order of 26 June 2017 - jurisdiction

60. The third and final basis on which Mr Dovar resisted the application to endorse the FTT's order of 26 June with a penal notice was that the FTT had had no jurisdiction to make the order and the Tribunal had no power to enforce it. Whether or not the respondent was in breach of the order, Mr Dovar submitted, it could not and should not be enforced.

61. Rule 20 of the FTT's Rules (under which the order of 26 June 2017 was said to have been made) is headed "Summoning of witnesses and orders to answer questions or produce documents." Rule 20(1)(b) provides that, on the application of a party or on its own initiative, the FTT may "order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings."

62. The current application for the enforcement of the order of 26 June was referred to this Tribunal by the FTT under Rule 8(5) of the FTT Rules, which provides that:

> "The Tribunal may refer to the Upper Tribunal and ask the Upper Tribunal to exercise its power under section 25 of the 2007 Act in relation to, any failure by a person to comply with the requirement imposed by the Tribunal –
>
> (a) to attend at any place for the purpose of giving evidence;
>
> (b) otherwise to make themselves available to give evidence;
>
> (c) to swear an oath in connection of the giving of evidence;
>
> (d) to give evidence as a witness;
>
> (e) to produce a document; or
>
> (f) to facilitate the inspection of a document or any other thing (including any premises)."

63. Where a party has failed to comply with a requirement of the FTT Rules, a practice direction or a direction, rule 8(2) allows the FTT to take such action as it considers just, which may include exercising its power to make a reference to the Upper Tribunal under rule 8(5).

64. The six specified circumstances in which such a reference can be made are listed in Rule 8(5)(a)-(e) (above). The first four concern failures in relation to the giving of

evidence. The last two concern failures "to produce a document' and "to facilitate the inspection of a document or any other thing (including any premises)."

65. The six categories of default, and the power to refer non-compliance to the Upper Tribunal, are derived from paragraph 10(3) of Schedule 5 to the 2007 Act. Schedule 5 and section 22 of the 2007 Act provide authority for the making of tribunal procedure rules. Paragraph 10 is concerned with evidence, witnesses and attendance.

66. As for the enforcement powers of Upper Tribunal itself, section 25 of the 2007 Act, to the extent relevant, provides as follows:

> "25. Supplementary powers of Upper Tribunal
>
> (1) In relation to the matters referred to in sub-section (2), the Upper Tribunal -
>
> (a) has, in England and Wales …, the same powers, rights, privileges and authority as the High Court …
>
> (2) The matters are –
>
> (a) the attendance and examination of witnesses,
>
> (b) the production and inspection of documents, and
>
> (c) all other matters incidental to the Upper Tribunal's functions.
>
> (3) Subsection (1) shall not be taken –
>
> (a) to limit any power to make Tribunal Procedure Rules;
>
> (b) to be limited by anything in Tribunal Procedure Rules other than an express limitation.
>
> (4) …"

67. Provision for the enforcement of a monetary award by the FTT or by the Upper Tribunal is made in section 27(1) of the 2007 Act. A sum payable in pursuance of the decision of such a tribunal made in England and Wales is recoverable as if it were payable under an order of the County Court or the High Court. That provision has no applications to non-monetary orders.

68. Since the accession of residential property tribunals to the unified tribunal structure in 2013 the enforcement of other forms of tribunal decisions is covered by section 176C, Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). By that section it is provided:

> "Any decision of the First-tier Tribunal or Upper Tribunal under or in connection with an enactment specified in section 176A(2), other than a decision ordering the payment of a sum (as to which see section 27 (enforcement) of the Tribunals, Courts and Enforcement Act 2007), is to be enforceable with the permission of a county court in the same was as orders of such a court."

The enactments specified in section 176A(2) of the 2002 Act include the Landlord and Tenant Act 1987, under which the Management Order was made.

The respondent's case on jurisdiction

69. In short, Mr Dovar's submission was that rule 20 of the FTT Rules, under which the order of 26 June 2017 had been made, and section 25 of the 2007 Act, are both directed at the production of documents which relate to issues in proceedings. They relate to the conduct of proceedings themselves and are intended to facilitate the FTT in making its decision; in other words, they are case management powers. They are not the means by which substantive decisions finally disposing of proceedings or issues in proceedings are to be enforced. That was said to be clear from the wording of the provisions, and in particular from the reference in rule 20 to the making of an order for the production of any document "which relates to any issue in the proceedings." Once the proceedings had been determined by the making of a final order, they were at an end and there were no remaining issues. Rule 8(5), and paragraph 10 of Schedule 5 to the 2007 Act from which it was derived, were also clearly concerned with case management, the attendance of witnesses at hearings and the production of documents for use in hearings, rather than with the enforcement of final orders.

70. Mr Dovar referred to a decision of the Upper Tribunal (Administrative Appeals Chamber), *PA v CMEC* [2009] UKUT 283 (AAC), concerning the scope of the Tribunal's power under section 25 of the 2007 Act. That case was the first occasion on which the breach of an order of a first-tier tribunal had been referred to the Upper Tribunal under the equivalent in the Social Entitlement Chamber of Rule 8(5) of the FTT Rules. The reference concerned a party who had failed to comply with the FTT's order to produce his bank statements in a dispute about child maintenance. At paragraph 10 the Upper Tribunal described the equivalent of rule 8(5) as being "concerned with the evidence which can be before the tribunal in order to decide the issues before it."

71. By the time the Upper Tribunal came to make its decision the bank statements had already been supplied, but the FTT's reference had also asked the Upper Tribunal to compel the party to produce information which had not previously been ordered. The Tribunal refused to do so, and added some general observations, at paragraph 14, on which Mr Dovar relied in support of his submissions on the scope of rule 8(5):

> "It is not open to the Upper Tribunal to impose a different requirement in substitution for that imposed by the First-tier Tribunal. It is the First-tier tribunal that knows what issues arise in the appeal and what material is required to assist in its resolution. It is therefore of the first importance that the First-tier tribunal consider carefully the terms of any direction to produce documents. Plainly any such documents require to be relevant to the resolution of the issues before it."

72. In this case the FTT made the order of 26 June 2017 because it was satisfied that the digital records were essential to enable the Manager to reconcile the service charge accounts. That, Mr Dovar submitted, was not a purpose within the scope of rule 8(5) but was about enforcing the Management Order. In any event, even if the rule was wide enough to be used to enforce compliance with a final order, it only related to the production of documents and could not be extended to the provision of computer hardware or software. The wider terms of the order of 26 June 2017 should not have been made under rule 20 and should not now be supported by a penal notice. If the Manager wished to enforce the Management Order itself, or any order ancillary to the Management Order, the correct route was by application in the County Court under section 176C of the 2002 Act.

The Manager's response

73. Mr Dovar's full frontal attack on the jurisdiction of the FTT to make the order of 26 June under rule 20, and to refer the issue of non-compliance to this Tribunal under rule 8(5), was not foreshadowed in Howard Kennedy's letter to the FTT of 10 July, or in the respondent's points of reply. For that reason Mr Isaac did not deal with the issue of jurisdiction in his written argument.

74. In his oral submissions Mr Isaac first referred to the breadth of the FTT's powers under section 24 of the 1987 Act. An order for the appointment of a manager could make provision with respect to such matters relating to the exercise by the manager of his functions under the order, and such incidental or ancillary matters as the FTT thought fit (section 24(4)). Paragraphs 4 and 5(b) of the Management Order, requiring cooperation and the delivery up of documents and computer records, were examples of matters incidental or ancillary to the making of a management order. (Mr Dovar accepted that that was the case and did not suggest that the FTT had lacked jurisdiction to make those orders).

75. Although they were not contained in the same document as the Management Order, the FTT's orders of 4 May and 26 June 2017, each addressed to the respondent, and requiring the delivery of documents and the release of software, computers and electronic records, also dealt with incidental or ancillary matters and fell within the scope of section 24(4).

76. Mr Isaac submitted that the order of 26 June 2017 was also within the scope of rule 20. That rule created a general power to order any person to produce any documents which relate to any issue in the proceedings. The orders were made in the course of continuing proceedings over the form of the Management Order itself (an application having been made by CREM under section 24(9) for a variation of that Order). Moreover, where the FTT had appointed a manager who was entitled to look to it for directions relating to the exercise of his functions, it was not right to regard the appointment proceedings as being at an end or as no longer giving rise to issues. The Manager was under the continuing supervision and guidance of the FTT and could ask it for assistance in the form of an order under rule 20 requiring the production of documents. By rule 1(3) a document included anything in which

information is recorded in any form, which was wide enough to include information in digital form stored on a computer server.

77. In pursuing its application in the FTT, rather than seeking the assistance of the County Court, Mr Isaac said that the Manager was following the course suggested by Her Honour Judge Walden-Smith in *Coates v Octagon Overseas Ltd*.

78. Mr Isaac reminded the Tribunal that the Manager had initially sought to enforce the Management Order, and to secure access to all necessary areas of Canary Riverside and to the documents he considered he would require, by issuing proceedings in the County Court for an injunction. That application had succeeded in the County Court, but the injunction had been discharged on appeal to the High Court. In a judgment given on 18 April 2017 Her Honour Judge Walden-Smith held (at paragraphs 22 to 23) that, except in special circumstances which did not apply, a claim for an injunction could not be pursued as a freestanding application, but only incidentally to the enforcement of some underlying cause of action. At paragraph 29 the Judge explained that "the [Manager] was entitled to apply to the county court to enforce the management order" but that was not the same as applying for an injunction with a penal notice attached, which could not be done because the Manager had no underlying cause of action.

79. The Judge also considered that the injunction granted in the County Court had impermissibly extended the scope of the Management Order; in paragraph 30 she said that "what the court has done is to grant an injunction backed with a penal notice thereby providing the [Manager] with new rights not provided by the management order." The Court's role (under section 176C of the 2002 Act) was to "assist in the enforcement of orders made in the FTT" but it could not create "new rights or orders"; it was for the FTT to decide how the Management Order should operate and how the Manager ("its agent") should fulfil his obligations (paragraph 31).

80. The Judge could see no reason why the FTT should not attach a penal notice to its own order under its section 24(4) power to make provision for "such ancillary or incidental matters as the tribunal thinks fit." If the FTT determined that it was necessary for there to be a penal notice attached to the Management Order as a result of a failure to comply with the terms of the Order then section 24(4) of the 1987 Act "gives the FTT (Property) the power to do so" (paragraph 35).

81. Finally, Her Honour Judge Walden-Smith provided an analysis of the courses open to the Manager at paragraph 37, as follows:

> "There were two ways in which the [Manager] could have sought to take steps to ensure that the management order was complied with: the [Manager] could have applied to the FTT (Property) for further directions and orders including, if appropriate, for a penal notice to be attached to the management order; and the Respondent could have made an application to the County Court pursuant to the

provisions of CPR 70 and section 176C of the 2002 Act for permission for the management order to be enforceable *"in the same way as orders of such a court."* I do not consider that such applications would have to be made in the alternative, albeit that the Respondent might decide one course was preferable to the other.

Discussion and conclusion

82. For the reasons I have already given (see paragraphs 39 to 44 above) I do not consider that the FTT's additional order of 26 June 2017 imposed new obligations, beyond those imposed under the Management Order made under section 24(4) of the 1987 Act. The Management Order already required CREM and its agents to deliver all such documents, including computer records, as were necessary to the management of Canary Riverside and to provide reasonable assistance and cooperation to the Manager. The subsequent orders, and especially the order of 26 June, were more specifically targeted and timetabled, and were addressed to a particular agent, but they required nothing that was not already encompassed in the Management Order.

83. Even if that is to take too expansive an approach to the effect of paragraphs 4 and 5(b) of the Management Order, and the later orders should be seen as imposing new obligations, I nevertheless agree with Mr Isaac that those obligations were squarely within the scope of section 24(4) of the 1987 Act. They made provision for matters ancillary to the Manager's appointment, and could therefore have been included in the original order. It was open to any person interested (including the Manager) to apply under section 24(9) for the FTT to vary the Management Order. There is no reason why a variation should not include additional requirements, provided they are ancillary or incidental to the exercise by the Manager of his functions.

84. I also agree with Her Honour Judge Walden-Smith that the Manager could have asked the FTT to endorse the Management Order, or the order of 26 June, with a penal notice. The power in section 24(4) of the 1987 Act is wide enough, and if the FTT thinks that an application to the County Court under section 176C of the 2002 Act may be required to secure compliance with its order, the inclusion of a penal notice as an incidental or ancillary provision on the face of the Order would be entirely fitting.

85. It is true that there is nothing in the FTT Rules about penal notices, but that is no obstacle. Rule 6(1) of the FTT Rules does not restrict the FTT's case management powers, but expresses them in expansive terms: subject to the provisions of the 2007 Act and any other enactment, the FTT "may regulate its own procedure." It is within the scope of that power for the FTT to warn a party of the consequences of disobedience to its order, whether that order be a final order or a case management order.

86. A penal notice is simply a form of words, intended as a procedural safeguard, which is required by the Civil Procedure Rules as a precondition to an application under CPR 81.4 for an order for committal. CPR 81.9(1) is in these terms:

> "Subject to paragraph (2), a judgment or order to do or not to do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front to the copy of the judgment or order served in accordance with this section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets."

If the necessary warning is prominently displayed, the condition is satisfied. It does not matter which court or tribunal issues the warning.

87. As the notes to CPR 81.9 at paragraph 81.9.2 of the White Book explain, and as the accompanying practice direction, 81PD.2, also makes clear, the precise form of words required is not rigidly prescribed, and the language may be adapted to meet the circumstances of the particular case, so long as the chosen language is substantially to this effect:

> "If you the within-named […] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized."

I would suggest that the reference to being in contempt of court is not apt where the order which is being defied is that of a tribunal. Section 176C of the 2002 Act does not provide for the enforcement of an order of the County Court, but rather, with the permission of the County Court, allows for the orders of tribunals to be enforced in the same way as orders of that Court. The order to be complied with is the tribunal's order and the contempt demonstrated by non-compliance is a contempt of the tribunal which made the original order.

88. It was therefore open to the FTT, as Judge Walden-Smith had indicated, to include a penal notice in its order of 26 June 2017, and thereby to open the door to the enforcement of that order by an application for committal in the same way as an order of the County Court could be enforced, subject only to obtaining the permission of the County Court. It chose instead to warn that the issue of compliance with its order would be referred to this Tribunal. Thus its order of 26 June did not include a penal notice but included a statement that "failure to comply will result in the matter being referred to the Upper Tribunal under rule 8(5) of the Tribunal's Procedure Rules."

89. Regrettably I agree with Mr Dovar's submission that the course adopted by the FTT was not open to it, because the power to order the production of documents is a case management power and cannot be used as a route to the enforcement of a substantive decision, and the power to refer to this Tribunal is available in support of case management orders only. In short, the circumstances of this case do not fall within Rules 8(5) and 20(1)(b).

90. The FTT Rules maintain a distinction between tribunal directions, on the one hand, and tribunal decisions, on the other.

91. Directions are a tool of case management, and by rule 6(2) the FTT may "give a direction in relation to the conduct or disposal of proceedings at any time." Rule 7 provides a procedure for applying for and giving directions. Rule 8 couples directions with rules and practice directions and provides a menu of responses in the event of non-compliance.

92. Rule 20 does not refer in terms to a direction to produce documents, but speaks instead of a "summons" to attend and an "order" to produce a document. Nevertheless it is apparent that these are simply the forms in which particular types of directions are to be made. Rules 6, 7, 8 and 20 are all contained in Part 2 of the FTT Rules, which concerns "general powers and provisions."

93. Part 4 of the FTT Rules concerns hearings. Rule 31(1), which is in Part 4, requires that the FTT must hold a hearing "before making a decision which disposes of proceedings." Rule 36 deals with "decisions" and requires that after making a "decision which finally disposes of all issues in the proceedings, the FTT must provide a decision notice, written reasons for the decision and notification of any right of appeal (rule 36(2)).

94. Section 176C of the 2002 Act makes "any decision" of the FTT enforceable, with the permission of the County Court, in the same way as orders of that Court. The section was introduced into the 2002 Act by The Transfer of Tribunal Functions Order 2013 with effect from 1 July 2013, the date on which the Property Chamber of the FTT was created and on which the FTT Rules came into force. It is not necessary to decide whether section 176C is concerned exclusively with the enforcement of decisions, in the sense of decisions which finally dispose of proceedings, rather than with case management directions, but I am inclined to think that it is.

95. What is clear, however, is that the courses of action available under rule 8(2) where a party has failed to comply with a requirement of the FTT Rules, a practice direction or a direction, are provided to assist the FTT in policing the proceedings conducted before it. They are all about case management (requiring the default to be remedied, striking out a party's case, barring a party's participation, or exercising the power under rule 8(5)). They are not designed as methods of enforcement of substantive decisions by which the proceedings have finally been disposed of and the parties' rights and obligations determined.

96. As Mr Dovar pointed out, rule 8(5) is not applicable in all cases of non-compliance with FTT directions, but only where a direction has been given concerning the giving of evidence, the production of documents or inspection. It is apparent from the context that rule 8(5) is a case management power. A decision finally disposing of proceedings is not within the scope of rule 8, even where, incidentally, part of the decision results in an order that documents be handed over by

one party to another. The fact that the proceedings to vary the Management Order are continuing is equally irrelevant, as is the opportunity for the Manager to apply for further directions: the steps which the FTT has directed in paragraphs 4 and 5(b) of the Management Order and in the order of 26 June are nothing to do with case management of the variation application.

97. A reference to this Tribunal by the FTT under Rule 8(5) is therefore not an alternative to proceeding to enforce a substantive decision in the County Court under section 176C of the 2002 Act. If the case is one of non-compliance with one of the FTT's procedural rules, practice directions or directions, rule 8(5) provides a means of compelling compliance which does not require recourse to the County Court. But if the object is to enforce a decision of the FTT under one of the enactments specified in section 176A(2) of the 2002 Act, including the 1987 Act, Rule 8(5) is inapplicable.

98. It follows that the FTT had no power to refer non-compliance with the order of 26 June 2017 to this Tribunal, which may not, in these circumstances, exercise its own powers under section 25 of the 1987 Act.

Disposal

99. For the reasons I have given I refuse the Manager's application that the order of 26 June 2017 be endorsed with a penal notice.

100. If, after considering this decision, the Manager still wishes to pursue the respondent over the release of the computer records, he should take the course suggested by Her Honour Judge Walden-Smith. He should first ask the FTT to add a penal notice to the order of 26 June and then seek the consent of the County Court under section 176C to enforce the order in the same way as an order of the County Court itself. Before doing so, however, the Manager should consider whether at the same time as, or instead of, adopting that course, he should seek to enforce paragraphs 4 and 5(b) of the Management Order itself against CREM, the respondent's principal.

Martin Rodger QC
Deputy Chamber President

1 February 2018

Costs

101. By its decision of 1 February 2018 the Tribunal refused the applicant's request that a penal notice be endorsed on the Order of the FTT made on 26 June 2017 which required the respondent to release a computer used in the management of Canary Riverside together with the software and electronic records kept on it.

102. On 14 February 2018 the respondent applied for a direction that its costs of the application be paid by the Manager, on the grounds that the application had been misconceived and ought never to have been made, and was therefore unreasonable; it was also said that the application was pursued in an unreasonable, inappropriate and over-aggressive way.

103. Power to make an order for costs where the Tribunal considers that a party or its representative has acted unreasonably in bringing defending or conducting proceedings is conferred on the Tribunal by rule 10(3)(b) of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010, as amended. An identical rule is applicable in the FTT and its proper exercise was considered by this Tribunal in *Willow Court Management (1985) Ltd v Alexander* [2016] 0290 UKUT (LC).

104. The basis of the respondent's suggestion that the application was misconceived, and therefore unreasonable, was the Tribunal's conclusion that, if he wished to the enforce the FTT's direction, the Manager ought to have asked the FTT to endorse the Order of 26 June 2017 with a penal notice and then to have applied to the County Court under section 176C of the 2002 Act for its assistance in enforcement.

105. I do not regard the Manager's approach as having been unreasonable. My reasons can be summarised briefly, as follows:

> (1) The procedural course taken by these proceedings appears to have been directed by the FTT. The proceedings were referred to this Tribunal by the FTT on its own initiative, rather than as a result of any application on the part of the Manager.
>
> (2) The only application made by the Manager was in response to the Tribunal's direction that he should state the relief he wished to be granted. That direction was made at a case management hearing at which it was not suggested on behalf of the respondent that there was anything inappropriate in the course which the FTT had taken.
>
> (3) It was reasonable for the Manager to follow the course directed by the FTT, because it appeared to be unwilling to lend further assistance of its own to the enforcement of its Order. Had the Manager issued a further application at the FTT after it had referred the proceedings to this Tribunal for enforcement, it seems unlikely that the FTT would have been willing to entertain them until after the views of the Tribunal had been obtained.

(4) It was by no means obvious that the Tribunal lacked jurisdiction to make the order contemplated by the FTT under section 25, 2007 Act, as I eventually concluded was the case. The respondent's successful argument was not relied on until the day before the hearing, and it was not unreasonable for the Manager's advisers not to anticipate it.

(5) Had there been no problem of jurisdiction, there would have been strong grounds for the Tribunal taking steps to aid the enforcement of the FTT's order. None of the other arguments relied on by the respondent were successful and it remained in breach of the Order requiring it to deliver up software and computer records (and for all I know it remains in breach).

106. Nor do I consider the way in which the proceedings in this Tribunal have been conducted to have been unreasonable, such as to justify an order for costs. Having been informed that it was the respondent, and not CREM, which was refusing to supply the information required by the Manager, the FTT was entitled to make the Order of 26 June 2017 against the respondent despite the fact that the respondent was not a party to the proceedings. The Manager was not at fault for the FTT's omission to deal with the application to set aside the Order before it referred the matter to this Tribunal, and when the application was dealt with it was found to be without merit. It was not unreasonable for the Manager to request that a final order be made at the case management hearing at which the respondent was represented and able to make its own submissions in reply. The evidence before the FTT was that CREM had done what it could to comply with the Management Order and that the obstacle to the release of further information was the respondent. In those circumstances it was not unreasonable for the Manager to make no further application for relief against CREM after the case management hearing. I cannot say that it would not have been a reasonable to consider that, as such an application might have increased the costs and complexity of these already complicated proceedings, it ought therefore to be avoided until the outcome of the transferred application was known.

107. For these reasons I am satisfied that the Manager has not behaved unreasonably and I refuse the respondent's application for costs.

Martin Rodger QC
Deputy Chamber President

14 May 2018