UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 115 (LC) UTLC Case Number: LC-2021-580

Decision made on written representations

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – procedure – the exercise of concurrent tribunal and county court jurisdiction by judges of the First-tier Tribunal – review of a decision pursuant to Rule 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

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

BETWEEN:

GHOLAM HOSSEIN BEHJAT

Appellant

-and-

CRESCENT TRUSTEES LIMITED

Respondent

Re: Flat 3, 155/163 Balham Hill,
London,
SW12 9DJ

Judge Elizabeth Cooke

A decision on written representations

Decision Date:

SCS Law, solicitors, for the appellant
PDC Law, solicitors, for the respondent

The following cases are referred to in this decision:

Avon Ground Rents Limited v Child [2018] UKUT 204 (LC)
Crepps v Durden 98 ER 1283
Denton v TH Limited [2014] EWCA Civ 906
O'Connor v Isaacs [1956] 2 QB 288

Introduction

1. In this appeal the Tribunal has the opportunity to consider the operation of deployment arrangements whereby judges in the Property Chamber of the First-tier Tribunal ("the FTT") exercise the jurisdictions both of the FTT and of the county court in the same dispute. By doing so they are able to determine the issues that lie within the jurisdiction of the FTT and also to sit as a judge of the county court (an office they all hold by statute) in order to make decisions of the county court about issues that are within the court's jurisdiction and not the tribunal's.

2. Mr Behjat appeals a decision of the FTT of 30 September 2021 to set aside its own earlier decision of 16 August 2021 in which a judge, sitting as a judge of the FTT and pursuant to the FTT's procedural rules, struck out proceedings in the county court. The August decision was set aside on the basis that it was made without jurisdiction. The parties are in dispute about what was decided in the decisions of 16 August 2021 and of 30 September 2021, and about whether the judge in either case had jurisdiction to do what he or she did, whatever that was.

3. In order to determine the appeal it is necessary to look closely at the legal and practical basis for the deployment arrangements that gave rise to this appeal, and in the paragraphs that follow I explain that background before giving an account of the facts and events giving rise to the appeal. I then consider the parties' arguments before determining the appeal.

4. This appeal has been determined under the Tribunal's written representations procedure. The parties have been represented by their solicitors, SCS Law for the appellant and PDC Law for the respondent.

The legal background

5. Section 5(1)(t) of the County Courts Act 1984 provides that all tribunal judges are judges of the county court. Circuit judges and district judges are judges of the FTT by virtue of section 6 of the Tribunals Courts and Enforcement Act 2007.

6. This enables tribunal judges to be deployed in the county court on occasion. For example, judges of the Upper Tribunal sometimes sit as county court judges to hear applications for new leases by telecommunications operators where the expired lease was protected under the 1954 Act, because of their familiarity with the relevant legislation. Such arrangements are unremarkable and the deployment of tribunal judges in this way does not give rise to any legal difficulty. The decision to so deploy them is for the Designated Civil Judge (DCJ) for the region. Applications are made and fees paid to the county court, and all the judge's decisions are decisions of the county court.

7. A different situation arises where an issue in county court proceedings is also within the jurisdiction of the FTT and is more conveniently dealt with there, while other issues are within the exclusive jurisdiction of the county court. The most common example of this situation, and the one with which this appeal is concerned, is where a landlord takes

proceedings in the county court to recover unpaid service charges, and the tenant's defence is that the charges were not reasonable or payable. Section 19 of the Landlord and Tenant Act 1985 provides that service charges are payable only insofar as they are reasonably incurred, for services of a reasonable standard (I paraphrase), and section 27A enables the FTT to determine the reasonableness and payability of the charges. That provision does not deprive the county court of jurisdiction on that issue, but in practice the FTT is usually seen as the appropriate forum for it.

8. Section 176A of the Commonhold and Leasehold Reform Act 2002 provides:

> "(1) Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—
>
> (a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question…"

9. Among the enactments so specified is the Landlord and Tenant Act 1985. Typically therefore an action for recovery of unpaid service charges starts in the county court, and the issue of the reasonableness and payability of the service charges is transferred to the First-tier Tribunal. Once the FTT has determined what is due the county court enters judgment for that amount and determines any remaining issues, in particular liability for ground rent if that is in dispute, interest on outstanding sums and the costs of the county court proceedings (but only those costs, and not the costs incurred in the FTT, which are within the FTT's jurisdiction and subject to very different rules).

10. In order to avoid the necessity for the proceedings and the parties to journey from court to tribunal and then back to court, arrangements were made in a pilot project set up by the Civil Justice Council in 2016. The procedure agreed was for judges to sit both as judges of the FTT and as county court judges to determine all the issues in the proceedings.

11. Judge Siobhan McGrath, President of the First-tier Tribunal, Property Chamber, said this in Part Four of a report to the Civil Justice Council in October 2018 by, ("the 2018 report", to be found at property-chamber-deployment-project-report-oct2018.pdf (judiciary.uk)):

> "12. Where a court transfers issues for determination by the Tribunal, it may only determine those issues identified in the transfer order and is limited to the case stated within the pleadings. On transfer the Tribunal's procedural rules are applied for case management. The Tribunal per se cannot exercise any county court power when sitting as a Tribunal. Therefore, for example, it cannot deal with applications to amend the pleadings and importantly it cannot dismiss a case or make any other final order. If a party wishes to make this type of application the case must be returned to the court.

> 13. Under the deployment scheme these procedural difficulties can be resolved as the Tribunal judge is able to sit as a county court judge and make appropriate orders."

12. The pilot project was successful, and has been extended.

13. The deployment project does not change the law. Issues that are in the exclusive jurisdiction of the county court remain there; they are not and cannot be transferred to the FTT. No amendments have yet been made either to the Civil Procedure Rules or to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the FTT rules") to facilitate the project, although in the 2018 report the FTT Chamber President recommended that that be done. Deployment decisions are made on a case by case basis (paragraph 12 of Part Two of the 2018 report) .

14. Deployment decisions in county court proceedings are made by the relevant DCJ. As a matter of practical convenience he or she will usually arrange for day-to-day decisions to be made by other county court judges, but they remain the DCJ's responsibility. At paragraph 17 of Part Four of the 2018 report the FTT Chamber President reported the view of regional judges in the FTT that deployment decisions for concurrent sitting "work most effectively if cases are transferred at an early stage and preferably before directions are given in the county court."

15. In *Avon Ground Rents Limited v Child* [2018] UKUT 204 (LC) the Upper Tribunal (the President, the Hon Sir David Holgate and HHJ David Hodge) said this:

> "42. It is important to appreciate that the statutory provisions which permit the flexible deployment of FTT judges as judges of the County Court do not affect the substantive statutory provisions which govern the respective jurisdictions of the County Court and the FTT, nor do they alter the procedural rules which govern proceedings in those two bodies. There are significant differences between them. Procedure in the County Court is governed by the CPR while procedure in the FTT is governed by the FTT Rules. The FTT has no power to enter a money judgment or otherwise require one party to make a payment to another but simply declares what the parties' rights are and leaves questions of enforcement to the County Court.
>
> 45. Different rules govern the time for appealing, the procedure for seeking permission to appeal, and the destination of the appeal, depending upon whether it is sought to appeal a decision of the FTT or the County Court. It is therefore essential that where a judge acts on the same occasion both as a judge of the FTT and as a judge of the County Court, that judge is very clear in his or her own mind as to which "hat" is being worn in relation to each aspect of the decision-making process, and that he or she maintains and articulates a clear distinction at all times between the discrete functions and roles being performed."

The factual background

(1) The county court proceedings

16. On 26 June 2019 the landlord issued proceedings in the county court at Edmonton for the recovery of service charges and contributions to the reserve fund from the tenant. The tenant in his defence filed on 21 January 2020 challenged the reasonableness and payability of the service charges. Accordingly on 25 March 2021 a District Judge made the following order:

> "1. The claim is transferred to the First Tier Tribunal for a determination as to the recoverability and payability of the alleged arrears of £7,226.22 for reserve fund and remote charge.
>
> 2. Costs reserved."

17. Bearing in mind my comments above about deployment decisions, it is useful to note that at this point no decision had been made by anyone that the judge in the FTT would do anything other than determine the reasonableness and payability of service charges. No arrangements have been made for concurrent jurisdiction to be exercised by any judge.

(2) the July directions

18. On 7 July 2021 directions were given by the FTT. The order was headed "In the First-tier Tribunal, Property Chamber (Residential Property) and in the County Court at Edmonton sitting at 10 Alfred Place." It recited the claim and, in general terms, the nature of the defence and said:

> "These proceedings will be administered by the Tribunal. The Judge who eventually hears the case will deal with *all* the issues in the case, including interest and costs, at the same time as the tribunal decides the payability of the Service and Administration charges and the Judge (sitting alone as a Judge of the County Court) (DJ) will make all necessary County Court orders." (Emphasis in original.)

19. The directions went on to list a hearing on 8 November 2021. It then provided:

> "6. Neither the Claim Form or the Particulars appear to contain a proper and/or properly completed Statement of Truth.
>
> 7. By no later than 6 August 2021, the Claimant must file (with the Tribunal) and serve an amended Claim Form and Particulars containing a properly completed Statement of Truth complying with the Civil Procedure Rules."

20. Further directions required the tenant by 20 August 2021 to "file (with the Tribunal)" and serve an amended Defence setting out in full his case as to the reasonableness and payability of service charges, and for the landlord to "deliver to the Tribunal" and to the tenant a further

Statement of Case in response, for disclosure, the service of witness statements, and the provision of a hearing bundle.

21. The order concluded:

> "If the Applicant fails to comply with these directions the tribunal/court may strike out all or part of their case pursuant to rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") or the Civil Procedure Rules.
>
> If the Respondent fails to comply with these directions the tribunal/Court may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules or the Civil Procedure Rules."

(3) The order of 16 August

22. The landlord did not file or serve an amended Defence as directed. On 9th August the tenant's solicitors sent an email to the FTT pointing this out and said "Accordingly, we request the Tribunal to exercise its powers under rule 9(3)(a) and to strike out the Applicant's case". Rule 9(3)(a) of the FTT rules provides:

> "(3) The Tribunal may strike out the whole or a part of the proceedings or case if—
>
> (a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it; …"

23. The FTT did not seek representations from the landlord in response to that application. On 16 August 2021 it made an order, headed as an order of the FTT, and stated in its sub-headings to be made by a "Tribunal Judge". The full text of the order reads:

> "1. Following the Directions sent by the tribunal case officer to you dated 7 July 2021 this is a formal Decision from the Tribunal.
>
> 2. Your applicant is struck out on the following ground pursuant to rule 9(a) of The Tribunal (Procedure) (First-tier) (Property Chamber) Rules 2013, namely that:
>
> > you have failed comply with the tribunal's directions. Direction 7 of the tribunal's directions dated 7 July 2021 required you to file no later than 6 August 2021, an amended Claim form and Particulars containing a properly completed Statement of Truth complying with the Civil Procedure Rules.

> 3. As thus matter has been transferred from the County Court the tribunal invites the parties to provide written representations with 14 days of the date of this Decision as to the form of the County Court Order that should be made with the reasons why."

24. The order did not contain and was not accompanied by any information about the procedure for appeal.

(4) The order refusing relief from sanctions

25. The landlord's solicitor made an application on 2 September 2021 for relief from sanctions. In a witness statement of that date Mr Mustak Bari of PDC Law explained that he had recently taken over the conduct of the matter and had been unaware of the directions of 7 July 2021; they had been emailed to his firm but he had not seen the email. He referred to the principles set out in *Denton v TH Limited* [2014] EWCA Civ 906 and asked "for the claim to be reinstated".

26. In response, Mr Haris Ahmed of SCS Law in a witness statement of argued that the explanation given by Mr Bari was unsatisfactory and that the seriousness of the breach and the consequences for the tenant (in particular the need for a new hearing date because the timetable had slipped) meant that the application should be refused.

27. The application for relief was determined on the papers without a hearing, and on 28 September 2021 the FTT made a decision refusing relief from sanctions.

(5) The orders of 30 and 29 September, now being appealed

28. On 30 September 2021 a case officer in the FTT wrote to the parties enclosing directions dated 29 September 2021 for the further conduct of the case, which reproduced the text of the order of 7 July 2021 with the original dates struck through and fresh dates added. The officer's letter of 30 September began as follows:

> "This matter has been reviewed by [a Deputy Regional Judge]. **Please note that the Judge has set aside all those decisions and orders made after directions were given on 7 July**." (emphasis in the original)

29. The letter went on to say "The judge has commented as follows" and set out the judge's reasoning, beginning with a statement that the decisions of 16 August and 28 September 2021 " are a nullity for the following reasons:" and then continuing in numbered paragraphs to explain that the tenant's application to strike out the landlord's case should have been made on Form N244 pursuant to CPR 23 and should have been accompanied by the relevant fee; and that the judge who made the order of 16 August 2021 was sitting as a judge in the FTT and made her order under the FTT's rules, and therefore had no authority to strike out the County Court claim. Accordingly there was no need for the landlord to have applied to reinstate the claim and there was no valid order for the FTT to consider setting aside on 28 September 2021.

30. My heading above, and indeed the first sentence of paragraph 2 of this decision, begs the question whether this letter was an order. In refusing permission to appeal it the judge said:

> "I did not review or overturn the decisions [of 16 August and 28 September 2021], I pointed out that those decisions were of no effect insofar as they purported to strike out the claim"

and expressed the view that the letter of 20 September 2021 should not have said that the matter had been reviewed nor that he had set aside the decisions. He said that it was clear from the body of the letter that he considered the two decisions to be a nullity and that there was therefore no need for them to be reviewed or set aside as they were of no effect in the first place.

31. I find that the letter of 30 September 2021 was an order. It was sent at the direction of a judge. The emboldened words at the beginning of the letter say that the judge has set aside the orders of 16 August and 28 September 2021, and the "comments" that follow give the judge's reasons for that setting aside. Whatever the judge's intentions, construed objectively the letter was an order, its effect was to set aside the decisions of 16 August and 28 September, and it was therefore an order that could be appealed.

32. I expect that the judge's comments, set out in the email of 30 September, were written on 29 September when he made the revised directions; the directions of 29 September are the consequence of the order of 30 September despite the dates being the wrong way round.

33. The orders made by the FTT on 7 July, 16 August and 28 September were made by three different judges. The judge who made the orders of 30 and 29 September 2021 was the judge who gave the initial directions on 7 July.

The grounds of appeal

34. The tenant appeals the orders of 30 and 29 September 2021, with permission from the Upper Tribunal. His grounds of appeal are:

    a. first, that the FTT did not have jurisdiction to review the order of 16 August 2021 because rule 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) 2013 states that the FTT can only review a decision when an application has been made for permission to appeal it.

    b. Second, the tenant argues that the order of 30 September was mistaken; the FTT did not on 16 August strike out the county court case; all it did was to strike out the landlord's "application for recoverability and payability". It had no effect on the county court proceedings, hence the direction for the parties to make representations about the form of the county court order.

    c. In the alternative, it is said that in any event the directions of 7 July 2021 stated that "the FTT will deal with all aspects of the case".

d. Finally it is said that the judge had power under CPR 23.3., to dispense with an application notice on the appropriate county court form. I take it that this ground is also advanced in the alternative if the order of 16 August 2021 is found to have struck out the landlord's case in the county court.

35. Points c and d must be dismissed. The order of 16 August 2021 was made by a judge of the FTT under the FTT's rules. The FTT does not have power to strike out a case in the county court, nor to dispense with a notice of application in the county court.

36. It will be helpful for me next to address the second of those grounds by deciding what the FTT did on 16 August 2021.

What was the effect of the order of 16 August 2021?

37. The order of 16 August 2021 told the landlord "Your application is struck out."

38. After the transfer of proceedings pursuant to section 176A of the 2002 Act, the FTT of course had the power to regulate its own proceedings under its own rules. It could strike out either party's case about the reasonableness and payability of service charges, for example for non-compliance with the FTT's direction or because the case had no prospect of success, under rule 9 (as the order of 7 July 2021 stated). That is what the tenant now says was done in the order of 16 August 2021, made by a judge sitting as a judge of the FTT and under the FTT's rules.

39. Neither the landlord in applying for relief from sanctions nor the tenant in responding raised any question about what exactly had been struck out, nor did the FTT in its order of 28 September express any uncertainty about it. Neither party at that stage was suggesting that the county court action remained on foot and that only the FTT proceedings had been affected by the order of 16 August. Not until the tenant's application to the FTT for permission to appeal the orders of 30 and 29 September was it suggested that the judge had not struck out the landlord's case in the county court.

40. However, the only application the landlord had made by August 2021 was to the county court for recovery of service charges. True, the parties in the FTT would be referred to as applicant and respondent, in accordance with the FTT's rules, but substantively the landlord had not yet made out a case in the FTT. The default that was being punished was the landlord's failure to file and serve a revised pleading in the county court. I do not understand why the response to a failure to plead properly in the county court would have been to debar the landlord from participating in a different forum. I have no doubt that the judge in striking out his "application" on 16 August 2021 intended to bring the county court action to an end in response to his failure to file a proper pleading in the county court.

41. If the idea was to debar him from participating in the FTT proceedings it is difficult to see what the effect of that would have been. Did that mean that the tenant's challenge – not yet fully pleaded – to the reasonableness and payability of service charges would have been automatically successful? Or that it would have been decided without hearing the landlord? That would be difficult because typically a challenge to service charges requires the

landlord's participation so that invoices and accounts can be disclosed. If it was the judge's intention been to prevent the landlord from participating in the FTT's process, then she would have given directions about the future conduct of that process, rather than seeking representations about the form of an order in the county court.

42. The tenant argues that the FTT's request at paragraph 3 to the order of 16 August for representations about the form of the county court order meant that the judge intended only to debar the landlord from the FTT proceedings. On the contrary, paragraph 3 indicates that this was indeed a decision intended to bring the county court proceedings to an end and that the judge would like to hear from the parties in the usual way about the form of the final order.

43. So the judge in his commentary reproduced in the letter of 30 September was right: the judge on 16 August, sitting – as we have seen – as a judge of the FTT and pursuant to the FTT's rules purported to strike out a case in the county court. And obviously he was also correct to say that she did not have capacity to do so when sitting as a judge of the FTT. The second of the grounds of appeal set out above fails.

44. Does that mean that the order of 16 August was simply void and could be ignored (and therefore also the refusal of relief on 28 September), as the judge said in his refusal of permission to appeal and intended to say on 30 September?

45. That is not an easy question, and I have not had the benefit of argument about it from the parties' representatives. As I understand it, an order made without jurisdiction is void; but only one that is "bad on its face", which means that the absence of jurisdiction is obvious simply from reading the order, can be ignored. If it is not bad on its face, but is in fact void because it was made without jurisdiction, then a party is entitled to an order setting it aside, as Diplock J explained in *O'Connor v Isaacs* [1956] 2 QB 288 at 303, where he explained that the order under consideration in that case was "an order which is bad on its face, and, as such, it ceases to have the advantage which orders, although made without jurisdiction, but good on their face, have, namely, that they are to be treated as valid until they have been set aside." Authority for the distinction can be traced back to *Crepps v Durden* 98 ER 1283, a 1777 decision about Sunday trading laws.

46. It is not obvious whether the decision of 16 August 2021 was bad on its face, because of the difficulty of understanding, simply from reading the decision, what it does. Only by examining the context is it apparent that despite being an order of the FTT it strikes out a case in the county court and therefore is made without jurisdiction.

47. But I do not need to decide that. I have found that the letter of 30 September was an order that set the earlier decisions aside, even though that was not the intention of the judge. Despite what the judge said later, the letter of 30 September 2021 stated expressly that the earlier orders were set aside and that was its effect.

The appeal from the order of 30 September 2021

48. Now we can go back to the orders being appealed and address the first ground of appeal which is that the order of 30 September 2021 reviewed the orders of 16 August and 28 September 2021 and did so without jurisdiction.

49. The order of 30 September was that the two earlier decisions were set aside. The FTT has power to set aside a decision on review, and a separate power to set aside a decision that disposes of proceedings as a result of a procedural irregularity when it is in the interests of justice.

50. The FTT's power to review a decision is contained in section 9 of the Tribunals, Courts and Enforcement Act 2007. Section 9(3) enables rules to be made limiting that power, and rule 55 of the FTT rules states that the power may only be exercised when an application for permission to appeal has been made; it enables the FTT to avoid the need for an appeal when it can see that a ground of appeal is bound to succeed.

51. The FTT has power under rule 51 of the FTT rules to set aside a decision that disposes of proceedings:

> "(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings."

52. It is not possible to discern from the order of 30 September 2021 the basis on which the earlier orders were set aside. That is hardly surprising; the order took the form of a letter, which the judge probably did not see before it was sent, and it is apparent from what he said later when refusing permission to appeal that its words did not reflect his thinking. It is undoubtedly a decision that set aside the earlier decisions, because that it is what it expressly says it does. It cannot have done so under rule 55 because there had been no application for permission to appeal. The order does not purport to have been made pursuant to a power of the FTT pursuant to section 9 of the 2002 Act to set aside a decision on its own initiative, despite the terms of rule 55; had the FTT relied upon such a power that would have been controversial and would have called for detailed explanation. The order does not purport to

have been made under rule 51, although in my judgment it could have been because the decision 16 August 2021 purported to bring the county court proceedings to an end.

53. Accordingly, whilst the decision of 30 September 2021 gave a full and accurate explanation why the decision of 16 August 2021 was made without jurisdiction and had to be set aside, it did not explain how it was doing that. The reasoning was therefore inadequate. Furthermore, the FTT should have sought representations from the parties before setting aside a decision of its own initiative, and it did not do so; the FTT failed to follow a fair procedure in making its order of 30 September 2021. For both those reasons that order is set aside.

54. The directions of 29 September 2021 are necessarily set aside as a consequence, since they were made on the basis that the orders of 16 August and 28 September 2021 had been set aside.

55. To that extent the appeal succeeds, although not on the precise basis argued by the tenant; ground 1 would certainly have had merit if the order had been as a result of a review, but as I have explained it is not possible to know on what basis the order was made.

Re-making the FTT's decision

56. If I remit the matter to the FTT now, the position is that the decisions of 16 August and 28 September stand. The landlord is entitled to have them set aside because the decision of 16 August 2021 was made without jurisdiction. If the matter is remitted to the FTT it will be necessary either for the FTT to exercise its power to set them aside in rule 51 of the FTT rules or to invite the landlord to seek permission to appeal them so that they can be reviewed under rule 55. In order to save the parties from having to go through that additional process, and because the Upper Tribunal has read their written representations about the status of the order of 16 August, I can re-make the decision of 30 September.

57. In exercise of the power conferred by rule 51 of the FTT rules I set aside the decision of 16 August 2021 because of the procedural irregularity that it was made without jurisdiction, by an FTT judge who purported in that capacity to strike out a case in the county court in exercise of her powers under the FTT rules. It is of course in the interests of justice to do so, because justice is not served by a void order that has no effect.

58. The reasonableness and payability of the service charges can now be determined by the FTT and it will need to give directions for the tenant to set out its case, for the landlord to respond, and for disclosure, witness statements and a hearing in the usual way.

59. The action in the county court also needs to be progressed. In view of the deployment decision made in the directions of 7 July 2021, a judge of the FTT may now sit as a county court judge and make a fresh direction for the landlord to file and serve a proper pleading with the county court sitting at the FTT's offices at Alfred Place. The judge who eventually sits as an FTT judge to determine the payability of service charges will also sit as a county court judge to determine the remaining county court matters.

Observations about judicial deployment for concurrent sitting

60. When I explained the concurrent sitting arrangements I observed that they do not and cannot involve the transfer of a county court claim to the FTT. Section 176A of the 2002 Act enables the transfer to the FTT only of so much of the proceedings as it has jurisdiction to determine. The Tribunal cannot deal with proceedings falling exclusively within the county court jurisdiction. A Tribunal judge cannot make county court orders. A judge may only make county court orders if the matter has been allocated to them under the CPR.

61. That was forgotten in this case. So were the words of the Upper Tribunal in *Avon Ground Rents Limited v Child* (paragraph 15 above), at the cost of a great deal of delay and stress for all concerned.

62. To some extent the trouble originates in the order of 7 July 2021, and I am sorry to say this because no doubt it is a standard form of order in these cases, but I am afraid it should be reconsidered for the future. The order treats the two proceedings, one in the county court and one in the FTT, as a unity. It requires revised county court pleadings from the landlord. It then requires the tenant to set out his case in the FTT in his defence in the county court, and the landlord to file a further Statement of Case – again apparently a county court pleading – in response.

63. The judge on 16 August 2021 made an order that purported to bring the apparently unified proceedings to an end. It should have been abundantly obvious to her, particularly in light of the Tribunal's warnings in *Avon Ground Rents Limited v Child*, that she could not do so in her capacity as an FTT judge applying the FTT rules, but one reason why it was not obvious was the way the order of 7 July 2021 appeared to roll up the two jurisdictions into one action.

64. I wish to point to two further difficulties.

65. The first is that the deployment decision in this case, that a single judge would determine the FTT matter and the remaining issues in the county court, was made in the order of 7 July 2021. That decision should have emanated from the county court. It may be that it did; perhaps arrangements have been made with the DCJ at Edmonton that where service charge matters are transferred to the FTT under section 176A of the 2002 Act the FTT judge who gives directions in the FTT may sit as a county court judge to exercise the power to make the deployment decision, so that an FTT judge will also sit as a county court judge in the county court proceedings. It is not possible to tell from the order of 7 July 2021 whether that is the case. I am aware that this is a standard form order which the Tribunal has seen in a number of service charge appeals. For the future it would be helpful if the source of the authority to make the deployment decision were set out in the order in which it is made.

66. The second is that in his refusal of permission to appeal his decision of 30 September 2021 the FTT judge said this, in response to the tenant's argument that the order of 7 July 2021 said that the FTT would deal with all aspects of the case (see paragraph 34(c) above):

> "The directions given did not state that "*the Tribunal will deal with all aspects of the case*". The directions stated; "*These proceedings will be administered by the Tribunal. The Judge who eventually hears the case will deal with all issues in the case ….*" The directions make it clear that the administration of the case is dealt with by the Tribunal, that that the Tribunal (i.e. the FTT) will deal with all aspects of the case, It is only at the final hearing that the Tribunal Judge will sit both as part of the Tribunal and separately, when dealing with county court maters, as a judge of the County Court."

67. I do not understand what is being said here. Clearly the FTT could not make orders in the county court proceedings, and this particular ground of appeal was misconceived – the misconception rests on the idea that the county court proceedings had themselves been transferred to the FTT which of course is not right, but has been encouraged by the form of the directions of 7 July 2021 and by the instruction for example to file pleadings "with the tribunal" (see paragraph 20 above). But the idea that decisions can only be taken in the county court proceedings at the final hearing is puzzling. The directions of 7 July 2021 appear to make a deployment decision that is intended to take effect at once and to last for the remainder of the life of the county court case. That is why those directions themselves include a direction to the parties to file county court pleadings, and end with a threat of strike-out under the CPR if the directions are not complied with. If it was the judge's intention to make a deployment decision that had effect only for the final hearing then that should have been made clear. But that was manifestly not the effect of the deployment decision.

68. Once a decision has been made (by, or by delegation by, the relevant DCJ) that an FTT judge will also sit as a county court judge, then it will clearly also be convenient for a direction to be given to the parties to make applications in the county court proceedings to the FTT's offices. They still, obviously, have to use the relevant county court forms and the proceedings are governed by the CPR. That means that at any point in the proceedings from thenceforth a judge faced with an application in the case must ascertain whether the application is to the court or the tribunal, decide as a consequence in what capacity he or she is going to sit to determine it, and make clear in the ensuing decision in what capacity the decision is made. I can do no better than to repeat paragraph 45 of *Avon Ground Rents Limited v Child* (paragraph 15 above):

> "It is therefore essential that where a judge acts on the same occasion both as a judge of the FTT and as a judge of the County Court, that judge is very clear in his or her own mind as to which "hat" is being worn in relation to each aspect of the decision-making process, and that he or she maintains and articulates a clear distinction at all times between the discrete functions and roles being performed."

Judge Elizabeth Cooke

28 April 2022

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.