Neutral Citation Number: [2025] UKUT 115 (LC)

Case No: LC-2024-000375

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT Ref: LON/OOBG/LSC/2023/0098

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

8th April 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – new issue raised by First-tier Tribunal at the beginning of hearing to determine reasonableness of service charges - unfair conduct of hearing leading to the appearance of bias – decision of the First-tier Tribunal to admit new issue and give directions for its determination set aside

BETWEEN:

SOVEREIGN NETWORK HOMES
(formerly known as Network Homes Limited)

Appellant

-and-

(1) DR SHOGHIK HAKOBYAN AND OTHERS
(2) CUDWEED MANAGEMENT COMPANY LIMITED

Respondents

203 Cudweed Court,
2 Watergate Walk,
London, E14 9XH

The Chamber President, Mr Justice Edwin Johnson
4th March 2025

Justin Bates KC and Katherine (Kate) Traynor, instructed directly by Sovereign Network Homes' internal legal department, for the Appellant

Dr Shoghik Hakobyan and Ms Claudia Labruzzo appeared in person, for themselves and the remainder of the First Respondents/Applicants
The Second Respondent did not appear and was not represented

The following cases are referred to in this decision:

Serafin v Malkiewicz [2020] UKSC 23 [2020] 1 WLR 2455
Thirty One Crescent Grove Ltd v Atherden [2024] UKUT 80 (LC)
Birmingham City Council v Keddie [2012] UKUT 323 (LC)
Admiralty Park Management Company Limited v Olufemi Ojo [2016] UKUT 421 (LC)
Regent Management Limited v Jones [2012] UKUT 369 (LC)
Bucklitsch v Merchant Exchange Management Company Limited [2016] UKUT 527 (LC)
32 St John's Road (Eastbourne) Management Company Limited v Gell [2021] EWCA Civ 789 [2021] 1 WLR 6094
Moustache v Chelsea and Westminster Hospital NHS Foundation Trust [2025] EWCA Civ 185
Peabody Trust v Welstead [2024] UKUT] 41 (LC)
M&P Enterprises Limited v Norfolk Square (Northern Section) Limited [2018] EWHC 2665 (Ch)
Re G (A Child) [2015] EWCA Civ 834
Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468

Introduction

1. This is an appeal against what is expressed to be an interim decision of the First-tier Tribunal (Property Chamber), dated 23rd April 2024.

2. The case came before the First-tier Tribunal, which I shall refer to as **"the FTT"**, by way of an application made to the FTT by the tenants of certain flats in a block of flats known as Cudweed Court. The application was made pursuant to Section 27A of the Landlord and Tenant Act 1985 and, as the tenants' case was pleaded, challenged the reasonableness of payments demanded, by way of service charges, from the tenants by the Appellant.

3. The application came before the FTT, for hearing, on 15th and 16th April 2024. At that hearing (**"the Hearing"**) the FTT raised, on its own initiative, the question of whether the payments which had been demanded from the tenants were due at all, as a matter of contractual liability. In the face of the protests of the Appellant, the FTT decided, by the interim decision (**"the Interim Decision"**), that the hearing would have to be adjourned so that directions could be given for the determination of the issue of contractual liability which it had raised. The FTT also gave directions for the hearing of the issue of contractual liability.

4. The Appellant, Sovereign Network Homes, appeals against the Interim Decision with the permission of Martin Rodger KC, Deputy Chamber President of the Upper Tribunal (Lands Chamber). For convenience, I will refer to the Upper Tribunal (Lands Chamber) as **"the Tribunal"**.

5. The Appellant says that the FTT was wrong, for a number of reasons, both to raise the issue of contractual liability and to give directions for the determination of that issue. The Appellant's case is that the FTT should have confined itself to the pleaded issues in the application, which were limited to various grounds of challenge to the reasonableness of the relevant service charges. The Appellant also asserts that the hearing before the FTT was conducted in such a way as to render the hearing unfair, and to create the appearance of bias.

6. At the hearing of the appeal the Appellant was represented by Justin Bates KC and Katherine Traynor. Ms Traynor appeared for the Appellant at the Hearing. The Second Respondent, Cudweed Management Company Limited, did not appear and was not represented in the appeal because it is not directly concerned with the issue of contractual liability raised by the FTT. The parties described in the appeal as the First Respondents are the tenants who pursued the application under Section 27A of the Landlord and Tenant Act 1985 to the Hearing. The lead tenant in the application was, and remains Dr Shoghik Hakobyan, who appeared in person at the hearing of the appeal, representing both herself and her fellow applicants. Dr Hakobyan was accompanied by another of the applicant tenants, Ms Claudia Labruzzo, who also addressed me. I am most grateful to the Appellant's counsel and to Dr Hakobyan and Ms Labruzzo for their assistance, by their respective submissions, in my determination of this appeal.

7. The hearing of the appeal took place on 4th March 2025. Following the hearing my attention was drawn to a further authority which was of potential relevance. My attention was also drawn to some documents in the case which the parties had not seen, and which were also

potentially relevant. I invited the parties to make further submissions in writing on these matters, if they wished to so. The Appellant took up this invitation, with a short written further submission. The First Respondents, by Dr Hakobyan, also took up this invitation, with a short written further submission.

The parties and the relevant property

8. The application which came before the FTT concerns certain flats in a block of 57 flats known as Cudweed Court. The block itself is one of four blocks of flats in an estate known as 45 Millharbour, London E14 9TR.

9. The Appellant, which is a social landlord, holds 12 of the flats in Cudweed Court on long leases. The Appellant has underlet each of the 12 flats (**"the Flats"**) on shared ownership underleases. I will refer to these underleases as **"the Occupational Underleases"**. I will refer to the leases of the Flats held by the Appellant as **"the Headleases"**. As I understand the position, the Headleases were all granted on the same terms. Again as I understand the position, the Occupational Underleases were also granted on the same terms, but it should be noted that those terms differ from the Headleases.

10. The Occupational Underleases were each granted by the Appellant, as landlord, to the tenant/tenants of the relevant Flat. There was no other party to each of the Occupational Underleases.

11. The same is not true of the Headleases. Each of the Headleases was granted by Michael John Hunt, as landlord and freeholder, to the Appellant. The other party to each of the Headleases was the Second Respondent, Cudweed Management Company Limited. In broad terms the Second Respondent was a party to each of the Headleases as the management company, responsible for the delivery of services under the Headleases.

12. The application to the FTT was made by the tenants of eight of the Flats. The lead applicant was Dr Hakobyan. By the time the application reached the Hearing the applicants comprised the tenants of five of the Flats. The tenants of two of the Flats had withdrawn from the application. The tenant of one of the Flats had reached a compromise with the Appellant and the Second Respondent.

13. In order to avoid confusion in my description of the parties, as between the FTT and the Upper Tribunal, I will refer to the Second Respondent as **"Cudweed"**. I will use the collective expression **"the Applicants"** to mean those tenants of the Flats who constituted, at the relevant time, the applicants to the FTT. I will continue to refer to Sovereign Network Homes as the Appellant. I should mention that the Appellant was formerly Network Homes Limited but has since become Sovereign Network Homes pursuant to an amalgamation of social landlords.

The application to the FTT

14. The application to the FTT (**"the Application"**) was made by application notice dated 5th December 2022. As I have said, the Application was made pursuant to Section 27A of the

Landlord and Tenant Act 1985 (**"Section 27A"**). The application notice was issued by Dr Hakobyan, but the remainder of the Applicants were identified as parties to the Application, on the basis that the Application was a joint application. As mentioned above, the Applicants then comprised the tenants of eight of the Flats.

15. By the Application, the Applicants sought a determination under Section 27A in relation to the service charges, as they were described, for the period between November 2019 and March 2023. There were no formal grounds of challenge attached to the application notice but, in that part of the application notice where the Applicants were required to list the items of service charge which were in issue and their value, the following text appeared (italics have been added to all quotations in this decision):

> *"On 30 Sept 2022 the Applicants indicated above were sent a final service charge account by Network Homes for April 1 2021 to March 31 2022.*
> *The increase charged by Network Homes amounts to 42%, and this is on top of our estimated service charge for that year that Applicants have already paid.*
> *All Applicants requested that Newtork* [Network] *Homes provided an application for such costs, in terms of budget apportionment, actual costs and S22 that Network Homes need to serve to the managing agents.*
> *The budget apportionment figures sent to the Applicants don't match and do not coincide with the service charge calculations.*
> *The S22 was not provided (Flat 203 requested S22 for 2020 year in November 2021. It has been 13 months, and still nothing.)"*

16. Immediately below this in the application notice, where the Applicants were required to describe the questions they wished the FTT to decide, the following text appeared:

> *"We believe that the amount that we pay for the service charge is unreasonable and unfair, considering the poor services (especially throughout the pandemic) and evidence (supporting documents not sent).*
> *We would like to know how the service charges were spent and why it has increased so sharply last year. All flats have emailed Network Homes asking for clarification; since we were sent a final account we thought that getting the answers to these questions would be easy, but we are struggling to get even the simplest questions answered.*
> *A meeting was also requested and refused multiple times."*

17. The respondent to the Application was identified as the Appellant.

The relevant service charge provisions

18. Before I come to the procedural history of the Application it is necessary give a brief summary of the service charge provisions in the Headleases and the Occupational Underleases. This summary is essential to an understanding of the issue of contractual liability which the FTT raised at the Hearing.

19. Starting with the Headleases, they have what may be described as a fairly conventional set of service charge provisions. By paragraph 2 of Schedule 4 to the Headleases, the Tenant (the Appellant) covenants to pay the Service Charge. The Service Charge is payable on an estimated basis in each Service Charge Year by four equal instalments on each of the Rent

Payment Dates. There is also a balancing provision in paragraph 2, which provides either (i) for the Tenant to pay the excess, if the actual Service Charge for the relevant Service Charge Year exceeds the estimated payments or (ii) for the Tenant to be given a refund if the estimated Service Charge exceeds the actual Service Charge for the relevant Service Charge Year.

20. The Service Charge is defined to mean a fair and reasonable proportion, determined by the Landlord (Mr Hunt), of the Estate Service Costs and the Tenant's Proportion of the Building Service Costs. The Service Charge Year is defined as the calendar year. The Rent Payment Dates mean the usual quarter days in each year.

21. In terms of the party to whom the Service Charge is payable, clause 2.3 of the Headleases recites that the grant of the relevant Headlease was made in consideration of the Tenant covenanting to pay the Landlord and/or the Management Company (Cudweed) various specified sums as rent. There then follows a list of the specified sums, which include the Service Charge. Clause 5.1.1 of the Headleases contains a covenant on the part of the Tenant, with the Landlord and as a separate covenant with the Management Company to observe and perform the Tenant Covenants. The Tenant Covenants are set out in Schedule 4 to the Headleases, and thus include the obligation, in paragraph 2 of Schedule 4, to pay the Service Charge.

22. By clause 6 of the Headleases the Management Company covenants with the Tenant to observe and perform the Management Company Covenants. The Management Company Covenants are set out in Schedule 7 to the Headleases. By paragraph 1a of Schedule 7, the Management Company covenants to provide the Services. Paragraph 1 of Schedule 7 also contains provisions for the administration of the Service Charge, including provisions for (i) an estimate of the Service Charge, to be provided to the Tenant as soon as possible after the start of the Service Charge Year, and (ii) a certificate showing the Service Costs and the Service Charge for the Service Charge Year, to be provided to the Tenant as soon as reasonably practicable after the end of the relevant Service Charge Year.

23. The Services are defined to mean the Buildings Services and the Estate Services. The Service Costs are defined to mean the Building Services Costs and the Estate Services Costs. For the purposes of this decision, it is not necessary to go further into the definitions of the Buildings Services or the Estate Services.

24. In essence therefore the Headleases require the payment of an annual service charge, payable on an estimated basis by equal quarterly payments on the quarter days in each calendar year, with an end of year balancing charge or refund.

25. Cudweed retained managing agents to manage the estate, of which Cudweed Court forms part, on its behalf. Prior to 1st October 2021 the managing agent was London Residential Management Limited. After 1st October 2021 the managing agent was Anglo Fortune Estate Management Limited.

26. The FTT noted, in the Interim Decision, that Cudweed, by its managing agents, had not been operating the service charge strictly in accordance with the service charge provisions in the Headleases. The FTT noted various inconsistencies. First, Cudweed had made quarterly demands on the basis that the estimated service charge instalments were payable on 25th December, 25th March, 24th June and 29th September, which did not accord with the Service

Charge Year (the calendar year). The FTT noted that it would have been open to Cudweed to make the quarterly demands within each calendar year, commencing with 25th March, consistent with the requirement for an estimate of the Service Charge for the Service Charge Year to be provided as soon as possible after the start of the Service Charge Year. The FTT recorded that Cudweed had elected not to do this. Second, Cudweed had delayed in preparing service charge accounts and in making its demands for payment of the Service Charge. Third, and in addition to this, Cudweed, through its former managing agents, had adopted the practice of charging service charges on a six monthly rather than a quarterly basis; see paragraphs 34-36 of the Interim Decision.

27. The position in relation to the Occupational Underleases is rather different to the service charge provisions in the Headleases. There are no service charge provisions, as such, in the Occupational Underleases. Instead there is a tenant's covenant, at clause 3.3, which is in the following terms:

> *"**Outgoings***
> *3.3.1 To pay Outgoings.*
> *3.3.2 To refund to the Landlord on demand (where outgoings relate to the whole or part of the Building or other property including the Premises) a fair and proper proportion attributable to the Premises, such proportion to be conclusively determined by the Landlord (who shall act reasonably).*
> *3.3.3 To pay the sums due to the Superior Landlord under the Superior Lease."*

28. Outgoings are defined in the Occupational Underleases, at clause 1.2.22, in the following terms:

> *"**Outgoings** means (in relation to the Premises) all existing and future rates, taxes, charges, assessments, impositions and outgoings whatsoever (whether parliamentary or local) which are now or may at any time be payable, charged or assessed on property, or the owner or occupier of property."*

29. The Superior Lease is defined to mean the relevant Headlease of the relevant Flat. The Superior Landlord is defined to mean the landlord under the Headleases; that is to say the freehold owner of the relevant Flat (Mr Hunt).

30. In order to understand the basis on which the FTT made the Interim Decision it is necessary to differentiate between (i) the service charges payable under the Headleases, pursuant to the provisions which I have summarised above, and (ii) the same sums, as demanded from the Applicants by the Appellant in reliance upon clause 3.3 of the Occupational Underleases. I will refer to the service charges payable under the Headlease as **"the Service Charges"**. I will refer to the sums demanded from the Applicants by the Appellant, in reliance upon clause 3.3 of the Occupational Underleases, as **"the Payments"**. Neither expression is intended to imply any views on my part, preliminary or otherwise, either as to the correct description of these sums or as to the contractual position in terms of the obligation to pay these sums.

The relevant procedural history of the Application

31. The FTT first issued directions in the Application on 28th April 2023. By that date Dr Hakobyan had made an additional application for the appointment of a manager pursuant to

Section 24 of the Landlord and Tenant Act 1987. I understand that the remainder of the Applicants were also identified as parties to this application (**"the Manager Application"**). Cudweed was identified as the respondent to the Manager Application.

32. I have not seen a copy of the initial directions given by the FTT on 28th April 2023. As I understand the position the FTT, by those directions, set down both the Application and the Manager Application for a case management hearing on 30th May 2023.

33. The case management hearing duly took place on 30th May 2023, attended by the parties. At that stage, the Applicants had solicitors, Jobsons Solicitors Limited (**"Jobsons"**), acting for them. At the case management hearing the Applicants were represented by a Ms Collins of Jobsons. The Appellant was represented by two of its leasehold property managers. Cudweed was represented by counsel. The FTT provided a short written decision on the case management hearing, accompanied by directions (**"the May 2023 Directions"**).

34. The May 2023 Directions were subsequently amended on 14th August 2023, but the amendments are not material for the purposes of the appeal. For present purposes the following directions, within the May 2023 Directions, are relevant.

35. The Appellant was joined as a respondent to the Manager Application, and Cudweed was joined as a respondent to the Application. The FTT noted the agreement of the parties that Dr Hakobyan should be the lead Applicant and stated that the FTT would restrict itself to the issues raised by *"her application"*. I am not entirely clear whether the reference to *"her application"* was a reference to the Application or to both of the Application and the Manager Application.

36. In terms of disclosure the FTT gave the following directions:

> *"4. By **27 June 2023**, the Lead Applicant shall email to the First and Second Respondents all the demands for heating and hot water charges which she has received since 1 November 2019.*
> *5. By **27 June 2023**, the First Respondent shall email to the Lead Applicant and the Second Respondent copies of (i) all service charge demands made to the Lead Applicant since 1 April 2019; (ii) the service charge budgets for the years 2019/2020, 2020/21, 2021/2o22 and 2022/23; (iii) the budgets for these years; and (iv) any reconciliation between budgeted and actual expenditure.*
> *6. By **27 June 2023**, the Second Respondent shall email to the Lead Applicant and the First Respondent copies of (i) all service charge demands made to the First Respondent since 1 January 2019; (ii) the service charge budgets for the years 2018, 2019, 2020, 2021, 2022 and 2023; (iii) the budgets for these years; and (iv) any reconciliation between budgeted and actual expenditure."*

37. So far as statements of case were concerned the FTT noted, in its written decision, that Dr Hakobyan had not particularised the service charges which she sought to challenge, while also finding that it had been difficult for her to do so *"given the difficulties of reconciling the respective accounts maintained by the First Respondent (under the sublease) and the Second Respondent (under the headlease)"*. The FTT gave the following directions for the service of statements of case:

> *"**The Lead Applicant's case***

*7. By **25 July 2023**, the Lead Applicant shall email to the First and Second Respondents a **Statement of Case** identify the service charge items which are challenged and any legal submissions on why this Tribunal has jurisdiction to determine the same.*

The Respondents' cases

*8. By **29 August 2023**, the First and Second Respondents shall file their Statements of Case in response together with any legal submissions as to the Tribunal's jurisdiction."*

38. The FTT directed a hearing of *"the preliminary issues"* to take place on 25th September 2023. By reference to the terms of the FTT's decision, in giving the May 2023 Directions, these preliminary issues appear to have been issues raised by Cudwood's counsel as to whether the charges in dispute were in fact service charges amenable to the Section 27A jurisdiction; see paragraphs (14) and (15) of the decision.

39. So far as the Manager Application was concerned, the Applicants were given the option of withdrawing the Manager Application. As I understand the position, this came about because the FTT had identified to the Applicants' solicitor that the Manager Application might be misconceived, on the basis that a management order could not be obtained against the Appellant, as a social landlord; see paragraph (16) of the decision. Paragraph (17) of the decision recorded that Ms Collins, for the Applicants, had agreed to notify the FTT by 9th June 2023 as to whether the Applicants would be continuing with the Manager Application.

40. The parties then proceeded to file and serve their statements of case, pursuant to the directions given by the FTT. The content of these statements of case is central to the issues raised by the appeal. It is therefore necessary to spend some time on each statement of case.

41. The Applicants' statement of case was dated 18th August 2023. It bears a statement of truth signed by Ms Collins, the Applicants' solicitor. It is therefore reasonable to proceed on the basis that the statement of case was prepared either by or with the assistance of the Applicants' solicitors (Jobsons). Paragraph 1 of the statement of case identified the challenge made by the Applicants, in the following terms:

> *"1. The Applicants in this matter are the leaseholders of 45 Millharbour, London, E14 9TR and they bring this application for a determination of reasonableness as they consider that, for the period from 2019 to date the service charges which they have paid are an unreasonable amount. On that basis the Applicants seek a determination of reasonableness in respect of the charges levied in the years to November 2019-March 2020, April 2020-March 20*[2]*1, April 2021-March 2022 and April 2020-March 2023."*

42. The statement of case went on to set out the items of expenditure which were said to be unreasonable, and complained about the alleged lack of response and lack of information provided by the Appellant. Paragraph 8 made reference to various provisions in the Occupational Underleases, in the following terms:

> *"8. The Applicants rely on the following parts of the Lease to the apartments:*

(i) *Schedule 7 Clause 1: This requires the Management Company to provide an Account of Estate Service Charge Costs. This has now been provided however, this is significantly late.*

(ii) *The Managing Agent has throughout the Tribunal process, failed to provide data to the Respondent in a timely fashion which is indicative of their general lack of care and attention.*

(iii) *Schedule 7 Clause 1 h; This requires the Management Company to hold an annual meeting to discuss matters pertaining to the previous service charge year. The Management Company is in breach of this covenant.*

(iv) *3.2: The Applicants will state that the Service Charge Certificate fails to give a "fair summary" of the Management Company's expenditure and outgoings."*

43. Various service charge records were attached to the statement of case. The other attachment to the statement of case was a schedule, which set out individual items of expenditure which were being challenged. The items of expenditure were grouped by service charge year. This schedule (**"the Schedule"**) was divided into columns. The Applicants' case, in relation to each challenged item of expenditure, was set out in a separate *"Tenant's Comments"* column. This column (**"the Tenant's Column"**) also made use of a key, whereby the following numbers were used to denote the type of challenge being made to each item of expenditure:

*"*1) Chargeable under lease?*
**2) Reasonable in amount/standard?*
**3) Correctly demanded?"*

44. The number *"2)"* appeared in the Tenant's Column for every item of expenditure which was challenged. *"1)"* and *"3)"* did not appear. This was consistent with the Applicants' statement of case and the comments in the Tenant's Column, which raised no issue of contractual liability to make the Payments. The challenges made by the Applicants were all based on reasonableness grounds. To be more accurate, the consistent complaint in the Tenant's Column was absence of information and absence of explanation in relation to the challenged items of expenditure. In the statement of case itself, the challenges were more widely expressed, including complaints of excessive costs and poor service.

45. The Appellant's statement of case was dated 13th September 2023. The Appellant adopted what was characterised as a neutral stance, the grounds for which were explained in paragraph 2 of the statement of case, in the following terms:

"2. Network Homes Ltd has very little to say in this case. It is itself a tenant at this development and, in practice, largely acts as a "pass through" vehicle. It anticipates adopting a largely neutral stance. It is supportive of the rights of the Applicants to challenge their service charges and, in particular, to challenge the actions of Cudweed Management Co Ltd as the party who is largely responsible for the service charges. But, as Network Homes Ltd is simply a pass through vehicle, if there should be any finding that the service charges (as incurred by Cudweed Management Co Ltd) fall to be reduced under s.19, Landlord and Tenant Act 1985 and/or for any other reason, it seeks to have the same benefit applied to its service charge liabilities, so as to ensure consistency in the workings of the service charge regime."

46. The statement of case went on to set out some of the terms of the Headleases and the Occupational Underleases, and to explain how charges were made to the tenants of the Flats. The statement of case then briefly responded to the individual paragraphs of the Applicants' statement of case. The essential point made in this section of the statement of case was that the Appellant was a *"pass through"* body for the Flats. This was explained in paragraph 12 of the statement of case, in the following terms:

> *"12. The application challenges the costs incurred under the headlease (see, e.g. the exhibited accounts, which are from Cudweed Management Co Ltd). That is obviously correct. Network Homes Ltd is, in large part, a "pass through" body for this block. The parties that control the costs are the freeholder and management company under the headlease."*

47. Cudweed's statement of case was also dated 13th September 2023. Cudweed asserted that the Applicants' case was insufficiently particularised and further directions were likely to be required from the FTT in that regard. Subject to that opening qualification, the statement of case then set out Cudweed's case.

48. The statement of case set out the title structure of the Flats and the service charge provisions in the Headleases. The statement of case then turned to the question of whether there was a preliminary issue in the Application; in particular as to *"whether the Applicants were liable to pay a service charge to the First Respondent at all under the terms of the Occupational Leases"*; see paragraph 10 of the statement of case. As Cudweed pointed out, at paragraph 11 of the statement of case, the Occupational Underleases did not contain conventional service charge provisions, but only what was recoverable by virtue of clause 3.3 of the Occupational Underleases, which I have quoted above. Cudweed summarised its construction of clause 3.3 in paragraphs 12 and 13 of the statement of case, in the following terms:

> *"12. Neither §3.3.1 or 3.3.2 are apt to enable the First Respondent to recover from the Applicants the service charges it pays to the Second Respondent under the Superior Lease, given the definition of Outgoings at §1.2.22 of the Occupational Lease; outgoings are sums assessed against the property in the nature of taxes / rates, not service charges.*
>
> *13. However, given (a) the terms of §3.3.3 (sums due to the Superior Landlord under the Superior Lease), (b) the fact that under the Superior Lease, whilst in reality the service charges are payable / paid to the Second Respondent not the Superior Landlord, nonetheless the Service Charge is (arguably at least) 'due' to the Superior Landlord given the terms of §2.3 of the Superior Lease whereby the tenant must pay 'the Landlord and/or the Management Company' the rents, and (c) the fact that it is agreed between the Applicants and the First Respondent that in fact a service charge is due, the Second Respondent does not consider that a preliminary issue falls to be determined on this point."*

49. It will be noted that paragraphs 9-13 of Cudweed's statement of case raised the issue of whether the Appellant actually had any right, under the terms of the Occupational Underleases, to recover from the tenants of the Flats the Service Charges which the Appellant was obliged to pay to Cudweed under the terms of the Headleases. Cudweed's position was that a preliminary issue was not required, for the reasons set out in paragraph

13 of the statement of case, which included the assertion that it was agreed between the Applicants and the Appellant *"that in fact a service charge is due"*. Nevertheless, Cudweed's statement of case was an articulation of the question of whether the Applicants were liable, as a matter of contract, to make any Payments pursuant to the terms of the Occupational Underleases.

50. Subject to a reiteration of its complaint of lack of particularisation in the Applicants' case, Cudweed then proceeded, in the last section of its statement of case, to respond to the complaints of excessive charging and poor service in the Applicants' statement of case. The statement of case also made a brief response to the Schedule.

51. The May 2023 Directions, as given by the FTT on 30th May 2023, were amended on 14th August 2023. As I have said, the amendments are not material to the appeal. The amended version of the May 2023 Directions did record that the FTT had consented to the withdrawal of the Manager Application by the Applicants, on 14th June 2023. For this reason none of the statements of case dealt with the Manager Application.

52. A further hearing took place before the FTT on 25th September 2023. The Applicants were again represented by Ms Collins. The Appellant and Cudweed were each, respectively, represented by counsel. The FTT again provided a short written decision, accompanied by further directions (**"the September 2023 Directions"**). It is not necessary to go through the detail of the September 2023 Directions (subsequently amended on 11th January 2024). Essentially, the FTT gave directions which were intended to take the Application to a substantive hearing. The decision recorded that although Scott schedules and statements of case had been exchanged, it was agreed that these needed to be refined. This was reflected in the September 2023 Directions, which provided for a revised form of the Schedule to be provided by Dr Hakobyan, in the form attached to the September 2023 Directions, to which the Appellant and Cudweed could then respond, by completing the respective columns in the Schedule for their comments. The prescribed form of the Schedule used the same key as in the original form of the Schedule for identifying the nature of the issue raised in relation to each challenged item of expenditure.

53. The September 2023 Directions also required each party to serve a statement which was required to set out *"the relevant service charge provisions in the lease"*, and *"any legal submissions in support of the service charges claimed, including argument, if liability to pay is at issue"*. The September 2023 Directions also set down the Application for hearing in an eight week window from 19th February 2024.

54. The Applicants served a revised statement of case pursuant to the September 2023 Directions, which is dated 12th October 2023. In this revised statement of case the Applicants renewed their case that they had been given inadequate information regarding the relevant charges. The revised statement of case then went on to deal, at some length, with various individual heads of expenditure. No case was advanced, in the Applicants' revised statement of case, that there was no contractual liability at all, under the Occupational Underleases, to make the Payments.

55. The revised statement of case of the Applicants concluded with a statement of truth, signed by a solicitor. The solicitor's firm was not identified, but I assume that it was Jobsons. The revised statement of case was accompanied by various supporting materials and documents.

56. The Appellant's revised statement of case was dated 31st October 2023. The Appellant set out its basic position in response to the Applicants' revised statement of case in the following terms, at paragraphs 3-6:

> *"3. It does not appear that the Applicants are making any substantive challenge against Sovereign Network Homes ("SNH") (the Scott Schedule, for example, only refers to challenges, questions, disputes etc with the Second Respondent).*
> *4. If would not be surprising if they were not seeking any remedy against SNH. After all, SNH is itself a tenant at this building. Save for an exceptionally modest internal management cost charged by SNH to its own tenants, the service charges are under the control of the freeholder and/or Second Respondent.*
> *5. If no remedy is sought against SNH then, whilst SNH would remain a party for the purposes of ensuring it is bound by the decision, it will likely adopt a "watching brief" approach (although it will seek its own order under s.20C, LTA 1985). If the Applicants succeed in reducing any of the service charge costs for which the Second Respondent is responsible, then SNH (as leaseholder) would seek the same reductions as regards the charges raised by the Second Respondent, so that SNH can then pass the proportionate reduction on to the relevant applicant.*
> *6. If a remedy is sought against SNH, then the Applicants are requested to please confirm by return what remedy is sought and which items of service charge it relates to."*

57. The Appellant then set out its response to the complaints set out in the Applicants' revised statement of case. The response was limited on the basis, as repeatedly asserted by the Appellant, that the matters raised were for Cudweed to respond to. The revised statement of case concluded, at paragraph 26, with the following assertion:

> *"26. As far as SNH can see, they have nothing to answer in this application and, indeed, have very little to say about this case at all. They reiterate the "Introduction" to this document and their previous statement of case, including, in particular, paragraph 19."*

58. Cudweed's revised statement of case was also dated 31st October 2023. The revised statement of case was accompanied by a form of the Schedule, with the column for *"Landlord's Comments"* completed by Cudweed. So far as I can see, the form of the Schedule in which Cudweed set out its responses was the original version of the Schedule attached by the Applicants to their original statement of case. Cudweed was thus replying to the comments in the Tenant's Column, as they were set out in the original version of the Schedule, all marked with a *"2)"* to denote the type of issue being raised by the Applicants.

59. So far as the revised statement of case itself was concerned, Cudweed reiterated its complaint of lack of particularity in relation to the Applicants' case, both in relation to the Applicants' statement of case and in relation to the Applicants' case in the Schedule; see in particular paragraphs 12-14 of the revised statement of case. Subject to that complaint Cudweed then set out its case in response to the Applicants' revised statement of case. This was prefaced by a repetition of Cudweed's summary, in its original statement of case, of the service charge provisions in the Headleases. So far as the Occupational Underleases were concerned, Cudweed essentially repeated its point that the Occupational Underleases contain no conventional service charge provisions, and quoted clause 3.3 of the

Occupational Underleases. Paragraph 11 of the revised statement of case then repeated paragraph 12 of Cudweed's original statement of case, but with the addition of the following sentence (shown by underlining):

> *"11. Neither §3.3.1 or 3.3.2 are apt to enable the First Respondent to recover from the Applicants the service charges it pays to the Second Respondent under the Superior Lease, given the definition of Outgoings at §1.2.22 of the Occupational Lease; outgoings are sums assessed against the property in the nature of taxes / rates, not service charges. <u>It is understood to be the case that the First Respondent relies upon §3.3.3 for passing on the service charge costs it incurs under the Superior Leases.</u>"*

60. The relevant point here is that Cudweed did not repeat paragraph 13 of its original statement of case, which I have quoted above. I infer that this was because Cudweed was assuming that the contractual liability of the Applicants to make the Payments under the Occupational Underleases was not in issue in the Application.

61. The September 2023 Directions also provided for the exchange of witness statements. Both Dr Hakobyan and Ms Labruzzo made witness statements. In these witness statements Dr Hakobyan and Ms Labruzzo set out their complaints about the services which they had received. These complaints included complaints about lack of information concerning the Payments demanded of them. As I read the witness statements however, there was no suggestion that there was not a contractual liability to make Payments under the Occupational Underleases. The matters in issue were whether the Payments which had been demanded were reasonable and whether the Applicants had been provided with adequate information. The Appellant served a witness statement of Nicoy Musarurwa, Head of Leasehold Compliance, which concentrated upon explaining the system employed by the Appellant for passing on the Service Charges payable under the Headleases to the tenants of the Flats, by the Payments. The witness statement also reiterated the Appellant's perception of itself as the effective *"middle man"* in the service charge structure, between Cudweed and the tenants of the Flats. Cudweed served three witness statements, which were essentially concerned with answering the Applicants' complaints of poor services and lack of information.

The Hearing

62. I can now come to the Hearing itself which, as I have said, took place on 15th and 16th April 2024. The FTT at the Hearing comprised Judge Robert Latham and Antony Parkinson MRICS. The earlier directions hearings had been dealt with by Judge Latham, sitting alone. All parties were represented by counsel. The Applicants were represented by Ms Whitehouse, who had been instructed on a direct access basis. The Appellant was represented by Ms Traynor. Cudweed was represented by Mr Allison. All three counsel provided skeleton arguments for the Hearing.

63. In very brief summary, the skeleton arguments of counsel set out their respective approaches to the Hearing in the following manner:
    (1) In her skeleton argument for the Applicants Ms Whitehouse stated that the Applicants were applying to the FTT, pursuant to Section 27A(1)(c), for a declaration that the service charges applied between November 2019 and March 2023 were not payable in the sums claimed on the basis that they had not been reasonably incurred and/or

that the services provided were not of a reasonable standard. The skeleton argument did not raise any argument that there was no contractual liability to pay anything in relation to the disputed Payments. The skeleton argument set out, in some detail, the various complaints made by the Applicants on the question of the reasonableness of the disputed Payments, including a reiteration of the Applicants' complaints of lack of information.

(2) In her skeleton argument for the Appellant Ms Traynor did raise the question of whether Cudweed would be taking issue with the jurisdiction of the FTT to deal with the Payments. I assume that Ms Traynor had in mind the points made by Cudweed, in its statements of case, on the ability of the Appellant to recover the Payments by clause 3.3 of the Occupational Underleases. For this reason Ms Traynor's skeleton argument dealt at some length with the relevant provisions of the Headleases and the Occupational Underleases, and set out the Appellant's case that the FTT did have jurisdiction. So far as the Application itself was concerned, Ms Traynor said this, at paragraph 24 of the skeleton argument:

> *"24. Given that SNH adopts a "watching brief" approach, the writer does not propose to rehearse the legislative framework or principles which govern the Application."*

(3) In his skeleton argument for Cudweed Mr Allison reiterated Cudweed's criticisms, in its statements of case, of the alleged lack of particularity in the Applicants' case. After making some overriding points, the skeleton argument then turned to what were described by Mr Allison as the key issues. The key issues comprised particular matters of complaint made by the Applicants in relation to the services. The skeleton argument made no reference to any issue either as to the jurisdiction of the FTT to deal with the disputed Payments under Section 27A or as to the contractual liability of the Applicants to make Payments under the Occupational Underleases.

64. There is no transcript of the Hearing. In granting permission to appeal and giving directions for the conduct of the appeal, the Deputy President requested counsel and solicitors who attended the hearing to agree between themselves a note of the Hearing *"to the extent that it is relevant to ground 2 of the grounds of appeal"*. Pursuant to this request two notes of the hearing have been prepared. The first is a note agreed between the representative of the Appellant and the solicitor for Cudweed who attended the Hearing. The second is a note agreed, subject to some identified differences of recollection, between the three counsel who attended the Hearing. There is also an email which was sent by Mr Allison to Ms Traynor on 19th April 2024; that is to say very shortly after the Hearing. In that email Mr Allison commiserated with Ms Traynor, and expressed his concern in relation to what had happened in the Hearing. I also have the Interim Decision itself. I also have what I have been told by Dr Hakobyan in her skeleton argument for the hearing of the appeal and in her further written submission, in addition to what I was told by Dr Hakobyan and Ms Labruzzo in their oral submissions.

65. Acting pursuant to its powers under Rule 5(3)(n) of The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the Tribunal provided the notes of the Hearing, mentioned above, to Judge Latham and Mr Parkinson, the judge and professional member of the FTT in this case. Judge Latham and Mr Parkinson were requested to consider the notes and their own notes of the Hearing, and to inform the Tribunal whether the notes prepared by the solicitors and counsel accorded substantially with their own recollection

and records. There is no doubt that the Tribunal had the power, under Rule 5(3)(n), to take this step. I should add however that the Supreme Court, in *Serafin v Malkiewicz* [2020] UKSC 23 [2020] 1 WLR 2455, confirmed that in a case where there was no transcript of a hearing which was the subject of a complaint of unfair process, it might well be appropriate to invite the judge to comment in writing or perhaps to provide their own note of the hearing; see the judgment of Lord Wilson, with whom the President and other Justices agreed, at [45].

66. Both Judge Latham and Mr Parkinson made helpful responses to the request of the Tribunal. Each provided their own note, responding to the notes prepared by solicitors and counsel. Judge Latham also provided a chronology of the Application and the Hearing.

67. I am most grateful to Judge Latham and Mr Parkinson for their co-operation in this respect, which has done much to alleviate, albeit not to remove entirely the problem that there is no transcript of the Hearing in existence. In order to distinguish between the various notes I will refer to the note prepared by counsel as **"Counsels' Note"**, to the note prepared by the representative of the Appellant and the solicitor for Cudweed as **"the Solicitor Note"**, and to the notes provided by Judge Latham and Mr Parkinson as **"the Response Notes"**. I should also mention that the Response Notes were the further documents in the case, mentioned at the outset of this decision, on which I gave the parties the opportunity to make further submissions. In her further written submission Dr Hakobyan has stated that the Response Notes and chronology *"are accurate"*.

68. I will need to come back to the Hearing in more detail when I come to the grounds of appeal, but for the present purposes the following summary of events at the Hearing will suffice.

69. On the first day of the Hearing the FTT raised the issue of whether the Applicants were contractually liable to pay the Service Charges/Payments which were in dispute. By reference to the terms of the Interim Decision the point which appears to have concerned the FTT was that no demands for payment of the Service Charges/Payments, either between Cudweed and the Appellant or between the Appellant and the Applicants had been produced, notwithstanding that disclosure of the demands by the parties had been required by the May 2023 Directions. The FTT was concerned as to whether demands for payment of the disputed Payments had been made in accordance with the provisions of the Occupational Underleases. The FTT indicated that it wished to be addressed on this question, in the face of protests from Ms Traynor (i) that she was not in a position to deal with this question and (ii) that it was not open to the FTT to raise this issue, given that the issue had not been raised by the Applicants in their statements of case. In particular, Ms Traynor explained to the FTT that she had been instructed on a watching brief for the Hearing. This position had been foreshadowed in paragraph 5 of the Appellant's revised statement of case, which I have quoted above. It appears that, in taking the stance that it was not open to the FTT to raise this issue, Ms Traynor was supported by Mr Allison for the Second Respondent.

70. The exchanges between Ms Traynor and the FTT on this question appear to have occupied a certain amount of time on the first day of the hearing, but ultimately what happened was that Ms Traynor was required to address the issue of contractual liability to pay on the second day of the hearing, shortly after 10.00am. The Appellant had also been required, on the first day of the Hearing, to produce copies of the missing service charge demands. Copies of the missing demands were, I believe, provided to the FTT on the first and second

days of the Hearing. I will refer to the issue of contractual liability raised by the FTT at the Hearing as **"the Contractual Liability Issue"**. I stress that I am referring to the Contractual Liability Issue as it was raised by the FTT. My knowledge of the FTT's formulation of the Contractual Liability Issue derives from my reading of the Interim Decision. There has been no formulation of the Contractual Liability Issue by the Applicants.

71. Ms Traynor duly addressed the FTT on the second day of the Hearing. I have had the benefit of a Note which Ms Traynor prepared for the FTT, setting out her submissions on the Contractual Liability Issue. In this Note Ms Traynor reviewed the directions and statements of case in the Application and maintained her argument, which she supported by reference to authority, that it was not open to the FTT to raise, for itself, an issue which had not been raised by the Applicants in their statement of case. Ms Traynor argued that the Applicants were and should be confined to their pleaded case, which challenged the reasonableness of the disputed Payments/Service Charges, not the question of whether they were payable at all. Ms Traynor also protested the unfairness of requiring the Appellant to deal with the Contractual Liability Issue on what was effectively 24 hours notice. As Ms Traynor also pointed out, what I am referring to as the Contractual Liability Issue did not comprise an identified issue or issues. There was nothing pleaded in this respect, by which the Appellant could be expected to understand the case which it was being required to meet.

72. Ms Traynor's Note is an impressive document, particularly given the limited preparation time available to Ms Traynor. The Note and Ms Traynor's oral submissions were however only partially successful. The FTT was not persuaded that it was not open to it to raise the Contractual Liability Issue. In the relevant part of the Interim Decision, and after reviewing the authorities cited by Ms Traynor, the FTT concluded that it could and should raise the Contractual Liability Issue and that the Applicants and the Appellant should address the Contractual Liability Issue. The FTT was however also persuaded that it was not in a position to deal with the Contractual Liability Issue at the Hearing. The FTT concluded at paragraph 60 of the Interim Decision, in the following terms, that it had no option but to adjourn the case and give further directions:

> *"60. It is a matter of regret that the Tribunal has been unable to determine this issue of liability to pay at this two day hearing. Ms Traynor rather directed her attention to drafting a Skeleton Argument seeking to argue why we should not do so. If we are to deal with this matter fairly, we were satisfied that we had no option but to adjourn the case and give further Directions. This issue does not involve the Second Respondent and no further submissions are required from them. This Tribunal is accustomed to dealing with litigants in person. Neither the Applicants nor the First Respondent should feel the need to be legally represented."*

73. The FTT proceeded to give directions for the determination of the Contractual Liability Issue (**"the Interim Decision Directions"**). By the Interim Decision Directions, under the heading *"The Respondent's Case on the Issue of Liability to Pay"*, the Appellant was required first to file and serve a statement of case, setting out:

> *"• The relevant provisions in the underlease relevant to the tenant's liability to pay, including any legal argument, particularly with regard to Clause 3.3.*
> • *Whether it is contended that the Lead Applicant is liable to pay to the First Respondent any sum pursuant to Clause 3.3 of her lease for the 2019 service*

charge year, and, if so, what sums have been demanded and/or paid by the Lead Applicant.

- *In respect of each of the calendar years 2019 to 2023, all sums that it is alleged that the Lead Applicant has been obliged to pay pursuant to Clause 3.3 of her lease, the dates upon which the said sums became payable, the demands made for these sums, and all sums paid by the Lead Applicant."*

74. The Appellant was also required, by the Interim Decision Directions, to file and serve a bundle of documents including a variety of service charge documents, including statements of accounts, demands and accounts. Finally, the Appellant was required to file and serve any additional witness statements upon which it wished to rely. Directions were also given for Dr Hakobyan, as lead Applicant, to respond with her own statement of case *"setting out her case on the issue of liability to pay, including any legal argument."*, and with a bundle containing any additional documents upon which she wished to rely, and any further witness statements upon which she wished to rely. The FTT also directed that it would fix the case for a one day hearing of the Contractual Liability Issue. Cudweed was not included in the Interim Decision Directions, on the basis that the Contractual Liability Issue *"does not involve the Second Respondent and no further submissions are required from them"*.

75. The FTT also heard, at the Hearing, the dispute over the reasonableness of the service charges, which was the issue which had been pleaded in the statements of case (**"the Reasonableness Issue"**). The FTT did not however give a decision on the Reasonableness Issue. It is apparent that the FTT has made a decision on the Reasonableness Issue, but it appears that the FTT has decided not to issue that decision until the Contractual Liability Issue has been determined; see paragraph 65 of the Interim Decision, which states that the FTT will issue its decision on the Reasonableness Issue in the event that Dr Hakobyan should *"concede, having seen the First Respondent's Statement of Case and Bundle, that the sums demanded have been lawfully due"*.

The FTT's analysis of the Contractual Liability Issue

76. As I have noted, the FTT did not decide the Contractual Liability Issue. The FTT did however set out its analysis of the Contractual Liability Issue, which it is helpful to have in mind in considering the appeal. In the remainder of this decision, references to Paragraphs, without more and unless otherwise indicated, are references to the paragraphs of the Interim Decision.

77. The FTT started with an analysis of the service charge provisions in the Headleases, which I have summarised earlier in this decision. The FTT then went on to consider the provisions of the Occupational Underleases. After considering the provisions of clause 3.3 of the Occupational Underleases, and the definition of *"outgoings"* therein, the FTT set out the following preliminary views, at Paragraphs 40-42:

> *"40. The preliminary view of the Tribunal is that the service charges due to the "Management Company" under the headlease, are not "outgoings" as defined by the lease. The definition rather seems to refer to any sums assessed against the flat, the Building or part of the Building in the nature of taxes and rates. This is the analysis suggested by the Second Respondent in their Statement of Case (see [11] at p.561).*

41. In so far as the First Respondent relies on Clause 3.3.3, payment would only become "due" when lawfully demanded by the Superior Landlord in in accordance with the terms of the Superior Lease.

42. The Tribunal notes that Clause 1.2.32 defines "Superior Landlord" as "the landlord under the Superior Lease". In an earlier Statement of Case, dated 13 September 2023 ([[8] at p.243), the First Respondent suggest that the sums rather become payable pursuant to Clause 3.3.2. The Tribunal has heard no argument on this important point."

78. The FTT then referred to the demands which were produced by the Appellant on the first day of the hearing. The FTT analysed those demands and, at Paragraph 44, set out its *"preliminary"* views on what sums had actually become due to the Superior Landlord under the Headleases, for the purposes of clause 3.3.3 of the Occupational Leases, in respect of the service charge years from 2019 to 2023.

79. The FTT recorded the position of Ms Traynor in the following terms, at Paragraph 45:

> *"45. Ms Traynor felt unable to assist the Tribunal with the interpretation of the lease as she stated that she only had a watching brief. Ms Musarurwa (at p.982) describes how the First Respondent operates the lease:*
>
> *16. Sovereign Network Homes pays for the service charges upon receipt of a written demand from Anglo Fortune. We then recover the cost of service charges from our residents via a (typically) monthly service charge payment.*
>
> *17. Because of the differing financial years used by Sovereign Network Homes and Anglo Fortune (as explained more below), we send an estimate of anticipated expenditure to our residents prior to 01 April of every year. This is based upon the previous years reconciled accounts plus a small uplift to account for any increase in the provision of services or the provision of additional services.*
>
> *18. When we do get the estimated budget from Cudweed Management Company (via Anglo Fortune), our Leasehold Specialists will review the budget and cross reference it against previous years to see where the variances are. Any large variances or the introduction of new services are challenged directly with Anglo Fortune. This also applies to the reconciliation of year end accounts. We do not revise any estimates once they have been sent to our residents. Any increase in costs is reflected in the reconciled accounts."*

80. The FTT then expressed the following preliminary views, at Paragraphs 46 and 47:

> *"46. The preliminary view of the Tribunal is that the First Respondent has not demanded "the sums due" under Clause 3.3.3 in accordance with the terms of the lease. No liability arises on the Leaseholder to pay any sum until it becomes due the Superior Landlord under the Superior Lease. It will only become payable when the Management Company has approved a budget for the relevant service charge year and a demand has been made for an interim service charge.*

47. It is, of course, open to a landlord to accept monthly payments in respect of any sums that have become due. No tenant would object to this. However, the underlease does not permit the First Respondent to estimate what sum may become payable, to assist the budgeting by its tenants. This can only be done with the agreement of the tenants. The problem in the current case seems to have been that there has been no transparency as to how "the sums due" under the Superior Lease have been charged."

81. The FTT then moved to what it described as its ruling on the preliminary issue. It is not clear to me whether this meant the Contractual Liability Issue or the question of whether the Contractual Liability Issue could be considered at all. The FTT recorded Ms Traynor's arguments in the following terms, at Paragraph 49:

"49. Ms Traynor argued, with great vehemence, that it was not open to the Tribunal to raise the issue of the payability of the service charges pursuant to the terms of the First Applicant's underlease. She provided a Skeleton Argument in support of her submissions. She contended that the Applicants had been given every opportunity to set out the nature and scope of the issues in dispute. The Directions given on 25 September 2023, had required the Applicants to file a Statement of Case which should specify any legal submissions in support of the challenge to the service charges claimed, including argument, if liability to pay was at issue. The Applicants, advised by Solicitors, had filed a Statement of Case. Their Statement of Case was restricted to the reasonableness of the service charges which had been demanded. No issue was raised on the issue of liability to pay. The Respondents had prepared their Statements of Case on their understanding that liability to pay was not at issue."

82. The FTT then considered the various authorities relied upon by Ms Traynor. The FTT recorded the position of Ms Whitehouse, for the Applicants, in the following terms at Paragraph 54:

"54. In response, Ms Whitehouse stated that the Applicants wanted the Tribunal to consider the issue of reasonableness to pay. She had only been instructed some two weeks previously and had not drafted the Statement of Case. She was handicapped by the manner in which the case had been prepared by the previous solicitor. The Tribunal was not impressed by Ms Traynor's response to these submissions, namely that their remedy lay in a negligence claim against their former solicitor."

83. The FTT expressed its conclusions on the question of whether it should admit the Contractual Liability Issue in the following terms, at Paragraphs 58-60 (I have already quoted Paragraph 60, but I repeat it for ease of reference):

"58. Both this area of the law and the terms of these leases are unduly complex. This case raises a number of new and important points of principle. The Applicants have had difficulty is securing legal representation. The Tribunal is satisfied that there has been a lack of transparency for which the First Respondent is responsible. We are dealing with a Registered Social Landlord which is providing social housing. The Applicants have been unsure how the sums demanded from them have been computed. The demands provide no adequate

explanation. A demand for a monthly estimated service charge bears no resemblance to the First Applicant's liability under Clause 3 of her underlease. The Tribunal asked Ms Traynor to explain how the sums demanded reflected the tenant's liability to pay pursuant to the terms of her underlease. Her response that she was not in a position to do so because she merely had a watching brief, was not one that reassured the Tribunal.

59. The Tribunal is required to consider whether the service charges levied by the Second Respondent for 2019 are reasonable. We asked Ms Traynor whether the Lead Applicant was obliged to pay any "sums due to the Superior Landlord under the Superior Lease" in respect of this service charge year. She was unable to answer. Our preliminary view is that neither the Lead Applicant nor any of the other Applicants were obliged to pay any service charge in respect of this service charge year. This Tribunal does not determine academic questions.

60. It is a matter of regret that the Tribunal has been unable to determine this issue of liability to pay at this two day hearing. Ms Traynor rather directed her attention to drafting a Skeleton Argument seeking to argue why we should not do so. If we are to deal with this matter fairly, we were satisfied that we had no option but to adjourn the case and give further Directions. This issue does not involve the Second Respondent and no further submissions are required from them. This Tribunal is accustomed to dealing with litigants in person. Neither the Applicants nor the First Respondent should feel the need to be legally represented."

84. In summary, and as I read the Interim Decision, the point on contractual liability raised by the FTT, which I am referring to as the Contractual Liability Issue, related to the ability of the Appellant to pass on the Service Charges to the Applicants, by way of demands for the Payments. The essential reasoning of the FTT which, it appears, was intended to be expressed on a preliminary basis, was as follows:
    (1) The Payments are only recoverable pursuant to clause 3.3.3 of the Occupational Underleases.
    (2) The Payments only become due when lawfully demanded by the Superior Landlord in accordance with the terms of the Headleases.
    (3) The Appellant has no ability to demand Payments from the Applicants under the Occupational Underleases in advance of the relevant Service Charges becoming due under the Headleases.
    (4) Examination of the demands produced at the Hearing caused the FTT express the preliminary view that the Appellant had not been demanding the Payments in accordance with the terms of the Occupational Underleases, in the sense of demanding Payments only when the equivalent Service Charges had fallen due for payment under the Headleases.

The grounds of the appeal

85. There are two grounds of appeal.

86. The first ground of appeal (**"Ground 1"**) is that the FTT went wrong in raising the Contractual Liability Issue on its own initiative. The Appellant's case is that the Contractual Liability Issue was not an issue in the Application and that the FTT was wrong to adjourn the Contractual Liability Issue and to give the Interim Decision Directions. Although

Ground 1 is stated as a single ground of appeal, it is actually divided up into three sub-grounds, or supporting arguments, which are as follows:

(1) There was no pleaded issue which had ever been articulated by the Applicants in relation to the contractual validity of the demands for the Payments made of the Applicants.

(2) The Applicants, for whatever reason, chose to take no point in the Application on the validity of the demands made of them. In these circumstances the Applicants should be taken to have admitted or agreed the contractual validity of the demands, within the meaning of Section 27A(4)(a), so that it was not open to them or the FTT to raise an issue in relation to the contractual validity of the demands or in relation to the contractual liability of the Applicants to make the Payments.

(3) The FTT exceeded its jurisdiction, embarking on its own inquisitorial process by identifying issues which none of the parties had asked it to resolve. The FTT thereby acted in breach of natural justice, exceeded its jurisdiction and went beyond the proper role of the FTT.

87. The second ground of appeal (**"Ground 2"**) is that the Hearing was conducted in a way which was unfair and gave rise to the appearance of bias on the part of the FTT. As such, so it is contended, the decision of the FTT to admit the Contractual Liability Issue into the case and to give directions for its determination was unfair and should be set aside.

Ground 1 – was there admission or agreement within the meaning of Section 27A? - analysis and determination

88. In dealing with Ground 1 I find it convenient to take first the argument that the Applicants should be taken to have admitted or agreed the contractual validity of the demands for the Payments. Section 27A(4) sets out a variety of circumstances in which an application cannot be made under subsections (1) and (3) of Section 27A for a determination as to the payability of service charges. By paragraph (a) of subsection (4) no application may be made in respect of a matter which has been agreed or admitted by the tenant.

89. In support of this part of the Appellant's case I was referred by counsel to the decision of the Tribunal (Judge Elizabeth Cooke) in *Thirty One Crescent Grove Ltd v Atherden* [2024] UKUT 80 (LC). The case was concerned with an appeal by the landlord (a company) of a house which had been converted into six flats. The flats had been let on long leases and the tenants of the flats were members of the corporate landlord. The respondent to the appeal was the tenant of one of the flats. The appeal was against the decision of the FTT in that case that the landlord could only recover £250 by way of the service charge, in respect of work done to redecorate the stairwell, and that the sum of £600 spent by the respondent on the roof should be shared between the tenants, as part of the service charge.

90. So far as the work to the stairwell was concerned, the landlord contended that the respondent, Mr Atherden, had agreed to pay his share of the costs of redecorating the stairwell by an exchange of emails with a Mr Bingham, tenant of another flat in the building and an officer of the landlord company. The exchange of emails (Mr Bingham to Mr Atherden and then Mr Atherden in reply) was in the following terms:

> *"DCP Decorating will start work on the staircase tomorrow morning, using my first-floor flat as a base.*

The cost, assuming no extras and the discovery of nothing unexpected, will be £3,980 (no VAT applicable). At Sven's request, Trade Diamond Paint will be used on the walls."

"Thank you David, I am really pleased to hear that the decorating is starting tomorrow.
In relation to the paint, you clarified Trade Diamond will be used on the walls, (resulting in an increased cost of £280) I presume you meant all surfaces including the woodwork as per my request?"

91. At first instance the FTT had decided, on its own initiative, that the landlord's right of recovery was limited to £250 per flat, because there had been no compliance with the consultation requirements referred to in Section 20 of the 1985 Act. This was not a point which the respondent had raised. In the light of the email exchange, and the failure of the respondent to take the point on Section 20, Judge Cooke concluded that the decision of the FTT to restrict the recovery from the respondent to £250 was wrong and must be set aside. As Judge Cooke explained, at paragraphs 30-32 of the decision:

> *"30. Mr Atherden's email of the 10 May 2021 did not in terms state that he was content with the overall price. But two things are perfectly clear: one is that he was content for the work to go ahead. The other is that when he made an application to the FTT he did not raise a challenge on the basis of consultation under section 20 of the 1985 Act. And I take it from his enthusiasm for the work to go ahead that the absence of formal consultation did not trouble him. There had already been considerable email discussion as to what work was needed and indeed Mr Atherden himself had originally proposed a more extensive programme costing £4,800 (his email of 14 January 2021).*
> *31. Why the FTT introduced section 20 as an issue I do not know. Obviously when the FTT hears litigants in person it has to assist them, and such litigants will not often know the formal statutory basis of their case. Moreover, the FTT has to determine a great volume of service charge disputes; pragmatic decisions have to be made and for example it is sensible to give directions without a hearing. It is one thing to suggest to the parties in standard directions that consultation might be an issue; but without any indication from Mr Atherden following the directions that consultation actually was an issue for him, it is difficult to see any justification for deciding the application on the papers on a basis that Mr Atherden had not raised.*
> *32. He had not raised it because, to put it informally, the absence of formal consultation as prescribed by section 20 and the regulations thereunder was not a problem for him; to put it formally it was "a matter" that he had agreed to for the purposes of section 27A(4). The decision that only £250 was payable because of the absence of consultation was therefore made without jurisdiction and is set aside."*

92. Mr Bates contended that this decision was on all fours with the present case, where the question of the payability of the Payments, both on the basis of the terms of the Occupational Underleases and the demands for the Payments, was raised as a possible issue by the FTT, in the May 2023 Directions and in the September 2023 Directions, and was further raised as a possible issue by Cudweed in its statement of case and revised statement of case. Notwithstanding this, the Applicants did not raise any issue on the payability of the

Payments, either in their statement of case or their revised statement of case, but confined themselves to the Reasonableness Issue.

93. I do not accept that the present case is on all fours with the decision in *Atherden*. In *Atherden* there was an email exchange between the respondent, Mr Atherden, and the relevant officer of the appellant landlord, which I have quoted above, in which the respondent clearly approved the relevant work to the stairwell, and its cost.

94. In the present case the facts are rather different. What I am referring to as the Contractual Liability Issue was not articulated by any of the parties. It was articulated by the FTT, at the Hearing. The question of the contractual liability of the Applicants to make the Payments under the Occupational Underleases was raised in the statements of case, but it was raised by Cudweed and was not raised by way of an argument that there was no such contractual liability. Still less did Cudweed's articulation of this question correspond to the FTT's subsequent identification of the Contractual Liability Issue. The same applies to the May 2023 Directions. The issue of contractual liability to make the Payments which was identified as a potential preliminary issue in the May 2023 Directions does not correspond to the Contractual Liability Issue, as subsequently identified by the FTT.

95. Reviewing the procedural history of the Application, it does not seem to me that there was anything prior to the Hearing which can be relied upon by the Appellant as evidence that the Applicants were either agreeing that they had a contractual liability to pay the sums in dispute or admitting that they had this contractual liability. I do not read the Applicants' statement of case or revised statement of case as containing an agreement or admission to this effect. The same applies to the Applicants' skeleton argument for the Hearing. Essentially what the Applicants did, in terms of identification of their case, was to confine their case to the Reasonableness Issue. I do not think that this can be equated, without more, to agreement or admission that, subject to the Reasonableness Issue, they were subject to a contractual liability to make the Payments. On the facts of the present case I do not think that there was any more. Rather, it seems to me that the Applicants simply disregarded, either by accident or design, the question of contractual liability.

96. In saying this I should make it clear that I am not saying that there cannot be cases where agreement or admission, for the purposes of Section 27A(4), may be implied or inferred from conduct. I also accept that such conduct may include a case where there is an omission to raise a contractual challenge to the payability of a service charge, while raising other challenges to the payability of the relevant service charge. A finding of such an agreement or admission has to be based upon the objectively ascertained intention of the tenant, which may be express or implied or inferred from the conduct of the tenant; usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two. What is important is that the relevant agreement or admission must be clear. On the facts of the present case, and on the basis of the authority cited to me by the Appellant, I do not think that the position is sufficiently clear to give rise to an agreement or admission.

97. In summary therefore, I conclude that the decision in *Atherden* can be distinguished and that, on the facts of the present case, it cannot be said that the Applicants or any of them agreed or admitted, within the meaning of Section 27A(4), that, subject to the Reasonableness Issue, they had a contractual liability to make the Payments which were in dispute.

Ground 1 – the remaining grounds of appeal – analysis and determination

98. I therefore turn to the remaining arguments within Ground 1, which can conveniently be taken together. The remaining arguments can be summarised as follows. The Contractual Liability Issue was not a pleaded issue, and had not been raised by the Applicants. In raising the Contractual Issue on its own initiative, the FTT exceeded its jurisdiction, embarking on its own inquisitorial process by identifying issues which none of the parties had asked it to resolve. The FTT thereby acted in breach of natural justice, exceeded its jurisdiction and went beyond the proper role of the FTT.

99. I start by making reference to some of the principal authorities cited by the Appellant's counsel in support of the remaining arguments within Ground 1.

100. The first of these cases is the decision of the Tribunal (Judge Gerald) in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC). The case was concerned with an appeal against a decision of the Leasehold Valuation Tribunal (**"the LVT"**), as it then was, disallowing recovery of the cost of window replacement and balcony works, on the basis that it was not reasonable to replace the old windows. The appeal arose because the pleaded issue before the LVT had been whether the cost of the window replacement work was reasonable, given the standard of the work. It had not been in dispute that replacement of the windows had been required. The LVT decided however that the appellant landlord, the Council, had not been justified in concluding that the windows required replacement. The landlord appealed against the decision of the LVT, on the basis that there had been a breach of natural justice as a result of the LVT reaching a decision on grounds not raised in the respondent tenants' application and without giving the landlord the opportunity to make submissions on the question.

101. There was no objection from the respondent tenants to the appeal being allowed, since they had not argued and did not wish to argue that the windows should not have been replaced. The judge therefore allowed the appeal, on the basis of an agreement between the parties as to what a reasonable sum would be for the relevant works. The judge also however took the opportunity to set out some general principles in relation to the LVT raising issues of its its own motion. As the judge noted, at [13] of his decision:

> *"13. It is regrettable that it appears to be a developing practice within some leasehold valuation tribunals to take it upon itself to identify issues which are of no concern to the parties and then reach a decision on issues they have not been asked to which then results in an appeal and all the waste of time and money and attendant general aggravation. It may therefore be helpful to set out the legislative framework and general principles applicable."*

102. The judge then set out Section 27A and reviewed the procedure for the resolution of disputes in the LVT, both in terms of the application form to be used in service charge disputes and in terms of the use of statements of case in which the parties were required to set out their respective cases. Judge Gerald summarised the position in the following terms, at [17-18] of his decision:

> *"17. In this respect, it is important to bear in mind not just that the jurisdiction of the LVT is a creature of statute but that it is also a function of what the applicant and, by his response, the respondent wish the LVT to resolve. It is the*

jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so. To do so would be inimical to the party-and-party nature of applications to the LVT and would greatly increase the costs (frequently recoverable from the tenant through the service charge) and difficulties attendant to service charge disputes which by their nature are frequently fractious, involving relatively small sums within a complex matrix of divers items of expenditure.

18. It follows from the above that the LVT does not have jurisdiction under section 27A "to determine the entire service charge not only the matters in dispute, pleaded or otherwise specifically identified in the Service Charge application" as stated in the Refusal Decision. It is not an inquisitorial tribunal. It is there to resolve issues it is asked to resolve, not uncover ones which do not exist or which the parties are not concerned about."

103. The judge accepted that there might be cases in which it was appropriate or necessary for the LVT to raise issues not expressly raised by the parties, but he saw such cases as rare. As the judge commented, at [19-20]:

> *"19. That said, there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to properly determine the issues expressly in dispute. But even then, the issues must fall within the scope of the application, not something which arises outside of it. This no doubt is what His Honour Judge Mole QC had in mind when he said in Regent Management Limited v Jones [2012] UKUT 369 (LC), LRX/14/2009 that:*
>
> > *"29. The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."*
>
> *20. In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submission and if appropriate adducing further evidence in respect of the new issue before reaching its decision. Failure to do so is not only unfair, but may give the unfortunate impression that the LVT has descended into the fray and adopted a partisan position which may well serve to undermine the confidence of the parties in the impartiality of the LVT."*

104. An example of a case where it was decided that the FTT had been entitled to raise a matter which had not been raised by the parties is *Admiralty Park Management Company Limited*

v Olufemi Ojo [2016] UKUT 421 (LC). This was another case involving an appeal in a service charge dispute. The FTT had decided that the tenant was not liable to pay the service charges in dispute, because the services charges had not been calculated in accordance with the method prescribed by the relevant lease. This was an issue which had not been raised by the tenant. Instead, the issue had been raised by the FTT at the outset of the hearing. The landlord appealed against this decision, on the basis that there had been a serious procedural irregularity. The appeal was allowed by the Tribunal (Martin Rodger KC, Deputy Chamber President), but not on the basis that the FTT had been wrong to raise the issue of calculation of the service charges. The appeal was allowed on the basis that the FTT had been wrong to go on to decide this question without allowing the landlord to answer the point. The Deputy President concluded that this had created a procedural unfairness. This was material because the landlord's argument, which was accepted by the Deputy President, was that if there had been a failure to calculate the service charge in accordance with the provisions of the relevant lease, the tenant was estopped by convention from objecting to the basis on which the landlord had calculated the relevant service charges.

105. While it was therefore clear that the FTT had been wrong to decide the calculation question without giving the landlord the opportunity to answer the point, the Deputy President was not persuaded that the FTT had not been entitled to raise the question. After making reference to the decision of Judge Mole QC in *Regent Management Limited v Jones* [2012] UKUT 369 (LC), cited in *Keddie*, and to *Keddie* itself, the Deputy President summarised the position in the following terms, at [28-29] of his decision:

> *"28. Where an application is made to the FTT for a determination under section 27A of the 1985 Act the overarching question to be addressed is, usually: what sum, if any, is payable as a service charge by leaseholder. In order to answer that question a number of sub-questions or individual issues are likely to have to be addressed, but the tribunal's most important task is to determine that amount.*
>
> *29. Bearing in mind the FTT's overriding objective of dealing with cases fairly and justly, avoiding unnecessary formality, seeking flexibility and using its expertise effectively, care should be taken by tribunals to avoid adopting an approach which is too narrow, technical or fixated on adherence to procedure for its own sake. This is especially the case where one or more of the parties is unrepresented and where the FTT is likely to be very much better equipped than the parties to identify all of the important issues which need to be considered before the correct sum due from the leaseholder can be identified. An experienced tribunal, guided by the overriding objective, will have no difficulty in distinguishing between a point of significance which the parties may have overlooked, and a point with no real merit which it would be in nobody's interest to raise for consideration."*

106. So far as these principles applied on the facts of the case, the Deputy President said this, at [30] in his decision:

> *"30. In this case the appellant's departure from the scheme of accounting required by the lease was so fundamental that it was both proper and inevitable, in my judgment, that the FTT should raise the issue at the hearing. When it appeared to the tribunal that sums had been claimed and included in the service charge which fell outside the scope of the fifth schedule because they related to other buildings, it was undoubtedly entitled to ask for an explanation. The fact that*

Mr Ojo may not have appreciated that the service charges were being demanded on a different basis from the lease did not require the FTT to shut its eyes to an obvious and potentially fatal irregularity. It was, in any event, part of Mr Ojo's challenge to the service charges that they included at least one item of expenditure, on the employment of a caretaker, which was not wholly for the benefit of his building or even of his estate. It was within both the broad question which the FTT was required to determine, namely the quantum of Mr Ojo's liability, and this more specific issue, for it to consider the extent to which the charges were consistent with the contractual scheme."

107. I should also make reference to the decision of the Tribunal (Judge Huskinson) in *Bucklitsch v Merchant Exchange Management Company Limited* [2016] UKUT 527 (LC). The case came before the Tribunal by way of an appeal from the FTT. The question before the Tribunal was whether the FTT had been right in its decision on a new point which had been raised by the appellant tenants, for the first time, at the hearing before the FTT. The new point was whether anything at all was contractually payable by way of service charge, on the basis that the respondent landlord had failed to comply with a condition precedent, in the relevant service charge machinery, to the service charges being payable. The FTT decided that the condition precedent had not been complied with, but that the appellants were prevented, by estoppel or waiver, from taking this point. Judge Huskinson decided that the FTT had not had enough evidence before it to justify a finding of estoppel or waiver, and remitted the case to the FTT so that this issue could be considered further by the FTT.

108. For present purposes the relevance of the decision lies in the fact that Judge Huskinson rejected the argument that there had been procedural error or unfairness in the FTT allowing the appellants to take the condition precedent point. As Judge Huskinson explained, at [19]:

"19. In my judgment the F-tT cannot properly be criticised upon this basis in the present case. The question before the F-tT was how much was recoverable by way of service charge for the relevant two years. The appellants had raised for the first time at the hearing the argument that nothing was payable by reason of the failure to comply with a condition precedent regarding (putting it broadly) the audit and certifying of accounts and certifying the amounts of service charge. The F-tT was aware that both parties were appearing without legal representation. The F-tT was also aware that there had been an earlier 2014 decision when this point had not been raised by the appellants. I do not consider that it should be seen as a demonstration of bias for a F-tT to ask for assistance from the parties in circumstances where a point of law in its view potentially arises upon the facts before it, being a point of law of potential importance in the ultimate disposal of the case. I notice the observation in paragraph 22 of the appellants' written representations dated 13 August 2015 in relation to the first further directions issued by the F-tT. Here reference is made to the fact that the tenant (i.e. the appellants) had not in the 2014 proceedings raised the condition precedent argument. The appellants state:

> *"… the Tribunal will of course note that the previous Tribunal members (necessarily including at least two experienced property professionals) did not identify the arguments themselves either (something which was within their power to raise of their own initiative in much the same way as this Tribunal has raised this abuse of process issue of its own initiative)."*

I have considered the case of Birmingham City Council v Keddie [2012] UKUT 323 (LC) but I see nothing in that case justifying an allegation of improper conduct or

bias on behalf of the F-tT for raising the potential abuse argument (and subsequently the potential estoppel/waiver argument) in the present case. In Birmingham City Council v Keddie the Leasehold Valuation Tribunal had determined whether or not it was reasonable to replace the old windows – this was a matter of fact which had not been raised by either party. However in the present case the F-tT were faced with a legal argument (namely the condition precedent point) raised for the first time at the hearing. The F-tT were entitled, in circumstances where they were concerned that on the facts as the F-tT perceived them to be there may exist legal reasons why this condition precedent argument could not properly succeed, to ask the parties to address them on these legal arguments."

109. It will be noted that the decision in *Bucklitsch* was very much on its own facts, and concerned a point which, as the judge noted, was a point of law arising on the facts, as the FTT perceived them to be. It should also be noted that, in that case, the parties were appearing without legal representation when the point was raised. In addition to this, the principal focus of the appeal was on whether there had been sufficient evidence before the FTT to justify a finding of estoppel or waiver. The judge's answer to this question was in the negative, but the case had to be remitted because the judge was not himself in a position to make findings one way or the other on the evidential questions raised by the estoppel/waiver issue.

110. What I take from these three Tribunal decisions is that there can be circumstances in which it is appropriate for the FTT to raise a point on its own initiative. What the FTT should not do is to proceed to decide such a point without giving the parties and, in particular, the party for whom the point is an adverse point, a fair opportunity to put their cases on the point. In terms of identification of the circumstances in which it is appropriate for the FTT to raise a new point on its own initiative, it seems to me that the FTT should be cautious. While this is not an area where there can be a hard and fast rule, it seems to me that what are required, before the FTT should raise a point of its own initiative, are circumstances of the kind described by the Deputy President in *Admiralty Park*. In particular, it seems to me that the new point should, as a general rule, fall within *"the scope of the application, not something which arises outside of it"* (*Keddie*) or, putting the matter another way, should fall within *"the broad question"* before the FTT (*Admiralty Park*).

111. I should add that, in *Keddie*, Judge Gerald put matters on the basis that the LVT had no jurisdiction under Section 27A to determine whether it was reasonable to replace the old windows, because this issue had not been raised by the tenants; see paragraph 18 of the decision. It seems to me that some qualification is required to this analysis. In *Keddie* it seems to me that the LVT did have jurisdiction, under Section 27A, to decide whether replacement of the windows was required or not. This issue clearly fell within the very wide terms of Section 27A. Rather, it seems to me that Judge Gerald's reference to jurisdiction should be understood as a reference to the question of whether it was permissible for the LVT to consider this question, in circumstances where the question had not been raised by the tenants in the proceedings before the LVT.

112. My attention was also drawn to the summary, in Woodfall's Law of Landlord and Tenant, Volume 1, at 7.192.2, of the principles which should apply, in terms of the FTT raising new issues in the context of its jurisdiction under Section 27A. The summary is helpful in drawing together what one can find in *Keddie* and *Admiralty Park*, subject to what I have just said concerning jurisdiction:

"The Tribunal's jurisdiction and function is to resolve issues which it is asked to resolve: it has no jurisdiction to embark on its own inquisitorial process and identify issues which neither party has asked it to resolve. It is entitled to raise new points of law which arise out of the uncontested facts or the evidence which the parties have put before it, but it need not, and it should think very carefully about the consequences for the course of the hearing before doing so. There may be rare cases in which it is necessary or appropriate to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to properly to determine the issues expressly in dispute: but even then, the issues must fall within the scope of the application. Thus, it was held in one case that the landlord's departure from the scheme of accounting required by the lease was so fundamental that it was both proper and inevitable that the Tribunal should raise the matter at the hearing: the fact that the tenant may not have appreciated that the service charges were being demanded on a different basis from the lease did not require the Tribunal to shut its eyes to an obvious and potentially fatal irregularity. Where the Tribunal does raise a new issue, it must give both parties an opportunity of making submissions and if appropriate adducing further evidence in respect of the new issue before reaching its decision, and if it fails to do so, its decision may be set aside. 49 A dispute involving contested issues of fact turning on credibility should not be decided without a hearing."

113. Turning to decisions of the Court of Appeal, my attention was drawn to *32 St John's Road (Eastbourne) Management Company Limited v Gell* [2021] EWCA Civ 789 [2021] 1 WLR 6094, specifically in the context of the Appellant's argument that the Applicants should have been confined to the pleaded case in their statements of case. The case involved a claim against a tenant for unpaid service charges. The claim came before a deputy district judge in the County Court who struck out the tenant's defence and counterclaim, and entered judgment for an amount to be assessed upon the filing of further evidence. The tenant served a new statement, essentially repeating the allegations in his original defence and counterclaim. Following a further hearing, the deputy district judge directed that the question of the reasonableness of the service charges which had been claimed should be transferred to the FTT for determination. An appeal to a circuit judge by the landlord was successful. The circuit judge set aside the transfer to the FTT and ordered that judgment be entered for the landlord in the amount of service charges claimed.

114. The tenant appealed to the Court of Appeal. The appeal was dismissed, essentially on the basis that, in a claim for unpaid service charges, the court would adjudicate on the question of whether the service charges were reasonable if, and only if, a defence to that effect had been pleaded by the tenant. The facts of this case are somewhat different to the present case, but for present purposes the case is principally relevant as a reiteration of the general rule that a litigant should not be permitted to raise issues without pleading them. In *Gell*, the tenant had not put the reasonableness of the service charges in issue in his original defence. So far as the assessment of the service charges was concerned, there was nothing raised by the tenant which constituted a viable argument for the reduction of the amount claimed. The position was not one where any conceivable defence to the service charges was open to the tenant. Nor was the situation one where it was open to the deputy district judge, on the facts of the case and in the absence of any pleaded case on reasonableness, to transfer the case to the FTT for a determination of the reasonableness of the service charges.

115. Subsequent to the hearing of the appeal my attention was also drawn to a more recent decision of the Court of Appeal which addresses the question of whether it is appropriate for tribunals to raise questions on their own initiative. This was the authority, mentioned at the outset of this decision, on which I gave the parties the opportunity to make further submissions. *Moustache v Chelsea and Westminster Hospital NHS Foundation Trust* [2025] EWCA Civ 185 was an employment case. Before the Employment Tribunal (**"the ET"**) the parties had agreed a written list of issues for resolution at the final hearing of the employee's claims. The ET addressed and decided those issues. It dismissed all the listed claims. The Employment Appeal Tribunal decided that the ET should have identified and determined a further claim which was not on the agreed list. The employer appealed to the Court of Appeal against this decision. The appeal was allowed. For the reasons set out in his judgment, with which Elisabeth Laing LJ and Dingemans LJ agreed, Warby LJ concluded that the agreed list of issues included all the claims which, on an objective basis, the employee had put forward in her statements of case. As such, the ET had been entitled to proceed on the basis there was no other claim for it to consider. There was nothing in the employee's statements of case nor was there any other circumstance which placed it under a duty to do otherwise.

116. It will be noted that the question in *Moustache* was not the same as the question in the present case. In *Moustache* the question was whether the ET had been under a duty to identify and determine the further claim which did not appear on the agreed list of issues. In the present case the question, so far as Ground 1 is concerned, is whether the FTT was entitled to raise an unpleaded issue. It seems to me however that the case is relevant to this appeal. I say this because Warby LJ, in his judgment, set out some useful general guidance on the role of the ET in identifying and determining issues in proceedings. It seems to me that this guidance is also applicable to proceedings in the FTT.

117. In the relevant part of his judgment, starting at [32], Warby LJ commenced by identifying four general points. At [33] and the first part of [34], Warby LJ identified the first two of these points in the following terms:

> *"33. First, proceedings in the ET are adversarial. The range of claims that may be brought and the range of substantive or procedural answers that may be raised to those claims are defined by law, principally by statute. In any given case the primary onus lies on the parties to identify, within those ranges, which claims they wish to bring and which answers they wish to advance.*
>
> *34. Secondly, the issues raised by the parties are those which emerge clearly from an objective analysis of their statements of case. Identification of the issues does not involve reference to other documents which do not have the status of pleadings and come later. Nor should the process be a complex or difficult one."*

118. The third point was concerned with the duty of the ET to decide those issues which emerge from an objective analysis of the statements of case. The fourth point, which seems to me to be of most relevance in the present case, is stated in the following terms, at [37]:

> *"37. Fourthly, however, the ET's role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party's case by way of clarification. That*

may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT."

119. Also relevant is the following statement of principles, from an earlier employment case, quoted by Warby LJ at [38]:

> *"38. We have been referred to the decisions of this court in Mensah (above) at [28] and [36] and Muschett v HM Prison Service [2010] EWCA Civ 25, [2010] IRLR 451 [31]. I do not consider it necessary to review those two cases in further detail. That was done in Drysdale v Department of Transport [2014] EWCA Civ 1083, [2014] IRLR 892 where the court subjected the relevant authorities to a detailed analysis from which Barling J (with whom Arden and Christopher Clarke LJJ agreed) derived the following general principles:*
>
> *(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.*
>
> *(2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.*
>
> *(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.*
>
> *(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.*
>
> *(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.*
>
> *(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant."*

120. Finally, I should record the helpful threefold classification, identified by Mr Bates in his submissions, of the circumstances in which the issues to be determined by the FTT may go beyond the pleaded issues. The first category of cases concerns rent assessment cases, where the procedure is not conducted upon a party and party basis; see the decision of the

Deputy Chamber President (Martin Rodger KC) in *Peabody Trust v Welstead* [2024] UKUT] 41 (LC) at [46]-[48]. The second category of cases concerns cases where there is a legislative requirement to take a particular matter into account, whether or not it has been pleaded; see by way of example the identification of this category by Edis LJ in his judgment in *Gell* at [66]. The third category of cases concerns those cases where it is appropriate, applying the principles to be derived from the cases cited to me in this appeal, for the FTT to permit a point to be taken which is not pleaded. The first and second categories are not engaged in the present case. It is the third category with which Ground 1 is concerned.

121. I therefore turn to apply the principles which emerge from the above authorities, and from the remainder of the relevant authorities cited to me in this appeal, to the facts of the present case.

122. The starting point is to identify the decision against which the Appellant is appealing. This is important because Mr Bates, in his submissions, referred to the Hearing below as *"a trial"*. This was, as I understand the position, true in the case of the Reasonableness Issue. It was not true in the case of the Contractual Liability Issue. I will need to come back to the preliminary views expressed by the FTT on the Contractual Liability Issue later in this decision. In terms of formal decisions however, all that the FTT actually decided was that the Contractual Liability Issue should be brought into the Application and should be adjourned, pursuant to the Interim Decision Directions, for determination at a later hearing.

123. What follows from this is that the FTT did not go wrong in this case by formally deciding an issue, which it had raised, without giving the parties the opportunity to address that issue. It is clear that tribunals and courts should not do this. In the present case the parties, namely the Applicants and the Appellant, have been given the opportunity to address the Contractual Liability Issue, by reason of the decision of the FTT to adjourn the Contractual Liability Issue and issue the Interim Decision Directions.

124. This in turn means that the Appellant must demonstrate, in the present case, that the FTT was wrong to allow the Contractual Liability Issue into the Application. There are different ways in which this can be put. It can be said that the FTT should never have raised the Contractual Liability Issue at all. It can be said that the FTT, having raised the Contractual Liability Issue, should have acceded to Ms Traynor's argument that it should not be allowed into the Application. Whichever way the case is put, the essential task for the Appellant is the same; namely to demonstrate that the FTT was wrong to allow the Contractual Liability Issue to be brought into the Application.

125. It seems to me that this is not necessarily an easy task. In deciding whether it was appropriate to raise the Contractual Liability Issue, the FTT was required to exercise its judgment and discretion; see the judgment of Warby LJ in *Moustache* at [38] and see the discussion of this question in *Keddie* and *Admiralty Park*. In my view, for the appeal to succeed on Ground 1, it is not sufficient for me to disagree with the decision of the FTT to allow the Contractual Liability Issue into the Application. It seems to me that I have to be persuaded that the decision was one which no FTT, properly directing itself and in the exercise of its discretion and judgment, could have made.

126. The relevant circumstances of the present case are striking. I start with the statements of case in the Application. They have two important features.

127. First, the Applicants' statement of case and revised statement of case did not raise the Contractual Liability Issue, or for that matter any issue of contractual liability to make the Payments. The Applicants' challenge, in relation to the disputed Payments, was confined to complaints of poor service and lack of information. This was confirmed by their counsel's skeleton argument for the Hearing, paragraph 36 of which I quote:

> *"36. The Applicants apply to the Tribunal pursuant to section 27A(1)(c) of the LTA Act 1985 for a declaration that the services charges applied between November 2019 and March 2023 are not payable in the sums claimed on the basis (a) they have not been reasonably incurred pursuant to section 19(1)(a) of the LTA Act 1985 and/or (b) that the services provided were not of a reasonable standard pursuant to s19(1)(b) of the LTA Act 1985."*

128. Second, the issue of contractual liability which was raised in the statements of case was not the Contractual Liability Issue. In its original statement of case Cudweed noted that the Occupational Underleases contained no conventional service charge provisions and raised the possibility of an issue as to what right of recovery existed under clause 3.3 of the Occupational Underleases. In its revised statement of case, as I have explained earlier in this decision, Cudweed made less of this possible issue, which reflected the fact that no point on contractual liability to make Payments had been taken by the Applicants. The issue of contractual liability to pay which Cudweed floated in its statements of case was not the Contractual Liability Issue. The Contractual Liability Issue, as identified in the Interim Decision, is not concerned with whether Payments can be recovered in reliance upon clause 3.3 of the Occupational Underleases, but rather with the question of whether the Appellant has operated correctly the contractual machinery of clause 3.3.3, by only demanding Payments in respect of sums which had fallen due for payment under the Headleases. This is well-illustrated by Ms Traynor's skeleton argument for the Hearing, which did deal with the possibility that an issue of contractual liability to make the Payments might be raised. The possibility which Ms Traynor was dealing was however the possibility of Cudweed reviving the issue, which it had floated in its original statement of case, of there being no right of recovery, in respect of sums paid by way of the Service Charges, under clause 3.3 of the Occupational Underleases. Ms Traynor's skeleton argument made no reference to the Contractual Liability Issue, because no one had taken the point.

129. Moving on from the statements of case, this was not a case where the Applicants were litigants in person. They had solicitors acting for them, when their statements of case were prepared. They had counsel acting for them at the Hearing. At the hearing of the appeal, Dr Hakobyan and Ms Labruzzo argued that they had been badly served by their solicitors. I took their point to be that Jobsons should have identified the Contractual Liability Issue as an issue to be raised, and failed to do so. This however is not a satisfactory answer to the point that the Applicants were legally represented. I am in no position to judge whether Jobsons were at fault in their advice to the Applicants. There has been no waiver of the privilege in the advice given by Jobsons, or for that matter by Ms Whitehouse. In these circumstances, it would be quite wrong for me to make assumptions on the question of whether the Applicants' lawyers were at fault. The relevant point is that the Applicants were legally represented, both when the statements of case were prepared and at the Hearing. In my view I must proceed on the assumption that the Applicants were appropriately advised and represented in the preparation of the statements of case and at the Hearing. If that assumption is wrong, and I am in no position to find that it is wrong, that is a matter between the Applicants and their legal advisers.

130. Coming to the Hearing itself, it seems to me that it had a number of unusual features. The dispute which the parties brought to the Hearing, for resolution, was the Reasonableness Issue. It is an unfortunate commentary on the present case that although the FTT heard the evidence and argument on the Reasonableness Issue, it has so far not issued its decision on the Reasonableness Issue. The reason for this, as I understand the position, is that the decision of the FTT on the Reasonableness Issue would be rendered academic or largely academic, if the Contractual Liability Issue should be resolved in favour of the Applicants. This seems to me an unacceptable state of affairs. The issue which the parties brought to the FTT for resolution and which the FTT has a duty to resolve, namely the Reasonableness Issue, remains unresolved because the FTT has itself raised an issue, namely the Contractual Liability Issue, which none of the parties brought or intended to bring to the FTT for resolution.

131. As Warby LJ explained in *Moustache*, at [37], the role of the ET is arbitral, not inquisitorial or investigative. The ET *"may consider it appropriate to explore the scope of a party's case by way of clarification"*, particularly in the case of an unrepresented party. As I have said, I regard this guidance as equally applicable to the FTT. The language used by Warby LJ seems to me to be significant. The relevant tribunal may consider it appropriate to explore the scope of a party's case. This language does not contemplate the relevant tribunal raising a new point which lies outside the scope of a party's case. It seems to me that this is consistent with the decision of the Deputy President in *Admiralty Park*, which I have also quoted above. For ease of reference, I repeat the guidance given by the Deputy President in paragraph 28 of his decision in *Admiralty Park*:

> *"28. Where an application is made to the FTT for a determination under section 27A of the 1985 Act the overarching question to be addressed is, usually: what sum, if any, is payable as a service charge by leaseholder. In order to answer that question a number of sub-questions or individual issues are likely to have to be addressed, but the tribunal's most important task is to determine that amount."*

132. In my view the direction in which the FTT took the Hearing, by raising the Contractual Liability Issue cannot properly be described as an exploration of the Applicants' case. The Applicants' case was concerned with the Reasonableness Issue. The FTT raised an entirely separate issue, which was whether there was a contractual liability to pay against the demands made of the Applicants. It seems to me that this issue lay well outside the scope of the Applicants' case. It was an entirely new point.

133. This is borne out by the terms of the Interim Decision and the Interim Decision Directions. Given the adversarial nature of the proceedings before the FTT, it was for the Applicants to take the point on the Contractual Liability Issue. In this context the terms of the Interim Decision are instructive. At Paragraph 32, the FTT recorded the position of Ms Whitehouse in the following terms:

> *"32. On the morning of the second day, we heard detailed submissions from Ms Traynor on why we should not consider the issue of liability to pay. Ms Whitehouse indicated that the Applicants wished to take this point. We made a brief ruling stating that we would require the First Respondent to address this issue. We agreed to put our reasons in writing. In the afternoon, we concluded*

our consideration of the reasonableness of the service charges challenged in the Scott Schedule."

134. At Paragraph 54, in recording the argument on the second day of the Hearing on the question of whether the Contractual Liability Issue should be brought into Application, the FTT recorded the position of Ms Whitehouse in the following terms, at Paragraph 54:

> *"54. In response, Ms Whitehouse stated that the Applicants wanted the Tribunal to consider the issue of reasonableness to pay. She had only been instructed some two weeks previously and had not drafted the Statement of Case. She was handicapped by the manner in which the case had been prepared by the previous solicitor. The Tribunal was not impressed by Ms Traynor's response to these submissions, namely that their remedy lay in a negligence claim against their former solicitor."*

135. The position of Ms Whitehouse does appear therefore to have been somewhat equivocal. I stress that this is no criticism of Ms Whitehouse. It seems clear that she, in common with Ms Traynor and (I assume) Mr Allison, was taken by surprise by the FTT raising the Contractual Liability Issue. Dr Hakobyan and Ms Labruzzo did assure me, at the hearing of the appeal, that it had been made clear to the FTT that the Applicants wished to take the point on the Contractual Liability Issue. This was reiterated by Dr Hakobyan in her further written submission. I also note that Judge Latham, in his Response Note, states that Ms Whitehouse did say, on the second day of the Hearing, that the Applicants wished to take the point on **"payability"**, which I take to be a reference to the Contractual Liability Issue. The position is also confirmed by what is recorded in Paragraph 32. I therefore accept that the Applicants did communicate to the FTT, at the Hearing, that they wished to take up the Contractual Liability Issue.

136. This does not however alter the fact that the Applicants seem to have had only a very limited role at the Hearing, in relation to the Contractual Liability Issue. The Contractual Liability Issue was raised by the FTT. It is clear from the terms of the Interim Decision that the argument in favour of the Applicants, in relation to the Contractual Liability Issue, came from the FTT, not the Applicants. The impression created, both by the terms of the Interim Decision and by the notes of the Hearing, is that the argument over the Contractual Liability Issue was an argument between the FTT, on the one side, and the Appellant, represented by Ms Traynor, on the other side. All this is confirmed by the terms of the Interim Decision Directions. What is notable about the Interim Decision Directions is that the Appellant was required to go first with its statement of case. It is also notable that this statement of case was not to be confined to the Contractual Liability Issue. In terms of the requirements imposed by the FTT, in relation to this statement of case, the Appellant was effectively required to produce a set of Particulars of Claim, pleading a contractual claim for the disputed Payments and answering the case articulated by the FTT on the Contractual Liability Issue.

137. Putting the matter more simply the FTT, by the Interim Decision and the Interim Decision Directions, effectively converted an application by the Applicants under Section 27A, challenging the reasonableness of the Payments, into a contractual claim by the Appellant for the recovery of the Payments. This was not an exploration of the Applicants' case, but the conversion of that case into a different dispute, within which the Appellant, the First Respondent to the Application, was effectively put into the position of applicant. The facts

of the present case are not on all fours with *Gell*, but it does seem to me that there are similarities to be found between what happened in the present case, and the decision of the deputy district judge in *Gell* to send the dispute off to the FTT for the determination of a question, namely the reasonableness of the relevant service charges in that case, which no one had raised.

138. In saying this, I do not overlook that the Contractual Liability Issue arose out of the demands made by the Appellants for the disputed Payments. The May 2023 Directions did require the production of those demands, and they were not produced. Mr Bates also, very properly, drew my attention to the fact, which I have already noted, that the Applicants had complained in their statements of case of the lack of information from Cudweed and the Appellant in relation to the Service Charges and the Payments. It seems to me however that this brings out the striking feature of this case which I have just identified. The Applicants, who were represented, were content to confine their case at the Hearing to the Reasonableness Issue. They did not, as they might have done, seek the enforcement of the direction for production of the demands. Instead, the FTT took the initiative for itself, required production of the demands and, on the basis of the demands, put the case for the Applicants on the Contractual Liability Issue.

139. The way in which the Contractual Liability Issue came to be raised brings out another point which seems to me to be significant. The Contractual Liability Issue was not, or at least was not necessarily a point of law, which simply required the FTT to hear argument from the parties. The Contractual Liability Issue depended upon an analysis of the demands made for the relevant Service Charges/Payments. Beyond this, as Mr Bates pointed out in his submissions, the Appellant might seek to argue that the Applicants were prevented by their past conduct from disputing the contractual validity of the relevant demands for Payments. The Appellant might, by way of example, seek to argue that the Applicants were estopped by convention from challenging the contractual validity of the relevant demands. An argument of this kind succeeded before the Tribunal in *Admiralty Park*, where the Deputy President concluded that the tenant was in fact estopped by convention from taking the point that the relevant service charges had been demanded during the relevant period in a manner inconsistent with the accounting provisions of the lease. An argument of this kind in the present case, in response to the Contractual Liability Issue, would require factual investigation.

140. One other feature of the Hearing which justifies express mention is that the FTT took a very different attitude to the raising of new points in its consideration of the Reasonableness Issue. In the course of hearing the Reasonableness Issue the FTT took a strict line, in terms of the Applicants seeking to introduce new evidence or raise new issues. This is recorded in Counsels' Note, and is confirmed in Mr Parkinson's Response Note. I have no doubt that the FTT was right to take a firm line in this respect. It does however serve to bring out the contrast with the attitude shown by the FTT to the Contractual Liability Issue.

141. In their submissions in response to Mr Bates' submissions, and in the skeleton argument in response to the appeal prepared by Dr Hakobyan, both Dr Hakobayan and Ms Labruzzo addressed me clearly and cogently. It was however obvious that their submissions were really directed to the pleaded complaints of the Applicants in relation to the Reasonableness Issue. Both complained that they had been badly served by their lawyers, but I have already dealt with this argument. Both made complaints about excessive demands for Payments and the alleged absence of information provided by the Appellant and Cudweed. It seemed

to me however that all this would have fallen to be ventilated and, I am sure, was ventilated in the trial of the Reasonableness Issue which took place at the Hearing. Both also stated their strong belief, of which I take due account, that the Hearing had been fair.

142. Both Dr Hakobyan and Ms Labruzzo made the point that the demands for the Payments/Service Charges were only produced at the Hearing, when their production had been required by the May 2023 Directions. This is a fair point. Directions of the FTT should be complied with, not ignored. Nevertheless, and as I have already commented, the failure of any party in the Application to raise this matter, until it was raised by the FTT at the Hearing, serves to bring out the point that none of the parties were wishing to rely on the demands, in relation to an argument that there was no contractual liability to make the Payments. This was because no such argument had been raised in the Application.

143. Returning to the specific grounds of appeal which I am considering in this part of this decision, and drawing together all of the above analysis, I reach the following conclusions.

144. As I have noted, the Contractual Liability Issue was not pleaded in the statements of case. It was not raised by the Applicants in their pleaded case, either in their original statement of case or in their revised statement of case. Nor was it raised in the statements of case of Cudweed or the Appellant. It seems to me that this factor alone does not necessarily mean that the FTT was wrong to raise the Contractual Liability Issue. More is required to justify the conclusion that the FTT was wrong to do so.

145. In the present case however it seems to me that there is more. As I have explained above, the circumstances of the present case are striking. For the reasons which I have set out, it seems to me that the Contractual Liability Issue lay well outside the scope of the Applicants' case. When the FTT raised the Contractual Liability Issue, they were not raising a matter which lay within the broad scope of the Applicants' case, such as Judge Gerald had in mind in *Keddie*; see the decision at [19] as quoted above. Nor do I see the present case as one where the FTT, if had not raised the Contractual Liability Issue, was being required to shut its eyes to an obvious and potentially fatal irregularity; such as the Deputy President had in mind in *Admiralty Park*; see the decision at [30] as quoted above. Instead, what happened was the FTT, on its own initiative, formulated and advanced a new case on behalf of the Applicants.

146. Applying, in particular, the guidance given in *Moustache* to the present case, it seems to me that the FTT, in raising the Contractual Liability Issue, stepped outside its arbitral role and effectively took on an inquisitorial or investigative role. As Warby LJ explained in *Moustache*, at [37], the ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. It seems to me clear, from what was said in *Moustache*, that the circumstances in which it is appropriate for a tribunal to take pro-active steps to prompt some expansion or modification of the case advanced by a party are also limited, and do not extend to the circumstances of the present case.

147. As I have explained above, it seems to me that the bar is set high in relation to Ground 1. In my view it is not sufficient that I disagree with the decision of the FTT to raise the Contractual Liability Issue. I have to be satisfied that the decision was one which no FTT, properly directing itself and in the exercise of its discretion and judgment, could have made.

148. In the particular circumstances of this case, and for the reasons which I have set out, I am satisfied that the decision of the FTT to raise the Contractual Liability Issue, was not only wrong, but was a decision which no FTT, properly directing itself and in the exercise of its discretion and judgment, could have made. In my view the FTT should either not have raised the Contractual Liability Issue at all or, having raised the Contractual Liability Issue, should have accepted the argument of Ms Traynor that it was not appropriate to allow the Contractual Liability Issue to be brought into the Application.

149. I should add one further point to this conclusion, for the avoidance of any doubt in this respect. The Appellant contended, as part of its argument in support of Ground 1, that the FTT exceeded its jurisdiction. In case the point matters, I do not think that this is strictly correct. As Mr Bates accepted, the FTT did have jurisdiction, under Section 27A, to consider questions of contractual liability. As such, it seems to me that the problem in the present case was not lack of jurisdiction to deal with the Contractual Liability Issue. Rather, the problem was that it was not appropriate to raise the Contractual Liability Issue or to allow the Contractual Liability Issue into the Application, as the FTT should have recognised.

150. I therefore conclude that the appeal succeeds on Ground 1. The FTT was wrong to decide that there should be an adjournment for the purposes of the determination of the Contractual Liability Issue and was wrong to decide that the Interim Decision Directions should be given. In making these decisions the FTT went wrong as a matter of law, within the meaning of Section 12(1) of the Tribunals, Courts and Enforcement Act 2007. The FTT should not have raised the Contractual Liability Issue at all. Alternatively, having raised the Contractual Liability Issue, the FTT should have decided that it was not appropriate to allow the Contractual Liability Issue into the Application.

151. By virtue of Section 12(2)(a) I have a discretion to set aside the decision of the FTT to adjourn the Contractual Liability Issue on the Interim Decision Directions. In my view this decision cannot stand and must be set aside. I must then decide either to remit the case to the FTT with directions for its reconsideration or re-make the decision. In the present case it seems to me that I should re-make the decision of the FTT as a decision that the Applicants are not permitted to pursue a case on the Contractual Liability Issue in the Application. The case should also be remitted to the FTT with a direction to the FTT to issue its decision on the Reasonableness Issue and deal with any other consequential matters arising from its decision on the Reasonableness Issue.

152. For the sake of completeness, I should mention one other question which I canvassed with the parties in argument, and which gave me some pause for thought in reaching the above conclusions. The question was the impact, upon the ability of the Applicants to argue in the future that they have no contractual liability to make Payments under the Occupational Leases, of a decision that the Applicants were not entitled to put their case on the Contractual Liability Issue in the Application. Mr Bates helpfully confirmed to me that a decision to exclude the Applicants from putting a case on the Contractual Liability Issue in the Application would mean that it was not open to them to run this case in relation to the period which was in dispute in the Application. By reference to the application notice this would mean the period from November 2019 to March 2023. Mr Bates accepted that this decision would not formally preclude the Applicants from pursuing a case on the Contractual Liability Issue in relation to future years. Mr Bates did qualify this position by raising the possibility that the Appellant might argue, in the future, that the Applicants should not be permitted to raise the Contractual Liability Issue on what he referred to as a *Henderson v*

Henderson basis. I took this to be a reference to an argument by the Appellant that the Applicants should not be permitted to pursue a case on the Contractual Liability Issue, in relation to future years, because such a case could and should have been pursued in the Application. While I did not understand Mr Bates to concede the position, he did candidly accept that such an argument by the Appellant might be an uphill struggle. It seems to me that I should not be making any decision or indicating any views on arguments which might or might not be raised in relation to future years. The relevant point is that my decision does seem to me to have the effect that the Applicants are not now permitted to pursue a case on the Contractual Liability Issue in the Application, in relation to the years which are in issue in the Application. That is an inevitable consequence of my reasoning set out above. In my view it is not a matter which undermines my reasoning or supports a different decision.

Ground 2 - analysis and determination

153. In the light of my decision on Ground 1, Ground 2 does not strictly arise for decision. If, as I have decided, the FTT was wrong to raise the Contractual Liability Issue on its own initiative and to give directions for its determination in the Application, the question of whether the Hearing was conducted in a way which was unfair and gave rise to the appearance of bias on the part of the FTT is not material. Assuming that such unfairness did occur, the FTT would still have been wrong in the Interim Decision, if such unfairness had not occurred.

154. It seems to me however that I should deal with Ground 2. The Appellant's case in support of Ground 2 is a concerning one. It is alleged that there was judicial bullying of the Appellant's counsel, Ms Traynor, by the FTT; specifically by Judge Latham. It is alleged that this created a situation where the Hearing was unfair and gave rise to the appearance of bias on the part of the FTT. In my view, these allegations need to be addressed, and a decision made on Ground 2.

155. It is convenient at this point to make reference again to one particular piece of evidence which I have concerning the Hearing. As I have said earlier in this decision, I have been provided with a copy of an email sent by Mr Allison, counsel for Cudweed at the Hearing, to Ms Traynor. The email was sent a few days after the Hearing. I do not think that it is necessary to quote the email. Essentially, Mr Allison was commiserating with Ms Traynor in relation to what Ms Traynor had, in the opinion of Mr Allison, had to endure at the Hearing, in terms of her treatment by the FTT. Without making any findings on the content of the email, the fact that Mr Allison considered it appropriate to send an email of this kind to his professional colleague, in the aftermath of the Hearing, seems to me to reinforce my conclusion that Ground 2 needs to be addressed.

156. So far as the relevant legal principles concerning unfairness and bias are concerned, it seems to me that they are conveniently set out in the judgment of Hildyard J in *M&P Enterprises Limited v Norfolk Square (Northern Section) Limited* [2018] EWHC 2665 (Ch). The case was concerned with an appeal against the decision of a judge, in the County Court, that the appellant was not entitled to a new lease of certain premises held on a business lease, pursuant to the provisions of Part II of the Landlord and Tenant Act 1954. As Hildyard J recorded in his judgment, the case was an unusual one in the sense that the appellant did not appeal against the first instance judgment itself or the findings therein. Rather, the appellant's argument was that the process of the trial was so unfair as to result in the outcome of the trial being void.

157. In terms of the fairness of the conduct of a trial, Hildyard J explained what is required in the following terms, at [16]-[18] of his judgment:

> *"16. The right to a fair trial, both under the common law and Article 6 of the European Convention on Human Rights (the House of Lords in Lawal v Northern Spirit Limited [2003] UKHL 35 having confirmed that there is no difference between the requirements in each) includes the right to a trial and decision conducted and made by a decision-maker free not only from actual bias but also from the appearance of bias. Justice most both be fair and be seen to be fair.*
>
> *17. Whether a trial was fairly conducted is a subjective assessment, necessarily made after the event and with the benefit of hindsight but without (of course) the benefit of any input from the relevant judge. In making that assessment, the reviewing court must bear in mind that (per Jonathan Parker LJ in The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu [2006] EWCA Civ 281 at [142]):*
>
> > *"...within the bounds set by the Civil Procedure Rules, a first instance judge is entitled to a wide degree of latitude in the way in which he conducts proceedings in his court. However, that latitude is not unlimited. Ultimately, the process must always be the servant of the judicial function of dealing with cases justly (see the overriding objective expressed in CPR 1.1) ..."*
>
> *18. It is a most important facet of the judicial function that the judge should always remain above the arena so as to maintain the detachment required of a judge. The judge must not take on the role of an advocate. If a judge intervenes in the process of the presentation and eliciting of evidence he runs the risk by such intervention of "descending into the arena", so as to become (per Lord Greene MR in Yuill v Yuill [1945] P 15 at 20)*
>
> > *"...liable to have his vision clouded by the dust of conflict."*

158. As Hildyard J also explained, at [19]-[21], the necessity to remain above the arena had persisted into the modern age, notwithstanding the emphasis on active case management:

> *"19. That necessity to remain above the arena persists notwithstanding the modern emphasis on active case management. To quote further from Jonathan Parker LJ's judgment in the Kofi-Adu case:*
>
> > *"Nowadays, of course, first instance judges rightly tend to be very much more proactive and interventionist than their predecessors…That said, however, it remains the case that interventions by the judge in the course of oral evidence (as opposed to interventions during counsel's submissions) must inevitably carry the risk so graphically described by Lord Greene MR. The greater the frequency of the interventions, the greater the risk; and where interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one."*
>
> *20. The same judgment continues in the next paragraph ([146]) as follows:*
>
> > *"It is, we think, important to appreciate that the risk identified by Lord Greene MR in Yuill v Yuill does not depend on appearances, or on what the objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene MR's*

description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment and may for that reason render the trial unfair."

21. This brings home the point that the assessment of unfairness is one for the reviewing court to make according to its perception as to whether there was a failure on the part of the judge to discharge his or her judicial function with the result that the trial was unfair. Actual unfairness in the way the trial was conducted, in other words, is the test. Kofi Adu is a case where that test was demonstrated to have been satisfied."

159. Hildyard J then quoted at length, at [23], from the judgment of Black LJ (as she then was) in *Re G (A Child)* [2015] EWCA Civ 834, by way of illustration both of the generous ambit allowed to trial judges and yet also the sort of judicial conduct which may result in a finding that a trial was unfair.

160. Following this the judge proceeded to the question of the appearance of bias. The second aspect of the appellant's case was that the judge's conduct of the case at first instance was such as to give rise to a reasonable perception of a real risk of bias. Actual bias was not alleged. As such, Hildyard J identified the issue for determination as whether, on the facts, *"a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias."*.

161. Hildyard J went on, at [25]-[26], to elaborate on this test of apparent bias, in the following terms:

> *"25. That formulation of the question incorporated Lord Hope's "modest adjustment" to the formulation of the test set out by Lord Goff in R v Gough [1993] AC 646 (which had been put forward by Lord Phillips MR in In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700), replacing the reference in the earlier test to a "real danger" by a reference to "real possibility" of bias (R v Gough at p.670; and see In re Medicaments at p.711 A-B and Porter v Magill at [99]-[103]).*
>
> *26. This question of whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias, is to be taken in two stages. First, all the circumstances having a bearing on the suggestion that the Judge appeared to be biased must be ascertained; and second, it must then be determined whether those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility that the Judge was biased (see In re Medicaments, at p. 711 A-B; and Porter v Magill, at [102]-[103])."*

162. Hildyard J then proceeded to consider further the circumstances in which the conclusion of a real possibility of bias could be reached by a fair-minded observer. In terms of what is meant by bias Hildyard J explained the position in the following terms, at [30]-[31]:

> *"30. As to what constitutes "bias", Ms Shea QC (on behalf of the Respondent) submitted that Lord Goff's definition in R v Gough (at page 670) and paragraph [99] of Porter v Magill above) remained apt: "bias" is the possibility that the decision-maker*

"might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him".

31. I was not taken by the parties to further authorities on the meaning of "bias", but in another very recent judgment in the Court of Appeal in another case of apparent bias, Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468, Leggatt LJ summarised (at [17]):

"Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117, para 28; Secretary of State for the Home Department v AF (No 2) [2008] EWCA Civ 117; [2008] 1 WLR 2528, para 53".''

163. Hildyard J addressed the interplay between actual unfairness and reasonable perception of bias in the following terms, at [32]-[33]:

''32. Although for the purpose of analysis, and in conformity with the observation in Kofi Adu, I have sought to distinguish the two categories (actual unfairness and the appearance of bias), there is often an interplay between them: the symptoms of unfairness being also often likely to encourage a perception of bias. Put another way, the manifestations of a Judge's failure to discharge his judicial function may also be such that a fair minded and informed observer would conclude that there was a real possibility of bias.

33. However, in that second context the court adopts the role or mantle of a fair-minded informed observer in order to assess whether, even if the evidence is not such as to require the Court to conclude that the judge did fail to discharge his judicial function so that the trial was unfair, nevertheless the way the trial was conducted would have led such an informed observer to conclude that there was a real possibility of bias.''

164. In setting out the above principles it is important to keep in mind that, in the present case, there was not at the Hearing, as such, a trial of the Contractual Liability Issue. The formal position is that the Contractual Liability Issue was adjourned for determination at a later date. It seems to me however that the principles identified in *M&P Enterprises* and in other cases, concerning fairness in the conduct of a trial and apparent bias, are capable of being applied to the Hearing and the Interim Decision, provided that one keeps firmly in mind that the position in the present case, at least in formal terms, is that the Hearing was not the trial of the Contractual Liability Issue.

165. As Mr Bates also reminded me the focus, in considering questions of bias and unfairness, is not upon the legal representative, but upon the client; in this case the Appellant. The argument in support of Ground 2 is that it is the Appellant which suffered loss, as a result of the alleged unfairness of the Hearing and as a result of the alleged appearance of bias.

166. The allegations of unfair conduct in the present case, leading to the appearance of bias, are summarised in the following terms, in the Appellant's skeleton argument for the appeal. Each allegation or set of allegations is relied upon both individually and collectively:

(1) The FTT, by Judge Latham, asked how long the Appellant's counsel had been doing her job and appearing before the FTT; this statement was inappropriate and sought to undermine counsel's professional abilities.

(2) The FTT gave counsel only until 10am on the second day of the Hearing to secure instructions and provide copy demands, despite having been told that the relevant

officer/employee was unavailable and that counsel was instructed under a watching brief only.

(3) The FTT, by Judge Latham, communicated that the Appellant should consider any appeal carefully because, as a social landlord, it would not be good for their reputation.

(4) The FTT, by Judge Latham, frequently referred to the fact that counsel was instructed on a watching brief in a negative tone and with eye-rolling, despite this being flagged well in advance in the pleadings.

(5) The FTT, by Judge Latham, consistently addressed counsel for the Appellant in a negative tone, accompanied by eye-rolling**.**

(6) The FTT, by Judge Latham, frequently stopped counsel for the Appellant from answering his questions and instead directed his questions to counsel for Cudweed.

(7) The FTT was inconsistent in its approach throughout the Hearing, so that it prevented the Applicants from taking matters on reasonableness, which were not pleaded, but did not take the same approach with respect to the contractual position. This appeared to be because, as Judge Latham is alleged to have said, he considered that the contractual argument was the best point for the Applicants.

(8) The FTT, by Judge Latham, expected counsel for the Appellant to understand the position on the Contractual Liability Issue, despite the absence of any pleaded position by the Applicants. When counsel for the Appellant indicated that she felt disadvantaged, as a result of being on a watching brief and quite properly not having instructions because it was not a pleaded point, she faced both explicit and implicit criticism. In contrast counsel for the Applicants was not criticised when she conveyed a similar constraint.

167. The allegations of unfair conduct are, necessarily, said to have affected the decision making of the FTT, as a panel, in this case. I should however record that, as between the members of the FTT panel, the Appellant's case was that it was Judge Latham who was directly responsible for the unfair conduct, not Mr Parkinson.

168. In considering the allegation of unfair conduct, I should start by acknowledging the constraints to which I am subject. I was not present at the Hearing. Nor is there a transcript of the Hearing, so that I can consider the exact words used at any particular point. Even if there was a transcript available, this would not be able to reproduce the atmosphere at the Hearing or the context or manner in which particular words were spoken. An example of this is the question put to Ms Traynor as to how long she had been appearing before the FTT. It is not clear precisely what the terms of the question were, but I see from the Response Notes that a question of this kind was put to Ms Traynor. For present purposes the relevant point is that a question of this kind may or may not be appropriate, depending upon the context and manner in which it is put. Depending upon context and manner, it may come across as a semi-jocular judicial response, along the lines of *"come off it"*, to a submission from counsel which is seen as unrealistic. Depending upon context and manner, it may come across as a comment intended to belittle counsel, by questioning their competence.

169. Beyond this, I am concerned with the determination of this appeal. I am not presiding over a complaint process, with the Appellant on one side as the complainant, and the FTT on the other side, as respondent to the complaint. I am not in the same position as the Judicial Conduct Investigations Office, which would be better placed to consider, as complaints, some of the complaints within Ground 2.

170. Bearing in mind the constraints on my role, I do not think that I am able to make a decision on all the allegations of unfair conduct relied upon by the Appellant. For a reason which I shall also explain, I do not think that this matters.

171. The allegations of unfair conduct on which I do not consider that I am able to make a decision, and the reasons why I do not feel able to make a decision, are as follows:
    (1) So far as the question to Ms Traynor as to how long she had been appearing before the FTT is concerned, it is clear that this question was put to Ms Traynor by the FTT, although the precise terms of the question are unclear. I do not feel able to make a decision on whether the putting of this question constituted judicial bullying or part of a pattern of judicial bullying. As I have explained above, the context and manner in which this question was put are important, and I do not consider that I have sufficient evidence to allow me to decide whether the question did come across as a derogatory question to Ms Traynor.
    (2) So far as the allegations of eye rolling are concerned, I do not consider that I am able to decide, as a matter of fact, whether this occurred. It is not accepted by the FTT that it occurred. Dr Hakobyan has said, in her further written submission, that she did not witness any eye rolling. I note that Ms Whitehouse has also qualified her position on whether there was eye rolling, in the relevant part of Counsel's Note.
    (3) Without a transcript I do not think that I am in a position to decide whether the FTT, by Judge Latham, frequently stopped counsel for the Appellant from answering his questions and instead directed his questions to counsel for Cudweed.
    (4) Without a transcript I do not think that I am in a position to decide whether Judge Latham said that he considered the contractual argument to be the best point for the Applicants.

172. The reason why I do not think that this matters is because it seems to me that, for the purposes of reaching a decision on whether there was unfair conduct, leading to the appearance of bias, one can form a sufficiently clear picture of what happened at the Hearing simply by looking at the agreed or undisputed facts and, most important, by looking at the terms of the Interim Decision and the Interim Decision Directions.

173. A number of matters are clear, in relation to the way in which the Contractual Liability Issue was brought into the Application and dealt with at the Hearing:
    (1) It is clear that the Contractual Liability Issue was brought into the Hearing, on the first day, by the FTT. The Contractual Liability Issue was not raised by Ms Whitehouse. So far as the Hearing was concerned, there is no evidence of the Applicants having formulated or attempted to formulate a case, let alone a pleaded case on the Contractual Liability Issue.
    (2) It is clear that Ms Traynor was required to respond, substantively, on the Contractual Liability Issue at the Hearing. The FTT clearly expected and required Ms Traynor to be in a position to respond substantively on the Contractual Liability Issue at the Hearing.
    (3) It is clear that Ms Traynor was given only 24 hours for her response. The response was heard on the second day of the Hearing.
    (4) It is clear that the FTT was, at the least, critical of the fact that Ms Traynor was not in a position to deal substantively with the Contractual Liability Issue; see Paragraphs 45, 58 and 60. As the Appellant's skeleton argument for the appeal pointed out, this was in marked contrast to the attitude of the FTT to Ms Whitehouse, when she was in

difficulties in her response to the Appellant's submissions, at the Hearing, that the Contractual Liability Issue should not be allowed into the Application; see Paragraph 54.

(5) I am satisfied that Judge Latham, when informed of the Appellant's intention to appeal, stated that the Appellant should think carefully about an appeal, as it had its reputation as a social housing provider to consider. This is confirmed by the Solicitors' Note and Counsels' Note and is not disputed in the Response Notes.

174. What is also clear is a matter which I have already set out in my analysis of Ground 1. It is clear from the terms of the Interim Decision that the argument in favour of the Applicants, in relation to the Contractual Liability Issue, came from the FTT, not the Applicants. As I have said, the picture which emerges, both from the terms of the Interim Decision and from the evidence of the Notes and the Response Notes, is that the argument over the Contractual Liability Issue was an argument between the FTT, principally it appears by Judge Latham, and the Appellant, represented by Ms Traynor. As I have also pointed out, this picture is confirmed by the terms of the Interim Decision Directions, where the Appellant was required to go first with its statement of case. By that statement of case the Appellant was effectively required to produce a set of Particulars of Claim, pleading a contractual claim for the disputed Payments and answering the case articulated by the FTT on the Contractual Liability Issue.

175. So far as Ground 2 is concerned, it seems clear that substantial parts of the Hearing comprised argument, in relation to the Contractual Liability Issue, between (i) the FTT, principally it appears by Judge Latham, and (ii) the Appellant, represented by Ms Traynor. As Judge Latham confirms in his Response Note, the FTT was *"insistent"* that the Appellant, by Ms Traynor, should address the Contractual Liability Issue. Both the Solicitors' Note and Counsel's Note record Judge Latham's frustration and exasperation with the stance taken by Ms Traynor. This is consistent with what I read in the Interim Decision, which also contains criticism of the stance taken by Ms Traynor, and consistent with what was said by Mr Allison in his subsequent email to Ms Traynor. Putting all of this together, I think that there is amply sufficient to establish, in relation to the Contractual Liability Issue, (i) that the argument at the Hearing was an argument between the FTT and Ms Traynor, and (ii) that this argument did, at least at times, become acrimonious, and (iii) that the FTT, at least by Judge Latham, became visibly frustrated and exasperated by Ms Traynor's stance.

176. In the context of the allegations of procedural unfairness, leading to the appearance of bias, there is one other feature of the Interim Decision which I should highlight. As I have already noted, the only formal decisions made by the FTT, in relation to the Contractual Liability Issue, were the decision to adjourn the Contractual Liability Issue and the decision to issue the Interim Decision Directions. This is however only part of the picture. The reality is that the Interim Decision contains a detailed analysis of the Contractual Liability Issue. The outcome of that analysis was the expression of the following views by the FTT, at Paragraphs 46 and 59:

> *"46. The preliminary view of the Tribunal is that the First Respondent has not demanded "the sums due" under Clause 3.3.3 in accordance with the terms of the lease. No liability arises on the Leaseholder to pay any sum until it becomes due the Superior Landlord under the Superior Lease. It will only become payable when the Management Company has approved a budget for the*

relevant service charge year and a demand has been made for an interim service charge."

"59. The Tribunal is required to consider whether the service charges levied by the Second Respondent for 2019 are reasonable. We asked Ms Traynor whether the Lead Applicant was obliged to pay any "sums due to the Superior Landlord under the Superior Lease" in respect of this service charge year. She was unable to answer. Our preliminary view is that neither the Lead Applicant nor any of the other Applicants were obliged to pay any service charge in respect of this service charge year. This Tribunal does not determine academic questions."

177. It is of course important to acknowledge that these views were expressed as preliminary views. In Paragraph 60 the FTT went on to *"regret"* that it had been unable to determine the Contractual Liability Issue at the Hearing. Nevertheless, the views of the FTT on the Contractual Liability Issue emerge very clearly from the Interim Decision. Given the terms of the FTT's analysis it is difficult to see how the FTT could have been expected to reach a different decision on a further hearing of the Contractual Liability Issue. It is part of one of the complaints of unfair conduct made by the Appellant that Judge Latham is alleged to have said that he considered the Contractual Liability Issue was the best point for the Applicants. As I have already noted, without a transcript of the Hearing, I do not think that I am in a position to decide whether this was in fact said. Whether or not this was said in terms during the Hearing, it seems to me to emerge very clearly, from the FTT's analysis of the Contractual Liability Issue in the Interim Decision, that this was the view of the FTT.

178. I turn now to the question of whether there was unfairness, leading to the appearance of bias, in the FTT's conduct of the Hearing. On the basis of the matters which I have set out above, where it is clear what occurred, it seems to me that the answer to this question is also clear. I regret to say that, in the very particular circumstances of this case, I have reached the clear conclusion that the FTT's conduct of the Hearing was unfair, and gave rise to the appearance of the bias. My reasons for this conclusion are as follows.

179. It is convenient to start by identifying what should, in my view, have happened at the Hearing if it is assumed, contrary to my decision on Ground 1, that it was appropriate for the FTT at least to raise the Contractual Liability Issue at the outset of the Hearing. On this hypothesis it seems to me that the FTT should, when raising the point, have inquired of the Applicants whether they wished to pursue the Contractual Liability Issue. It was for the Applicants, not the FTT, to pursue the Contractual Liability Issue. If the answer to that inquiry was no, the Contractual Liability Issue should have ended there. If the answer was yes, the Applicants needed, in my view, to make an application to amend their statement of case in order to plead their case on the Contractual Liability Issue. This in turn engaged the question of whether permission should be granted for such an amendment, which was a question on which both the Appellant, as the party most directly affected by the amendment, and Cudweed, as the other party to the Application, were entitled to and needed to be heard. Given that the FTT had the Reasonableness Issue to deal with in any event, the fair and sensible course would have been to hear the application to amend on the second day of the Hearing.

180. Assuming, contrary to my decision on Ground 1, that it would have been open to the FTT to grant permission to amend, after hearing the parties, the FTT would, as part of its

consideration of the application to amend, have had to consider the case management consequences of the grant of such permission.

181. The case management consequences would have been problematic. It would have been unfair to require the Appellant to answer substantively the Contractual Liability Issue at the Hearing. The Applicants had not pleaded their case on the Contractual Liability Issue. The Appellant had not been expecting to have to deal with the Contractual Liability Issue, prior to the Hearing, and would have had no opportunity to take advice, consider its position, and formulate its own case. In particular, there had been no opportunity for the Appellant to investigate and formulate a case on the factual issues which were or might be raised by the Contractual Liability Issue. Bearing in mind these difficulties, it seems inevitable, on the basis of the hypothesis I am considering, that the hearing of the Contractual Liability Issue would have had to be adjourned, with appropriate case management directions being given. These case management consequences would, in and of themselves, have provided powerful reasons for refusing the application for permission to amend.

182. Beyond this, and again in terms of case management, an adjournment of the Contractual Liability Issue to a separate hearing, leaving the Reasonableness Issue for determination on its own, would not have been an ideal solution for another reason. Adjournment of the Contractual Liability Issue to a separate hearing would have created the same problem which now exists in relation to the decision of the FTT on the Reasonableness Issue. As matters actually stand, the FTT has apparently made its decision on the Reasonableness Issue; see Paragraph 65. The FTT has not however released that decision, because it may be rendered academic by the decision of the FTT on the Contractual Liability Issue; see Paragraph 59. On the hypothesis which I am currently assuming, the FTT would have been confronted by the same problem of what to do about its decision on the Reasonableness Issue, given the adjournment of the Contractual Liability Issue. The FTT would either have had to issue its decision on the Reasonableness Issue, subject to the proviso that it might be rendered academic by its subsequent decision on the Contractual Liability Issue, or the FTT would have had to determine, but not release its decision on the Reasonableness Issue, pending its decision on the Contractual Liability Issue. In the further alternative, and least satisfactory of all given the intended purpose of the Hearing, the FTT could have adjourned the hearing of the Reasonableness Issue, pending its decision on the Contractual Liability Issue. Again, these further case management difficulties would, in and of themselves, have provided powerful reasons for refusing the application for permission to amend.

183. By way of reminder, the hypothesis I am currently considering is the question of what should have happened at the Hearing if it is assumed, contrary to my decision on Ground 1, that it was appropriate for the FTT at least to raise the Contractual Liability Issue at the outset of the Hearing. Even on that hypothesis, and if it assumed that the Applicants had made an application for permission to amend, so as to pursue a case on the Contractual Liability Issue, it seems doubtful that the FTT would have been correct to grant permission to amend. Even if however, it is assumed that the FTT would have been entitled to grant permission to amend, it will be noted that the grant of such permission to amend would have required, as a minimum, the hearing of the Contractual Liability Issue to be adjourned, with appropriate case management directions being given.

184. Returning from the hypothesis which I have been considering to the actual events at the Hearing, the contrast is obvious:

(1) The Contractual Liability Issue was not put before the parties at the Hearing on the basis that it was for the Applicants to decide whether they wished to pursue this point and, if they did so wish, to make the appropriate application. Instead the FTT raised and pursued the Contractual Liability Issue for itself.

(2) For reasons which I find impossible to understand, the Appellant, by Ms Traynor, was treated as being at fault for not being ready or able to deal with the Contractual Liability Issue at the Hearing. When I refer to dealing with the Contractual Liability Issue it will be appreciated that I am not referring to dealing with an application by the Applicants to amend their statement of case to bring the Contractual Liability Issue. I am referring to dealing with the Contractual Liability Issue on a substantive basis. The FTT was insistent that Ms Traynor deal substantively with the Contractual Liability Issue and was acutely critical of her stance that she was not in a position to do so and should not be required to do so. Given that the Contractual Liability Issue had been raised for the first time, at the Hearing and by the FTT, it seems to me that Ms Traynor's stance was a reasonable one which, at the very least, did not justify the criticism which it received from the FTT.

(3) The result of all this was that the Hearing, so far it was concerned with the Contractual Liability Issue, degenerated into an argument between the FTT, on the one side, and the Appellant, by Ms Traynor, on the other side. So far as one can see, and for reasons which I can understand given that Ms Whitehouse was similarly not expecting the Contractual Liability Issue, the Applicants largely sat on the sidelines of the argument.

(4) In strict terms the FTT did not decide the Contractual Liability Issue. In reality the Interim Decision contains the analysis and conclusions of the FTT on the Contractual Liability Issue which, although expressed as preliminary views, come across as finalised views.

185. Applying the principles which govern the question of whether a trial has been conducted fairly, as set out by Hildyard J in *M&P Enterprises*, and for the reasons which I have set out above, it seems to me that the present case was one where the Hearing was not conducted fairly. I accept the submission of counsel for the Appellant that, in this case, the FTT crossed a line and allowed its interest in an unpleaded issue to get the better of it. It seems to me that the FTT descended into the arena, and became the advocate of the Applicants' case on the Contractual Liability Issue. This rendered the Hearing unfair.

186. It does not necessarily follow from this conclusion that the Interim Decision and the Interim Decision Directions should be set aside. If one takes Ground 2 as a free standing ground of appeal, and if one disregards my decision on Ground 1, the question which would arise is whether the unfairness which I have found in the Hearing has the consequence that the Interim Decision and the Interim Decision Directions fall to be set aside. The one does not necessarily follow from the other. In most cases where unfairness is alleged in a trial, the argument of the appellant is that the unfairness tainted the hearing in such a way as to affect the outcome of the hearing. The complaint may be that important evidence was not heard, or was stifled or distorted. The complaint may be that submissions were not the subject of proper consideration. Where complaints of this sort are made out, the usual, and unfortunate consequence is that there has to be a re-hearing of the relevant trial. In the present case however all that the FTT formally decided was that the Contractual Liability Issue should be adjourned subject to the Interim Decision Directions. If it is assumed, contrary to my decision on Ground 1, that the FTT did not go wrong in concluding that the Contractual Liability Issue should be adjourned to a subsequent hearing, subject to the Interim Decision Directions, it is difficult to see why the fact that the Hearing was conducted in an unfair

manner should result in the formal decisions of the FTT being set aside, It would be reasonable to assume that the formal decisions would have been the same, even if the FTT had conducted the Hearing in a fair manner.

187. In the present case however, and if Ground 2 is taken as a free standing ground of appeal, it seems to me that the formal decisions of the FTT do fall to be set aside, regardless of my decision on Ground 1. I say this because the Appellant's complaint goes beyond a complaint of unfairness. It is submitted that this unfairness gave rise to an appearance of bias on the part of the FTT.

188. A definition of bias is to be found in the judgment of Leggatt LJ (as he then was) in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468, at [17], quoted by Hildyard J in *M&P Enterprises*:

> *"Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case:"*

189. Applying this definition of bias, the question which I have to ask myself, taking into account all of the circumstances having a bearing on the suggestion that the FTT appeared to be biased, is whether a fair-minded and informed observer, having considered those facts, would conclude that there was a real possibility of bias. On the basis of the analysis of the Hearing and the conduct of the FTT which I have set out above, it seems to me that there can only be one answer to this question. In my view a fair-minded and informer observer, having considered all the relevant facts, would have concluded that there was a real possibility of bias. This conclusion seems to me to follow inevitably both from what happened in the Hearing and from the Interim Decision itself. I have already explained the way in which the FTT descended into the arena and became the effective advocate of the Applicants in relation to the Contractual Liability Issue. There is also however the Interim Decision itself which, as I have explained, contains what comes across as a concluded analysis and determination of the Contractual Liability Issue by the FTT. In these circumstances, and by reason of this apparent bias, it seems to me that the Interim Decision and the Interim Decision Directions cannot stand.

190. This decision is a decision that the Interim Decision and the Interim Decision Directions cannot stand and fall to be set aside, on the basis of Ground 2. The question which would then follow is what decision I should make, consequential upon the setting aside of the decisions of the FTT. Given my decision on Ground 1, this question does not strictly arise. I have already decided, on the basis of Ground 1, that the Interim Decision and the Interim Decision Directions must be set aside and that these decisions should be re-made as a decision that the Applicants are not permitted to pursue a case on the Contractual Liability Issue in the Application. I have also decided that the case should also be remitted to the FTT with a direction to the FTT to issue its decision on the Reasonableness Issue and deal with any other consequential matters arising from its decision on the Reasonableness Issue.

191. I should however explain what the result would have been if I had been dealing with Ground 2 alone. On this hypothesis the outcome of the appeal, from the point of view of both parties to the appeal, would have been a good deal less satisfactory. The reason for this is that if I had been dealing with Ground 2 alone, it would not have followed, from my decision that the Interim Decision and the Interim Decision Directions should be set aside, that the Applicants could not pursue the Contractual Liability Issue. This would have remained for

argument, at a hearing before the FTT untainted by any unfairness and without any appearance of bias. On this hypothesis it seems to me that the case would have had to be remitted to the FTT, inevitably to a differently constituted FTT, for the FTT to re-address the question of whether the Contractual Liability Issue should be brought into the Application. Alternatively, and assuming no objection from the parties, I would have had to decide this question for myself.

192. As matters have turned out, the somewhat inconvenient consequences which would have resulted from a decision on Ground 2 alone do not have to be addressed.

The outcome of the appeal

193. The appeal is allowed, on Ground 1 and on Ground 2. On the basis of each of Ground 1 and Ground 2, I set aside the Interim Decision and the Interim Decision Directions.

194. By reason of my decision on Ground 1, I re-make these decisions of the FTT as a decision that the Applicants are not permitted to pursue a case on the Contractual Liability Issue in the Application. I remit the case to the FTT, with a direction to the FTT to issue its decision on the Reasonableness Issue and to deal with any other consequential matters arising from its decision on the Reasonableness Issue.

Postscript

195. This is an unfortunate case. I recognise that the question of whether the FTT should raise a new point of its own initiative is one which calls for the exercise of the FTT's judgment and discretion. There can be no absolute rules. Much depends upon the facts and circumstances of the particular case. The facts and circumstances of the present case are unusual, which is why I have concluded that I am entitled to interfere with the Interim Decision and the Interim Decision Directions, and that I should give my decision on both of Ground 1 and Ground 2. In terms of the future I suggest that it is important for the FTT to keep firmly in mind the following matters, when deciding whether to raise a point of its own initiative:
    (1) The process in an application under Section 27A is an adversarial one. It is not inquisitorial.
    (2) The primary and, in most cases at least, the sole task of the FTT is to resolve the dispute which the parties have brought before the FTT for determination, on their pleaded cases.
    (3) The circumstances in which the FTT can and should intervene to raise a new point are limited; see in particular the guidance in *Keddie*, *Admiralty Park*, and *Moustache*.
    (4) In raising a new point the FTT should not descend into the arena or give the appearance of descending into the arena. The role of the FTT is limited to raising the new point, assuming that it is appropriate to raise the point at all. Thereafter, it is for the relevant party, to whose advantage the new point may be, to decide whether to pursue the new point. At that point, and assuming that the relevant party elects to seek to pursue the new point, the first task of the FTT is to hear from the other party or parties as to whether they object to the new point being taken. If they do, the FTT must then hear the parties on the question of whether the new point should be allowed into the relevant application. This will, in turn, engage the questions, but only amongst a number of other possible issues, of whether the new point can be brought in for determination without prejudice being caused to the other party or parties and, if there is such prejudice, whether the prejudice can be met by appropriate case

management directions. In such circumstances, it may be appropriate to provide a litigant in person (for whom the rules and practice of the FTT are the same as they are for represented parties) with some limited assistance, in order to ensure that their case on these matters is fairly heard, but beyond that the FTT should confine itself to hearing the argument and deciding whether to allow the new point in and, if so, on what terms.

Mr Justice Edwin Johnson, Chamber President
8th April 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.