Neutral Citation Number: [2025] UKUT 97 (LC)

Case No: LC-2024-608

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT Ref: LON/00AY/HIN/2021/0021

Royal Courts of Justice, Strand,
London WC2A 2LL

25 March 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – FTT PROCEDURE – COSTS – appeal to FTT against improvement notice – application by successful appellant for costs of appeal refused by FTT – whether appellant's case presented on flawed basis – whether FTT's assessment of respondent's conduct flawed – rule 13(1)(b), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal dismissed

BETWEEN:

MANAQUEL COMPANY LIMITED

Appellant

-and-

LONDON BOROUGH OF LAMBETH

Respondent

Dorchester Court, Herne Hill,
London SE24

Martin Rodger KC,
Deputy Chamber President

27 February 2025

Nicholas Isaac KC and *Richard Miller,* instructed by Comptons Solicitors LLP, for the appellant
Nicholas Ham, instructed by Lambeth Council Legal Services, for the respondent

The following cases are referred to in this decision:

Bristol City Council v Aldford Two LLP [2011] UKUT 130 (LC)

Curd v Liverpool City Council [2024] UKUT 218 (LC), [2024] HLR 43

Lea v GP Ilfracombe Management Co Ltd [2024] EWCA Civ 1241, [2025] 1 WLR 371

Ridehalgh v Horsfield [1994] EWCA Civ 40, [1994] Ch 205

Waltham Forest London Borough Council v Hussain [2023] EWCA Civ 733, [2024] KB 154 (reversing *Waltham Forest London Borough Council v Hussain* [2022] UKUT 241 (LC), [2023] HLR 1)

Willow Court Management Ltd v Alexander [2016] UKUT 290 (LC), [2016] L & TR 34

Introduction

1. This is an appeal against the refusal of the First-tier Tribunal, Property Chamber (the FTT) to make an award of costs in favour of the appellant, the successful party in a dispute over an improvement notice served by the respondent under Part 1 of the Housing Act 2004 (the 2004 Act).

2. The appellant, Manaquel Co Ltd, is the registered freehold proprietor of Dorchester Court in Herne Hill (the Estate). The respondent, the London Borough of Lambeth, is the local housing authority for the area which includes the Estate. On 20 October 2021 Lambeth served an improvement notice on Manaquel requiring it to carry out work at the Estate. On 17 November 2023, after a hearing lasting two days, the FTT allowed an appeal by Manaquel and quashed the notice in its entirety.

3. The FTT is not a forum in which the successful party can usually expect to recover their costs from the unsuccessful party. Under rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules) the FTT has power to award costs in a residential property case only under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 (wasted costs ordered to be paid by a legal or other representative) or if a person has acted unreasonably in bringing, defending or conducting the proceedings.

4. By a decision handed down on 16 May 2024 (the Costs Decision) the FTT decided that Lambeth had not acted unreasonably and refused Manaquel's application under rule 13(1)(b) for an order that Lambeth pay its costs of the improvement notice appeal.

5. The FTT granted permission to appeal the Costs Decision. When it did so it said that the application of the law to the facts, and the weighting of different factors in this case, was complicated.

6. At the hearing of the appeal Manaquel was represented by Mr Isaac KC and Mr Miller, and Lambeth by Mr Ham, all of whom had appeared before the FTT. I am grateful to them for their submissions.

The relevant facts

7. The Art Deco Estate consists of eight separate Grade II-listed blocks containing 96 flats, of which at the material time 73 were let on assured shorthold tenancies and the remaining 23 on long residential leases. Manaquel acknowledges that in some respects the Estate was in a dilapidated condition.

8. On 20 October 2021 Lambeth served an improvement notice requiring Manaquel to carry out works to "Flats within Dorchester Court". The notice contained a schedule which identified what were considered by Lambeth to be Category 1 and Category 2 hazards. The most serious Category 1 hazard was excess cold, attributed to the condition of the windows of "most flats" (without further identification), and to deficiencies with the heating and hot water system. The other Category 1 hazard was from hot surfaces and

materials caused by the excessive temperature of the hot water provided to the flats. Excess heat, again due to the condition of the heating and hot water system in the plant room, substations and individual flats was identified as a Category 2 hazard.

9. The improvement notice contained a second schedule identifying action required to address the hazards which, if taken, would result in the notice being revoked under section 16 of the 2004 Act. To address the excess cold caused by corroded frames, broken window components and broken glazing, Manaquel was required to instal replica galvanised steel, double glazed Crittall windows, to match the existing windows as closely as possible. Works were also required in the plant room, substations, heating network and dwellings. The specified action mostly comprised works but included the provision of a programme of works and liaison with planning officers to approve the window replacement in advance. Lambeth required the works to begin by 24 November 2021 and to be completed within 15 months. Failure to comply with the notice would be a criminal offence, exposing Manaquel to the risk of civil penalties, rent repayment orders and other sanctions and disabilities.

10. Manaquel's appeal to the FTT against the improvement notice was submitted only two weeks after the notice had been served. Amongst the points made in the grounds of appeal at that early stage were that some of the measures had already been attended to and that instructions for other items were "being urgently implemented". Manaquel also challenged the validity of the notice on the basis that Lambeth had disregarded its intention to redevelop the Estate pursuant to a planning consent which was awaiting determination by Lambeth's own planning committee. The application sought consent for the construction of additional flats on top of the existing blocks, the replacement of the existing windows, alterations to services, engineering works and the installation of new biomass boilers. It was said that all of the enforcement issues would be addressed once planning permission had been granted and that to carry out the works in the schedule prematurely would involve significant and unnecessary duplication and additional expenses for Manaquel and the leaseholders.

11. A period of almost 2 years elapsed between the service of the improvement notice on 20 October 2021 and the hearing of Manaquel's appeal in October 2023. Documents prepared for the hearing included an "update tracker" dated 28 August 2023, which I have not been shown but which I understand to have been Manaquel's record of works done since the service of the improvement notice.

12. In his skeleton argument for the FTT Mr Isaac KC pointed out that works undertaken following the service of the notice would have reduced the likelihood and severity of any harm arising from the excess heat hazard; details of those works were given, including the installation of thermostatic valves on radiators and adjustments or replacements of weather compensation valves for each block. As far as the hazard of hot surfaces and materials was concerned, it was accepted that excessively hot water temperature within the flats "potentially constitutes a hazard", but this had been addressed by adjustments made by Manaquel's heating contractor. As regards the excess cold hazard, Mr Isaac accepted that, where they existed, poorly fitting windows, broken components and broken glazing might cause an increase in draughts, but doubted the severity of the problem and criticised the notice for failing to identify which flats suffered from which faults.

13. At the hearing before the FTT Lambeth adduced evidence from Ms Ward of its Private Sector Housing Enforcement Team who explained that her team had received a number of complaints from residents of the Estate during the winter of 2020/21 about problems with heating. They had undertaken inspections between March and June 2021 leading to the service of the improvement notice in October that year. Ms Ward accepted during her evidence that Lambeth had not reinspected the Estate in the two years since the notice was served. She acknowledged there was no detailed record of the condition of the windows or other problems in any specific flat, and that notes of the inspections had not been kept.

14. As recorded by the FTT in its decision, it was put to Ms Ward by Mr Isaac KC that, for the purpose of the appeal, the relevant assessment date for the hazards was the day of the hearing, as it was a re-hearing. Ms Ward accepted that improvements had been carried out by Manaquel since the service of the notice and that it was possible that there was no longer an excess heat hazard.

15. Lambeth's counsel, Mr Ham, does not appear to have dissented from Mr Isaac KC's proposition that the relevant date of assessment was the date of the hearing. That presumably contributed to his decision not to ask the FTT to uphold the improvement notice in its entirety and his acceptance that there were reasonable grounds for varying it. He suggested that the hearing might be adjourned to enable an up to date schedule of work to be prepared if the FTT was not prepared to accept his submission that the notice should be interpreted flexibly and in a common-sense way (so that, for example, new double glazed windows installed in some of the flats before the notice was served were not required to be replaced).

16. On 17 November 2023, the FTT handed down its decision on the appeal, in which it quashed the improvement notice in its entirety. It had inspected the Estate and began its analysis by saying that it was clear, "and readily conceded by Manaquel", that there was significant disrepair. It continued, at [69]:

> "However, in this case we have major concerns about the contents of the Improvement Notice itself. It is clear that the Applicant has carried out certain works which the Respondent concedes have remedied some deficiencies and reduced the extent of certain other deficiencies, and the Respondent has not reinspected or carried out a recent reassessment of the hazards. The Respondent is therefore in difficulty when it comes to evidencing the current position and the extent to which remedial action still needs to be taken. The Respondent has now conceded that the Excess Heat hazard would appear to have been adequately dealt with, but it is not able to demonstrate the current position with the Excess Cold hazard (this being its main current focus) or the Hot Surfaces and Materials hazard."

17. The FTT also criticised the improvement notice as not being specific enough. It said that Lambeth did not suggest that all of the windows needed to be replaced, but it was not clear which of them the remedial works were intended to apply to. Lambeth had also failed to demonstrate that its hazard scoring and schedule of works had a sufficient evidential base due to an absence of records, and it had conceded that there may no longer be an excess heat hazard in the common parts. The FTT concluded that it could not confirm an improvement notice which was "patently flawed", and because of insufficient information

it could not vary the notice so that it "fairly and specifically sets out the hazards that exist and the works that need to be carried out in order to alleviate those hazards." It regarded it as "unsatisfactory that there is significant disrepair within the Estate which has not been attended to over a long period of time, and flat occupiers will have suffered as a result."

18. Having secured the dismissal of the improvement notice Manaquel then made an application under rule 13(1)(b) of the FTT Rules for an order requiring Lambeth to pay its costs. It supported its application with a schedule showing that it had incurred costs of more than £145,000 in pursuing its appeal.

The Costs Decision

19. The FTT refused Manaquel's application. In its Costs Decision it noted Manaquel's criticism of Lambeth's conduct in continuing to assert the existence of hazards without reinspecting the Estate, notwithstanding that works had been undertaken. There was, Manaquel had submitted, "no reasonable explanation for [Lambeth's] failing to correct the notice in the two years between the notice of appeal and the hearing."

20. The FTT directed itself on the law by reference to the Tribunal's decision in *Willow Court Management Ltd v Alexander* [2016] UKUT 290 (LC) which followed the Court of Appeal in *Ridehalgh v Horsfield* [1994] EWCA Civ 40. The Court held that unreasonable conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case, and identified the acid test as being whether there was a reasonable explanation for the conduct complained of.

21. The FTT was critical of Lambeth's conduct of the appeal. The improvement notice was "seriously flawed" and it should have been clear that it was unlikely to be upheld, and that Lambeth had provided insufficient information to enable a satisfactory variation to be ordered. Nor could Lambeth reasonably have expected the FTT simply to adjourn the proceedings to allow it to produce a more credible notice. Lambeth was not a litigant in person, but a local housing authority, yet it had failed to take steps which one would expect such an authority to take, including disclosing its hazard scoring calculations and inspection records and undertaking a reinspection of the Estate nearer to the hearing date.

22. The FTT also took account of considerations which it felt weighed more in Lambeth's favour. The authority had "identified many Category 1 and Category 2 hazards and [Manaquel] does not deny this." Lambeth had been under a statutory duty to act (a duty imposed by section 5(1), 2004 Act, where a Category 1 hazard is considered to exist). It faced a very difficult task since the nature and extent of the hazards was different in each flat and in the extensive common parts. There was persuasive evidence that Manaquel had failed to engage with Lambeth for long periods and the FTT had rejected its arguments (about the relevance of the application for planning consent). Lambeth had also demonstrated flexibility over how the parties should best proceed. The FTT did not accept that its conduct was vexatious, abusive, designed to harass the other side or frivolous, nor was there any suggestion that it had acted improperly.

23. The FTT turned finally to the question whether there was a reasonable explanation for Lambeth's conduct. On that question, it said this, at [30]:

> "[…], to treat the Respondent's conduct in this case as unreasonable conduct for the purposes of Rule 13(1)(b) would ultimately in our view be too harsh, as we do not accept that this is the type of situation envisaged by the Upper Tribunal in *Willow Court* as justifying a Rule 13(1)(b) cost order. Charlotte Ward, the Respondent's main witness, was cross-examined extensively at the hearing, and although she was unable to defend the improvement notice or the decision to contest the appeal to the tribunal's satisfaction, she nevertheless came across as an experienced professional who took her housing standards responsibilities seriously and had genuinely tried to engage with the Applicant. And whether it was due to an element of 'tunnel vision' or to a misguided belief that the improvement notice could sensibly be varied on the information available or due to some other factor or a combination of factors, our view is that the Respondent's approach in relation to these proceedings was incompetent but that the Respondent did not act unreasonably in the sense envisaged by the first stage of the *Willow Court* test."

24. Having decided that Lambeth had not behaved unreasonably, the FTT did not have to consider whether it should exercise its discretion to make a costs order. The application could simply be dismissed.

Relevant legal principles

25. Under rule 13(1)(b) of the Rules the FTT may make an order for costs "if a person has acted unreasonably in bringing, defending or conducting proceedings."

Acting unreasonably

26. In *Willow Court*, at [28], the Tribunal suggested that a systematic or sequential approach might be adopted by tribunals asked to determine an application under rule 13(1)(b). That approach entailed asking three questions. First, applying an objective standard, had the person against whom the order was sought acted unreasonably? If so, secondly, in all the circumstances, should an order for costs be made? If so, thirdly, what should the terms of the order be?

27. The Court of Appeal has recently considered *Willow Court* in *Lea v GP Ilfracombe Management Co Ltd* [2024] EWCA Civ 1241. Coulson LJ emphasised that determining whether or not there has been unreasonable conduct, and if so, whether an adverse order for costs should be made, is a fact specific exercise on which general guidelines could not normally be laid down. Sufficient guidance in respect of rule 13(1)(b) had been provided in *Ridehalgh* and in *Willow Court.* Coulson LJ clarified, at [9], that vexatious conduct or harassment were examples rather than requirements and that unreasonable conduct could be identified without those features being present.

28. In *Lea* the Court of Appeal also reminded itself of the function of an appellate body when considering an appeal against a determination not to award costs under rule 13(1)(b), and of the difficulty of the task faced by the appellant, at [28]:

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

29. The person said to have behaved unreasonably in *Lea* was a Mr Gubbay, who had brought a substantial claim for service charges without any genuine belief that the claim was justified. The FTT had acquitted him of unreasonable conduct partly because of his belief that "in his own way he was doing the best for everyone. Whether this view is misguided is not a matter we need to determine." At [36], the Court of Appeal said that approach was wrong:

> "[T]he FtT appeared to consider the reasonableness of Mr Gubbay's conduct from his own, subjective point of view. But what mattered is whether his conduct was objectively unreasonable. Thus the question of whether or not Mr Gubbay was "misguided" was a potentially relevant consideration: if he thought he was acting reasonably, but an objective observer would say that he was totally misguided and so was acting irrationally, that would indicate unreasonable conduct."

Waltham Forest v Hussain

30. In *Waltham Forest London Borough Council v Hussain & Ors* [2023] EWCA Civ 733, a decision of the Court of Appeal handed down three months before the FTT's hearing of the improvement notice appeal, the Court explained the proper approach to be taken by tribunals in appeals against licensing decisions of local housing authorities under Parts 2 and 3 of the 2004 Act. The day before the hearing of this appeal, I invited the parties to consider whether, in the light of the Court of Appeal's guidance, the FTT had been asked by them to consider the wrong question on the appeal against the improvement notice served under Part 1 of the Act, and if it had, whether that had affected the Costs Decision.

31. Appeals to the FTT against licensing decisions taken under Parts 2 and 3 of the 2004 Act are brought under paragraphs 31 or 32 of Schedule 5 to the Act. By paragraph 34(2), such an appeal:

> "(a) is to be by way of a re-hearing, but
>
> (b) may be determined having regard to matters of which the authority were unaware."

Identical language is used in paragraph 15(2) of Schedule 1 to the 2004 Act, which concerns appeals under paragraph 10 of that Schedule against improvement notices served under Part 1 of the Act.

32. *Hussain* was an appeal from a decision of this Tribunal (Sir Timothy Fancourt, President): [2022] UKUT 241 (LC). The issue was whether when hearing an appeal against a licensing decision under Schedule 5 the FTT makes its own assessment whether, *on the date of the appeal*, the appellant *is* a fit and proper person to hold a licence; or whether, as the authority contended, the task of the FTT was to determine whether the decision of the local housing authority was wrong, and therefore to consider whether the individual concerned *was* a fit and proper person *on the date on which that decision was made*.

33. Andrews LJ explained, at [51], that statutory appeals "by way of re-hearing" may range from re-hearings "in the fullest sense of the word", where the appellate body treats the matter as if it arises for consideration for the first time, with the opportunity to rely on fresh evidence, unconstrained or restricted by the decision under appeal, to something much closer to a review of the decision under appeal. Where on the spectrum a particular type of appeal fell depended on the nature of the decision under appeal and the relevant statutory provisions. Having regard to the language of paragraph 34 and to Parliament's intention that licensing decisions should be taken by the local housing authority, Andrews LJ concluded that the task of the FTT is to determine whether the decision under appeal was wrong at the time when it was taken. Lewison LJ agreed that the appellate tribunal is not entitled to decide an appeal by reference to facts which occurred after the date of the local authority's decision, except to the extent that they throw light on the question whether the local authority's decision was wrong. As he pointed out, at [101]:

> "To decide otherwise, and to hold that the FTT may legitimately conclude that circumstances have changed since the local authority's decision and that, although it was right at the time, events have since moved on, would be to countenance an ever-moving target."

34. Before turning to the appeal itself, it is necessary to consider the relevance of the Court of Appeal's decision in *Waltham Forest v Hussain* to the proceedings before the FTT.

Was the FTT asked to determine the right question?

35. The current appeal is not against the FTT's substantive decision to quash the improvement notice, nor did Lambeth question the FTT's approach to Manaquel's appeal against the notice in a cross-appeal of its own. The issue is whether the FTT erred in refusing to make a costs order against Lambeth. But it is impossible to determine whether the FTT was impermissibly lenient in its reaction to Lambeth's conduct without first considering whether the criticisms it made were based on a mistaken appreciation of the real issues in the appeal. Before deciding, for example, whether it was unreasonable for a party to fail to prepare evidence it is relevant to consider whether that evidence would have been relevant to an issue which properly arose for determination. It was for that reason that I asked the parties to consider the relevance of the Court of Appeal's decision in *Waltham Forest v Hussain*.

36. As I have explained, *Waltham Forest v Hussain* concerned a licencing decision under Part 3 of the 2004 Act. The local authority decided that Ms Hussain's mother was not a fit and proper person to hold a licence, having been convicted of making false statements in previous licence applications, and that in view of her close association with her mother and her involvement in the family letting business Ms Hussain herself could not be regarded as

fit and proper either. The FTT allowed Ms Hussain's appeal, taking into account progress she had made with her accountancy studies and the fact that the property company of which she was a director, and which had not begun to do business at the time of the authority's decision, was by the time of the appeal hearing a trading company with appropriate affiliations, a second director and an income stream to support its responsibilities as a licence holder. Those matters, which did not exist at the date of the local authority's decision, gave rise to the dispute over the proper question to be asked on an appeal against a licence decision.

37. The Court of Appeal disagreed with the FTT and with the Tribunal on the proper approach. The task of the FTT was "to determine whether the decision under appeal was wrong at the time when it was taken". Andrews LJ explained, at [64], that "wrong" in this context means that the FTT disagrees with the original decision despite having accorded it the deference appropriate to a decision involving the exercise of judgment by the body tasked by Parliament with the primary responsibility for making licensing decisions. It does not mean "wrong in law". Put simply, the FTT must consider whether the authority should have decided the application differently. Generally speaking:

> "… an event which occurs after a decision is taken will not be relevant to the assessment of whether that decision was right or wrong at that time. There is an obvious illogicality in the proposition that the Council were wrong to conclude that Farina was not a fit and proper person in November 2018 because she has subsequently achieved, or made significant progress towards achieving, certain relevant professional qualifications, and demonstrated to the satisfaction of the FTT that she has been doing a good job of managing the Westbury Road property in the intervening period."

38. Did paragraph 15(2) of Schedule 1 to the 2004 Act, which states that an appeal to the FTT against an improvement notice is to be by way of a re-hearing but may be determined having regard to matters of which the authority was unaware, require the adoption of the *Hussain* approach in this case? Or, when it decided Manaquel's appeal, was the FTT entitled to take account of the condition of the Estate at the date of the appeal and the works which had been undertaken since the service of the improvement notice?

39. The 2004 Act repeatedly directs tribunals that appeals against the decisions of local housing authorities are to be by way of a re-hearing but may be determined having regard to matters of which the authority were unaware. The Court of Appeal reversed the Tribunal's decision in *Hussain*, but it did not comment adversely on the President's acceptance, at [50], "that Parliament must have intended that essentially the same approach to an appeal would be taken by the appropriate tribunal in all such cases under the 2004 Act."

40. In *Curd v Liverpool City Council* [2024] UKUT 218 (LC), I referred to the Court of Appeal's decision in *Hussain* and, without having heard argument to the contrary, I indicated at [14] that the same approach applied to appeals against improvement notices i.e. "the FTT was required to consider whether the decision under appeal was wrong at the time when the decision was taken (and not at the date of the appeal)."

41. Manaquel's case on this aspect of the appeal was presented by Mr Miller. He acknowledged that there is a presumption that where the same words are used in different places in an Act of Parliament they are intended to have the same meanings, but that presumption is rebuttable. He submitted that differences between the new system for assessing the condition of residential premises introduced by Part 1 of the 2004 Act (the Housing Health and Safety Rating System, or HHSRS) and the selective licensing regime in Part 3 of the Act strongly suggest that the approach to appeals in *Hussain* should not apply to the former. Instead, in an improvement notice appeal, the statutory context requires an assessment of the notice and the works specified in it as at the date of the appeal hearing. He also identified what he suggested were anomalies if the FTT was required to consider the validity of an improvement notice by reference only to circumstances as they were at the date the notice was given and not at the hearing of the appeal.

42. The relevant differences and suggested anomalies which Mr Miller identified were the following:

    1. An improvement notice served under Part 1 imposes an obligation to do works backed by criminal and civil sanctions; if the recipient does not appeal, the notice becomes final and conclusive as to matters which could have been raised on an appeal (section 15(6)). In contrast, a licence granted under Part 3 confers on someone the right to do something; if a licence is refused, the person can simply wait and apply again.

    2. Regulation 6 of the Housing Health and Safety Rating System Regulations 2005 (the HHSRS Regulations), made under Part 1 of the 2004 Act, attempts to convert subjective probabilities into numbers which dictate the severity of a hazard. It looks to the future in considering the likelihood of a relevant occupier suffering harm as a result of a hazard during the period of twelve months beginning with the date of assessment. In an appropriate case, whether harm actually happened in the period following service of a notice must be relevant evidence.

    3. In *Bristol City Council v Aldford Two LLP* [2011] UKUT 130 (LC) the Tribunal (George Bartlett QC, President) decided that the views of the actual occupier (as distinct from a relevant occupier) were material to a local authority's decision whether to serve an improvement notice. The actual occupier could change between the date of the notice and the date of the hearing. Were the former the important date, the FTT could confirm or vary an obsolete notice.

    4. It is open to the FTT to consider different schemes of remedial works from those in an improvement notice. Those works must, in the circumstances, be those available to a recipient at the date of the hearing. If, for example, a new heating technology emerged after service of the notice, it would be absurd if its existence could not be taken into account in determining any variation to the notice.

43. I do not think any of these points justifies attributing a different meaning to the directions given to the FTT in paragraph 15(2) of Schedule 1 to the 2004 Act from that applied by the Court of Appeal in *Hussain* to the same language where it appears in paragraph 34(2) of Schedule 5. None of them provides any reason why Parliament should have contemplated a different form of re-hearing where the decision under appeal relates to the service of an enforcement notice rather than a licence. None of them justifies treating the issue on an

appeal as an ever-moving target, as Lewison LJ put it in *Hussain.* The question in both types of appeals is whether the local authority's decision was wrong. Events which occurred after the decision was made cannot be relevant to whether it was right or wrong.

44. The first of Mr Miller's points does not seem to me to identify a relevant difference. But in any event, it is not a comprehensive statement of the courses of action open to a person who receives an enforcement notice. If there are matters in the notice with which the recipient disagrees, they may of course appeal, but they may also apply to the local authority to vary or revoke the notice (section 16(8), 2004 Act). A separate right of appeal is available against an authority's refusal to vary an improvement notice (under paragraph 13 of Schedule 1, 2004 Act).

45. There would have been no obstacle in this case to Manaquel asking Lambeth to vary the notice to take account of work done after it was served in October 2021, or to have regard to evidence of how the heating system had performed during the next winter, or evidence that none of the potential deaths or serious injuries on which the hazard scores was predicated had occurred. On a proper analysis of the whole scheme, the anomalies and structural problems which Mr Miller relied on are illusory.

46. Sections 5 and 7, 2004 Act confer duties and powers in respect of enforcement action on the local housing authority, and Parliament intended that it should be the primary decision maker on the seriousness of hazards and the most appropriate way to address them. It is entirely consistent with that intention that any changes to enforcement action justified by evidence of recent events, or changes in the characteristics of the occupiers, or technological innovations should be considered first by the authority on an application to vary made under section 16(8). In my judgment the true anomaly would be for the FTT to have the first and final say on the effect of such changes.

47. Mr Miller suggested that there might be multiple appeals if the recipient of a notice was expected to request a variation from the local authority, and then appeal again if they were not satisfied with the response. Or if the recipient was content with some variations but not with others, an extant appeal against the notice would proceed on a confused basis. These do not seem likely to be serious objections in practice, but in any event, they are not a reason to upend the structure of Part 1 and substitute the FTT for the authority as the primary decision maker. That would be the effect of asking the FTT to consider whether an improvement notice should be upheld, varied, or quashed, based on circumstances existing at the date of the appeal rather than asking whether the authority's decision to serve the notice was wrong at the date the notice was served.

48. For these reasons I am satisfied that significant parts of Manaquel's case were presented to the FTT on a legally incorrect basis. The question for the FTT should have been whether Lambeth was wrong to serve the notice it did, when it did; works done since the service of the notice could not undermine the validity of Lambeth's decision, nor was there any requirement for Lambeth's officers to justify or reformulate the notice in the light of those works.

49. It is against that background that I now come to the appellant's grounds of appeal.

The appeal

50. Manaquel was granted permission by the FTT to appeal on three grounds, but each was simply a different way of contending that the FTT wrongly applied the law in finding that Lambeth's conduct was not unreasonable. Neither Mr Isaac KC nor Mr Ham stuck at all closely to the original division in their oral submissions and I will adopt the same approach.

51. Mr Isaac KC explained that the unreasonable behaviour which Manaquel alleged was Lambeth's decision to defend and to continue to defend the appeal against the "patently flawed" improvement notice it had served. He submitted that while the FTT had directed itself correctly on the test for determining whether conduct had been unreasonable, it did not apply that test to its own findings. The only conclusion which the FTT could have reached, was that in seeking to uphold an obviously defective notice, having an unrealistic approach to Manaquel, failing to adduce evidence, not disclosing inspection reports which it was obliged to keep, and then asking for an adjournment at the end of the final hearing, Lambeth acted unreasonably.

52. Mr Isaac KC drew attention to paragraph 69 of the FTT's decision, which I have quoted in full at [16] above, and which he said was of particular relevance to his argument. That paragraph is not a promising start, as it is perhaps the clearest example of the FTT applying the wrong legal test. For the reasons given by the Court of Appeal in *Hussain,* the works Manaquel had carried out since receiving the improvement notice were irrelevant to the questions the FTT had to determine. In any event, to the extent that those works remedied some of the defects identified in the notice they either tended to justify the service of the notice, or (if the works undertaken were different from those Lambeth had prescribed) they could have formed the basis of an application by Manaquel to vary the notice. In either case, they could not be the basis for legitimate criticism of Lambeth. Nor, contrary to the FTT's view, was Lambeth in difficulty in evidencing the current condition of the Estate or demonstrating the current position concerning the excess cold hazard, because there was no onus on it to do either.

53. The particular findings of the FTT on which Mr Isaac relied, and which he said led to only one possible conclusion, began with its criticism of the content of the notice. I would say immediately that the FTT was entitled to form the view that the notice was "not nearly specific enough"; nevertheless, the only example it gave of that deficiency related to a single paragraph in the schedule of remedial action, concerning the replacement of windows. The whole schedule contained 23 separate actions, and the work unrelated to the windows which was required in the plant room, substations, network and flats comprised more than two thirds of the total. That work had been specified by Lambeth's heating consultant, Mr James Gallimore, who is a Chartered Building Services Engineer, and the FTT did not suggest that it was imprecise or deficient. In his evidence Manaquel's own heating engineer, Mr Brian Kane, identified works in the schedule which had already been completed, and acknowledged that two pumps still needed to be replaced, and that insulation should be improved and other works undertaken. The thrust of Mr Kane's evidence, so far as the FTT recorded it, seems to have been that money spent on those matters now would be wasted as they would have to be re-done as part of the major works envisaged if planning permission was granted (a proposition which the FTT rejected as a ground of appeal against the notice).

54. I also have my doubts that the way in which the notice dealt with the requirement to replace windows was as flawed as the FTT was persuaded to accept. The action on which the FTT focussed was intended to address the excess cold hazard and required Manaquel to instal replica galvanised steel, double glazed Crittall windows, to match the existing windows as closely as possible. The location of the works was identified in the schedule of works simply as "flats within Dorchester Court" but the description of the deficiencies giving rise to the hazard made it clear that the concern was not for the windows in every flat ("The windows to most flats are single glazed and the frames are corroded"). The notice ought to have been read as a whole. Had it been it would have been understood by any practical person to require that in those flats where the windows were single-glazed, new double-glazed units should be installed. There would be no difficulty in identifying which of the existing windows were single glazed and ought therefore to be replaced. Had a practical person been in any doubt about whether any particular window needed to be replaced they would have seen that the schedule of action also required that a programme of works be prepared and provided to Lambeth and that the window replacement was to be approved by its conservation team in advance. Because a failure of compliance could lead to criminal sanctions, the FTT gave greater weight to the importance of precision than to a common sense reading of the document. I do not question the importance of clarity in the drafting of improvement notices, but in my judgment the absence from the notice of a list of flats with single glazed windows did not make it unclear.

55. The FTT formed the view, at paragraph 25 of the Costs Decision, that because of the serious flaws in the notice it should have been clear to Lambeth that it was unlikely to be upheld. That was a tenable conclusion so far as the requirement to replace windows was concerned, and the FTT was entitled to reach it (although it is not the only possible conclusion and it is not the one I would have reached). But an absence of precision is not a legitimate criticism of the remainder of the notice, which provided sufficient detail of the problems with the heating and hot water system to enable them to be addressed by Manaquel's contractors. The flaws in the notice to which the FTT referred may have justified the removal of the requirement to replace the windows, but they provided no answer to the remainder of the work and did not justify quashing the notice in its entirety.

56. In the same paragraph of the Costs Decision, the FTT also said that it should have been obvious to Lambeth that the FTT had insufficient information from it (Lambeth) to be in a position to order a satisfactory variation of the notice and that Lambeth could not reasonably expect the FTT simply to adjourn the proceedings to enable it "to try to produce a more credible improvement notice". Nor could Lambeth "realistically have expected Manaquel to save the Improvement Notice itself." These findings were relied on by Mr Isaac KC but once again they demonstrate that the FTT was being invited to consider legally irrelevant matters. Neither Manaquel nor Lambeth had asked for a variation of the notice as part of their case, and the suggestion that one might be required stemmed in part from Lambeth's failure to identify which windows should be replaced and in part from the absence of a current specification of the work which remained to be done after Manaquel had partially complied with the notice. Having taken the view that the failure to specify which windows were to be replaced was a serious flaw, the appropriate course for the FTT would have been to vary the notice by removing that requirement. But the suggestion that the notice might need to be varied at Lambeth's initiative to replace the original schedule of works with a schedule reflecting only those works which remained to be carried out was misconceived. It was not for Lambeth or the FTT to produce a revised notice, it was for Manaquel to request a variation and to identify the respects in which it

considered one was justified. It might have wished to have the notice varied to omit works which it considered were not required, or to substitute different works which it had undertaken instead of the specified works, but it did neither. It was wholly unnecessary for the notice to be varied simply to remove works which had already been undertaken.

57. In paragraph 26 of the Costs Decision, on which Mr Isaac KC also relied, the FTT referred to steps which it would have expected Lambeth to take in the circumstances of the appeal. One of those was to undertake a reinspection of the Estate nearer to the hearing date. Given that the condition of the Estate at the hearing date was not relevant to the validity of a notice served two years earlier, there was no compelling reason for a further inspection.

58. A more legitimate criticism of Lambeth's conduct of the proceedings which the FTT also identified concerned its preservation and provision of relevant documents. Regulation 5 of the HHSRS Regulations requires a local housing authority to keep an accurate record of the state and condition of premises in respect of which an inspection had been undertaken for the purpose of Part 1 of the 2004 Act. That record is distinct from the calculation of the seriousness of any hazard which has been found to exist which is required by regulation 6. I was told that the FTT had issued directions requiring Lambeth to provide Manaquel with copies of the record of inspection which preceded the improvement notice, but that Lambeth had been unable to comply. It had produced its hazard scoring calculations for the excess cold and excess heat hazards but not for the hot surfaces and materials hazard. I was told that after the service of the notice Ms Ward had moved to work for a different authority and that the record she had made could not now be found. That explanation is not mentioned by the FTT, and it was entitled to regard Lambeth's record keeping as deficient. The main impact of Lambeth's failure to disclose a record of inspections seems to have been that whatever contemporaneous written record there might have been in relation to windows was not available by the time of the hearing.

59. In its substantive decision the FTT stated that Ms Ward had identified a considerable number of deficiencies at the Estate and that photographs taken at the time of her inspections were provided to it. Those photographs have not been shown to me and the FTT did not say if it had considered whether they were a sufficient record (as they might have been). Ms Ward acknowledged during her evidence that there was no detailed record of the problems identified in relation to windows in any specific flat, nor was she able to say which flats already had double glazing. She had, she said, taken a sensible and proportionate approach to the windows as there were so many of them. The FTT did not agree that that was a satisfactory approach, and it was entitled to take that view.

60. The FTT also noted in its substantive decision that the hazard scoring calculation for the hot surfaces and materials hazard had not been produced, nor had Lambeth explained why its conclusions should be relied on without those calculations. The first part of that sentence is an aspect of Lambeth's poor record keeping of which the FTT was justly critical, but the second part is more puzzling. It was for Manaquel to show why the decision to issue the notice was wrong, rather than for Lambeth to prove that its concerns had been justified and could be relied upon. Paragraph 74 of the decision suggests the FTT did not approach the appeal on that basis. Had it done so, it would have seen that the details of the missing calculations for the hot surfaces and materials hazard were not significant. Manaquel did not rely on any assessment of its own to demonstrate that the hot surfaces and materials hazard did not exist. Its case on that issue was recorded by the

FTT in paragraph 27 of its decision. The problem of "excessively hot water temperature within flats" was not disputed and Manaquel accepted that it "potentially constitutes a hazard", but the issue had been addressed by its heating contractors adjusting the temperature control set point for each block downwards.

61. The other aspect of this hazard described in the notice was that scalding water caused the radiators in flats to be excessively hot. Manaquel's case on that complaint was that the radiators to which it applied had not been identified, and that in any event the issue had been addressed by the adjustment and repair of the weather compensating control system. The absence of Lambeth's hazard scoring calculation for hot surfaces and materials was therefore of little importance because the existence of the hazard was not challenged. As for the points Manaquel did make, the complaint that radiators had not been identified was a bad point as far as this hazard was concerned, as the specification of work in the notice did not include any work to the radiators (thermostatic control valves were required elsewhere in the schedule to address the excess heat hazard, but they were not specified as a remedy for the hot surfaces hazard). The fact that works had been done after the improvement notice was served, whether they were the works specified in the notice or different works, was irrelevant to the question which the FTT had to determine.

62. The FTT described Lambeth's conduct of the proceedings as "incompetent" (at paragraph 30 of the Costs Decision, reproduced at [23] above). That description was its summary of the whole body of criticism it had directed against Lambeth in both decisions. For the reasons I have explained, many of those criticisms were unjustified. The lack of precision in the improvement notice and the failure to keep records of the inspection were legitimate complaints so far as the windows were concerned, but they did not undermine the notice so far as it related to the other hazards or the actions required to address them and did not justify quashing the notice in its entirety. Lambeth's inability to produce the hazard score calculation for the hot surfaces and materials hazards justified the complaint that its record keeping was incompetent, but it did not cast doubt on the proposition that the supply of scalding water represented a hazard which required to be remediated. Lambeth's failure to arrange for a recent inspection and the absence of evidence enabling the FTT to vary the notice were not legitimate complaints and did not reflect badly on the notice. It was not fanciful to suggest that Manaquel might propose variations to the notice, since that is what the statutory scheme envisages. Finally, Lambeth's suggestion, through Mr Ham, that the hearing be adjourned to enable additional evidence to be prepared showing the current condition of the building was a reflection of the shared misconception about the proper subject matter of the appeal. Manaquel's case was founded on that misconception and while it ought not to have been acquiesced in by Lambeth, it did not justify singling the authority out for criticism.

63. Yet, despite the FTT's highly unfavourable assessment of Lambeth's conduct of the proceedings, it still acquitted the authority of having acted unreasonably. Mr Isaac KC submitted that the FTT's assessment was demonstrably flawed. Even if, in the light of *Hussain*, it should have adopted a different approach, and even if its failure to do so meant that some of its criticisms of Lambeth were misdirected, he submitted that its decision should be set aside. The focus of that submission was paragraph 30 of the Costs Decision, most of which I have already quoted, at [23] above. In it the FTT provided its assessment of Ms Ward, Lambeth's main witness. It concluded that "although she was unable to defend the improvement notice or the decision to contest the appeal to the tribunal's

satisfaction", she was an experienced professional who took her responsibilities seriously. The paragraph continues:

> "And whether it was due to an element of 'tunnel vision' or to a misguided belief that the improvement notice could sensibly be varied on the information available or due to some other factor or a combination of factors, our view is that the Respondent's approach in relation to these proceedings was incompetent but that the Respondent did not act unreasonably in the sense envisaged by the first stage of the *Willow Court* test."

64. Mr Isaac KC made three criticisms of this key paragraph. First, it took account only of the conduct of Ms Ward; secondly, its assessment of her conduct was subjective rather than objective; and, thirdly, it failed to identify a reasonable explanation for Lambeth's conduct.

65. I remind myself at this stage that although identifying unreasonable conduct involves the application of an objective standard, it is, as Coulson LJ put it in *Lea*, "an evaluative decision" and I should therefore allow the FTT "considerable latitude" before concluding that its decision cannot stand. Approaching Mr Isaac KC submission in that spirit, I reject his first and second criticisms. Ms Ward was Lambeth's main witness, and the person responsible for the original inspections and for preparing the improvement notice; there was no suggestion that she had the conduct of the proceedings themselves. Because of her role it was relevant that she was a conscientious professional who was doing her best, because that assessment underpinned the conclusion that Lambeth's conduct in serving the notice and pursuing it was not vexatious, abusive, frivolous or designed to harass. It is possible that the FTT was also treating Ms Ward's conduct as a proxy for Lambeth's because of her position, but I do not think that it lost sight of the fact that it was Lambeth's conduct which it had to assess. That is apparent from the statement that "the respondent's approach in relation to these proceedings was incompetent". It did not suggest that Ms Ward's conduct was incompetent; she was not responsible for the preparation of the appeal, nor was there any evidence that she was responsible for Lambeth's poor record keeping. She was responsible for drafting the notice and to that extent she contributed to the conduct which the FTT regarded as incompetent, although I respectfully disagree with its assessment of the notice and do not consider the way its was drawn up by Ms Ward calls her competence into question.

66. There is more force in Mr Isaac's third criticism of the FTT, and his complaint that it made the same mistake as in *Lea* when it failed to identify an explanation for Lambeth's conduct. It listed several possible explanations: tunnel vision, a misguided belief that the notice could sensibly be varied, or some other factor or combination of factors. The FTT began the paragraph by asking the right question: it was "still left with the question of whether there is a reasonable explanation for the respondent's conduct in this case". But that question remained unanswered by the end of the paragraph. Of the possible answers suggested by the FTT, "tunnel vision" might point towards unreasonable conduct, but it is not clear what the FTT meant by that expression. Did it mean that Lambeth was fixated on obtaining a favourable outcome to the appeal, or that it had failed to notice the current condition of the Estate? The former would support a finding that Lambeth's conduct had been unreasonable, but the latter would have been a perfectly proper approach. The suggestion of a misguided belief that the notice could be varied was speculation, but it also betrays the FTT's misunderstanding of the question it should have been focussing on; it

was not misguided for Lambeth to think, if it did, that the notice could be varied, if Manaquel requested it. The reference to some other combination of factors demonstrates that the FTT did not reach any conclusion on the decisive question it posed for itself.

67. Nor did the FTT refer in its decision to the explanation provided by Lambeth in its response to the costs application for its failure to prepare an updated assessment of the condition of the Estate. That explanation was that Manaquel had served its evidence of the work it had carried out only shortly before the hearing (Mr Kane's original witness statement of 10 January 2022 was updated by a further statement served on 18 September 2023, two weeks before the hearing). The FTT was mistaken in focussing on the condition of the Estate at the time of the hearing but given the importance it attributed to the lack of evidence about it, it ought to have addressed the explanation provided by Lambeth.

68. I therefore agree with Mr Isaac that the FTT's decision was flawed. It was flawed not only because the FTT was persuaded by Mr Isaac himself of the importance of matters which, on a proper analysis, were irrelevant, but also because it failed to answer its own question whether the conduct about which there were legitimate grounds of complaint was open to some reasonable explanation. The first flaw pervades the decision and undermines many of the criticisms on which the application for costs was originally based, but it does not cast doubt on the FTT's conclusion that Lambeth's conduct was not unreasonable. But the second flaw vitiates that conclusion because the FTT did not consider, in relation to each of the faults it found with Lambeth's conduct, whether there was a reasonable explanation. It simply asserted, without proper explanation, that its conduct of the proceedings was not unreasonable.

Consequences

69. What is the appropriate response to the combination of legal errors I have found in the Costs Decision?

70. On an appeal on a point of law under section 11 of the Tribunals, Courts and Enforcement Act 2007, if this Tribunal finds that the making of the FTT's decision involved an error on a point of law, it may (but need not) set aside the decision (section 12(2)(a), 2007 Act). If the decision is set aside the Tribunal must then either remit the case to the FTT for reconsideration or re-make the decision.

71. Neither party was enthusiastic about the application for costs being remitted to the FTT. The normal course where the Tribunal finds that a decision of the FTT involved an error of law is for it to set aside and re-make the decision. But I am very poorly placed to evaluate Lambeth's conduct as would be required if I were to remake the decision. There is no transcript of the hearing and the parties have agreed that the appeal bundle should not contain the evidence provided to the FTT or its direction or correspondence between the parties or with the tribunal. I know very little about how the proceedings were conducted. In addition, the FTT said that it had found the balancing exercise complicated, and it would be particularly difficult for me to assess the relative importance of the various flaws which it identified in Lambeth's conduct, some of which were justified, but others not. For these reasons this is a case in which it would not be appropriate for this Tribunal to re-make the decision on Manaquel's costs application.

72. The choice is therefore between remitting the case to the FTT or leaving its dismissal of the costs application undisturbed, notwithstanding its flaws. That choice is available under section 12(2)(a), which provides that the Tribunal "may (but need not)" set aside an FTT decision found to contain an error of law.

73. The question whether to set-aside a decision made on legally incorrect grounds, or to leave it undisturbed, involves the exercise of a discretion. In exercising that discretion I take account of the substantial sum of money claimed by Manaquel (£145,000). I need to consider the prospects of a different outcome if the FTT is asked to determine the application again. I will also have regard to the nature of the application and the resources of the parties and the justice system which it has already consumed. My decision must be consistent with the Tribunal's overriding objective of dealing with cases fairly and justly. As rule 2(2) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules explains, fairness and justice require that cases be dealt with in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties.

74. For the reason I have already given, this is not a case in which it would be possible for me to re-make the FTT's decision. It is nevertheless relevant to consider how many of the points originally relied on by Manaquel would still be material to any reconsideration by the FTT, having regard to *Hussain*.

75. Eight grounds were identified in the application notice as justifying an award of costs under rule 13(1)(b). For ease of reference I will group them as follows. (a) Two grounds concerned the form of the notice and the argument that it was "unsavable by variation" and therefore doomed to fail. (b) Two relied on Lambeth's failure to reinspect and its reliance on the hazards of excess heat and hot surfaces and materials despite the works done by Manaquel to improve the operation of the heating and hot water system. (c) Two concerned Lambeth's failure to disclose the record of its inspections and its hazard score calculations for the hot surfaces and materials hazard. (d) One suggested an inconsistency between reliance on the highest level of Category 1 hazard in respect of excess cold, and a statement in the improvement notice that a prohibition order was not required because there was no "imminent risk of serious harm to the health and safety of the occupants". (e) And one focussed on Mr Ham's invitation to the FTT to adjourn the hearing to allow more evidence to be adduced.

76. Grounds (b) and (e) were misconceived and could not properly support a finding of unreasonable conduct. Ground (d) was acknowledged by Mr Isaac KC to be a make weight ("not central" as he put it); additionally, although the FTT appears to have been impressed by the point, there is no inconsistency between a finding that there is a serious Category 1 hazard and a decision not to prohibit the use of the premises altogether.

77. The grounds which the FTT might consider of continuing relevance are (a) and (c).

78. As to ground (a), I have already explained why the lack of precision in the notice raised no doubt about two of the three hazards or more than two thirds of the prescribed actions and did not justify quashing the notice in its entirety. Variation (in the sense of prescribing different work to reflect the current condition of the Estate) was not a problem for

Lambeth. What properly remains of ground (a) in support of the charge of unreasonable conduct is therefore that Lambeth served, and did not withdraw, an improvement notice requiring the installation of new double glazed windows throughout the Estate without excluding those flats which already had double glazing or identifying the flats where work was required. The FTT was entitled to regard the notice as flawed in that respect. But, the FTT having acquitted Lambeth of vexatious behaviour, and having found Ms Ward to be an experienced professional who took her responsibilities seriously, it is not difficult to see a perfectly reasonable explanation for the form of the notice, namely, that as Ms Ward explained in her evidence, Lambeth considered it unnecessary to identify each window, or each flat. It would have been obvious on inspection which windows were not already double glazed, and if there was any doubt, it could be resolved by liaison with Lambeth's officers which the notice also required. The notice appears to me to be capable of a common sense reading and to be adequate for its purpose. The FTT was persuaded to take a different view, but the availability of an alternative interpretation of the notice would make it very difficult for the FTT to conclude, were it asked again, that there was no reasonable explanation for the form it took.

79. As to ground (c), Lambeth's failure to preserve records of inspections is certainly a ground on which it could be found to have conducted the proceedings unreasonably. The absence of one of the hazard scores was of little or no consequence as the existence of the relevant hazard was not seriously disputed, but it was a further example of poor record keeping by Lambeth which could be taken into account.

80. On any view, Manaquel's case for suggesting that Lambeth acted unreasonably is very much weaker than the case originally presented to the FTT. The FTT was not persuaded by the eight grounds originally relied on. There must be a significant chance that the much smaller catalogue of errors which have survived contact with *Hussain* would also fail to persuade the same panel if the application were remitted to them for reconsideration.

81. I also take into account that Manaquel was significantly responsible for directing the FTT's attention away from the condition of the Estate when the notice was served and persuading it to focus instead on its condition more than two years later, which was legally irrelevant. It presented its case to the FTT without reference to *Hussain*, decided by the Court of Appeal more than three months earlier. Lambeth acquiesced in that error but was not the source of it. That point would be relevant to the second of the *Willow Court* stages, whether an order ought to be made (assuming the FTT was satisfied that there had been unreasonable conduct). It would also be relevant at the third stage, when any award of costs came to be quantified. Why, it might well be argued, should Manaquel recover its costs of preparing irrelevant evidence, including expert evidence, and of presenting flawed arguments?

82. A final factor to which I give weight is the nature of the application. Appeals to the FTT usually involve no costs shifting. It is implicit in the Rules that there is no injustice in each party bearing its own costs. The Tribunal stressed the exceptional nature of the current application in *Willow Court*, at [43], when we said that costs applications "should not be allowed to become major disputes in their own right" and that they should be determined summarily, and preferably without the need for a further hearing. Those aspirations have not been achieved in this case.

83. I have come to the conclusion that, in these proceedings, enough is enough, and that, taking all of the matters I have identified into account, despite the flaws in its reasoning, the appeal can be disposed of fairly and justly by refusing to set aside the FTT's decision not to make an order for costs.

Disposal

84. For these reasons I dismiss the appeal.

Martin Rodger KC,
Deputy Chamber President
25 March 2025

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.