Neutral Citation Number: [2025] EWCA Civ 368

Appeal No: CA-2024-000216
Case No: H60YX202

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Martin Rodger KC, Deputy Chamber President ([2023] UKUT 197 (LC))
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
Tribunal Judge I Mohabir and Mr K Ridgeway MRICS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2/4/2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE SINGH
and
LADY JUSTICE FALK

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Between:

ADAM PAUL DAVIES	**Claimant Respondent**
- and –	
BENWELL ROAD RTM COMPANY LTD	**Defendant Respondent**

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Amanda Gourlay (instructed by **Lazarev Cleaver LLP**) for **Benwell Road RTM Company Limited** (the RTM Company)

Jonathan Ward (instructed directly) for **Adam Paul Davies** (Mr Davies)

Hearing date: 26 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 2 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

1. This is a second appeal concerning service charges and variable administration charges payable under Mr Davies's 125-year lease (the lease) of a self-contained townhouse live/work unit at 3 Benwell Road, London N7 7AY. The RTM (or Right to Manage) Company claimed £616.60 from Mr Davies by way of arrears of service charges in proceedings issued in the County Court on 11 May 2021. Those proceedings were transferred to the First-tier Tribunal (Property Chamber) (the FTT) on 25 February 2022. The RTM Company also claimed a variable administration charge of £3,240 together with interest and costs. The sum of £3,240 was claimed to be payable under the lease as "costs charges and expenses … incurred by the [RTM Company] in connection with the recovery of arrears of … the Service Charge".

2. Although the sums are relatively small, the case is important, because, as Lewison LJ identified in granting permission to appeal, it raises a significant point about the jurisdiction of the FTT. The point, in a nutshell, relates to the nature of the exercise that the FTT is undertaking in resolving applications under section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) "for a determination whether a service charge is payable". The statutory regime regulating the collection of service charges was replaced and extended by Chapter 5 of Part 2 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act), which introduced section 27A. That 1985 legislation provided, in essence, that service charges levied under a lease were only payable so long as they were reasonably incurred (section 19(1)(a) of the 1985 Act). The revised regime also provided that variable administration charges were payable only to the extent that the amount was reasonable ([2] of Part 1 of Schedule 11 to the 2002 Act) and gave the tribunal a similar role in relation to such charges as it had under section 27A ([5] of Part 1 of Schedule 11 to the 2002 Act).

3. In this case, the FTT decided on 31 August 2022 that Mr Davies was liable for (a) £616.60 by way of service charges, (b) £3,240 by way of variable administration charges, and (c) £8,197.50 in respect of the RTM Company's costs of the proceedings. I shall refer to this decision as the "2022 FTT" to distinguish it from the earlier 2014 FTT, which I shall mention shortly.

4. The Upper Tribunal (Lands Chamber) (the UT) allowed Mr Davies's appeal from the 2022 FTT. The UT decided that Mr Davies's only liability to the RTM Company was for £840 of the variable administration charges. The UT decided three questions as follows.

5. First, the UT decided that the claim for £616.60 by way of service charges was statute barred on the basis that 6 years from the relevant claim had expired in May 2020 (before the proceedings were issued on 11 May 2021) (see [51]–[57] of the UT's decision).

6. Secondly, the UT decided at [70]-[77] that £2,400 (of the £3,240 ordered by the FTT by way of variable administration charges) was not payable. The £2,400 was the capped costs of FTT proceedings brought by the RTM Company against Mr Davies in 2014 (the 2014 FTT). The UT decided that the 2014 FTT decided that £1,279.02 in service charges, demanded on 15 May 2014, was payable by Mr Davies, but **not** that there had been any arrears before 19 November 2014. Accordingly, the RTM Company's costs of the 2014 FTT could not have been costs incurred "in connection with" the recovery

of arrears of service charge. There were no arrears, according to the UT, until 19 November 2014.

7. Thirdly, at [78]-[86], the UT set aside the FTT's costs award on the basis that it was a variable administration charge, which had been assessed by the 2022 FTT on the false basis that the RTM Company had succeeded in its other claims, when it had (on appeal) only succeeded as to £840.

8. I will now briefly explain the parties' positions on the three grounds of appeal argued by the RTM Company. I shall deal with the first and second grounds together, because they are effectively all part of the same point. It may be noted that there is no appeal against the UT's decision that the claim for service charge arrears of £616.60 (which was the part of the £1,279.02 which Mr Davies had refused to pay) was statute barred.

9. First, the RTM Company argued that the 2014 FTT had decided, once and for all, on the basis of an admission by Mr Davies, that the service charge demand made on 15 May 2014 was valid. That demand had said that the payment was "now due" on 1 April 2014. On that premise, it was not open to Mr Davies to go behind that decision in order to argue that there were **no arrears** before 19 November 2014. Since there **were** arrears, Mr Davies must have been liable for the £2,400 by way of the costs of the 2014 FTT claimed as variable administration charges.

10. Mr Davies's answer to this first point was that the 2014 FTT had only been deciding whether the RTM Company was properly constituted so as to be the right person to claim the charges. The crucial part of the 2014 FTT decided at [42] as follows:

> As the demand for 2014 - 2015 was correctly made by [the RTM Company] through its appointed managing agents and as [Mr Davies] accepts in principle that the sums are reasonable and recoverable under the lease we determine that these sums (that is the sum of **£1,279.02**) is currently due and it should be paid by [Mr Davies] to the managing agents by **19 November 2014**.

The first part of this determination was simply deciding that the RTM Company had been the correct person to make the demand. The last part was deciding that £1,279.02 was "currently due" (or more properly "currently payable") on 17 October 2014 (the date of 2014 FTT), and should be paid by 19 November 2014. No part of the 2014 FTT was deciding that there had been any arrears before 19 November 2014. Accordingly, the £2,400 was not properly recoverable as the UT had decided.

11. The RTM Company's third ground concerned the UT's decision to set aside the costs award made by the FTT. It submitted that the UT had been wrong at [81] to hold that the RTM Company's costs of the 2022 FTT proceedings could not be recovered without having been formally demanded. On a proper construction of [4] of Part 1 of Schedule 11 to the 2002 Act and [2] of the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007 (SI 2007 No. 1258) (the 2007 Regulations), a formal demand was not needed. It was illogical and circular to require such a demand, which required the tenant to be informed that they could apply to the FTT to determine if the administration charge was payable, when the FTT had already decided that it was payable. In the course of oral argument, the RTM Company accepted: (a) that this third ground could only survive if the first two grounds succeeded, and (b) that, while the 2022 FTT had purported to assess costs under the Civil Procedure Rules (CPR) Part 44,

its only real jurisdiction was to determine what was a reasonable amount by way of variable administration charge under the lease under [5(1)] of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, and it should be treated as having done so. The RTM Company applied to make this latter point by way of an amendment to its Appellant's Notice. For reasons that will appear, I do not think that we will need to deal with that application.

12. Mr Davies's answer to the third ground was simply that the UT was right. No variable administration charge was ever payable without a demand being made in the appropriately prescribed form, however illogical that form may seem. The proposed amendment was resisted as having been made too late.

13. I have decided that all three grounds of appeal must fail in large measure for the reasons the UT gave.

14. I shall now explain my reasoning in the following order: (i) the essential factual background including the terms of the lease, (ii) the essential legislative provisions, (iii) the 2014 FTT, the 2022 FTT, and the UT's decision, (iv) whether the UT was right to decide that there had been no arrears of service charge before 19 November 2014, so that the RTM Company's costs of the 2014 FTT could not be claimed under the lease, (v) whether the UT was right to decide that the RTM Company's costs of the 2022 FTT were not payable as variable administration charges under [5] of Part 1 of Schedule 11 to the 2002 Act, and (vi) conclusions.

The essential factual background including the terms of the lease

15. The lease was dated 6 March 2006. It was entered into before the RTM Company took over responsibility for "the Services" that were, under the lease, to be provided by a Management Company. Mr Davies was, under the lease, responsible, by way of "Service Charge", for 3.605% of the total "Service Costs" that were described in the Ninth Schedule. Nothing turns on the detail of these provisions. The argument before the 2014 FTT was, however, specifically, as I have said, about the right of the RTM Company to claim any service charges at all from Mr Davies.

16. Clause 2(B) of the lease provided that Mr Davies agreed to pay "by way of further and additional Rent the Service Charge at the times and in the manner stipulated in the Twelfth Schedule hereto".

17. Part II of the Sixth Schedule included Covenants between the lessee, the lessor and the Management Company, from whom the RTM Company took over. [33] of the Sixth Schedule included Mr Davies's covenant to pay:

> (a) all expenses including Solicitors costs and Surveyors fees incurred by [the RTM Company] incidental to the preparation and service of a Notice under Section 196 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Sections 146 and 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court …
>
> (c) all costs charges and expenses which may be incurred by the [RTM Company] in connection with the recovery of arrears of the Rent and the Service Charge

18. The Twelfth Schedule to the lease provided as follows:

> 1. The Service Charge shall be an amount determined as hereinafter provided and payable at the times and in the manner hereinafter mentioned
>
> 2. As soon as is reasonably possible after the end of the Management Company's Financial Year and thereafter at yearly intervals [the RTM Company] will estimate the amount required from [Mr Davies] to cover his liability for the Service Charge for the following year and will serve written notice thereof on [Mr Davies] SUCH estimate shall wherever possible be based on the actual cost and expenses of providing the said services for the previous period (except in the first year) together with provision for any expected increase in costs for the succeeding period and together with such provisions as [the RTM Company] may consider reasonable to provide for any future capital or unusual or other expenditure and [the RTM Company] shall as far as it considers practicable equalise the amount from year to year of its costs and expenses by creating reserve funds and in subsequent years expending such sums as it considers reasonable by way of provision for depreciation future expenses liabilities and payments whether certain or contingent and whether obligatory or discretionary
>
> 3. On ten dates during each year nominated by [the RTM Company] and with not less than one month between each date (or such other dates as shall from time to time be nominated by [the RTM Company] at its sole discretion) [Mr Davies] shall pay by Banker's Standing Order or such other payment method as may be stipulated by [the RTM Company.]

19. I can deal with the remainder of the background shortly, taking the summary largely from the 2022 FTT.

20. In 2013, the RTM Company issued County Court proceedings against Mr Davies claiming £3,847.27 in service charges (and possibly administration charges) up to the beginning of the 2014 service charge year. On 2 December 2013, District Judge Burne dismissed the claim on the basis that the RTM Company had not been able to satisfy her on the evidence that it was properly constituted, such as to have a right to bring the proceedings. DJ Byrne also found that she was not sufficiently satisfied that the full amounts claimed were properly substantiated on the evidence that had been provided at the hearing.

21. On 20 January 2014, the RTM Company made an "application for a determination of liability to pay and reasonableness of service charges" to the FTT, which was what I have referred to as the "2014 FTT". The RTM Company sought a declaration as to the payability of service charges for the years 2011/2012, 2012/2013 and 2013/2014 and proposed service charges for 2014/2015. On 13 May 2014, Judge Martyński gave directions to the effect that the £3,847.27 that had been claimed in the 2013 County Court proceedings could not be pursued before the FTT, but that the RTM Company could pursue its claim as to the validity of its formation and its right to manage the properties in question.

22. The service charge demand in issue in this case was served on Mr Davies by the RTM Company two days later on 15 May 2014. It was a request for payment of £1,279.02,

apparently on 1 April 2014, by way of interim service charge for the period 1 April 2014 to 31 March 2015, and said to be an "[a]mount now due".

23. The 2014 FTT decided on 17 October 2014 that the RTM Company was indeed a properly constituted RTM company and that the interim service charges for 2014/2015 were reasonable. Mr Davies ultimately paid all the outstanding service charges on 31 May 2015, save for the sum of £616.60. Mr Davies had paid the sum of £616.60 under protest on 5 March 2013 in respect of the 2012/2013 service charge year. He later claimed credit for that sum on the basis of the dismissal of the 2013 County Court proceedings.

24. In the 2022 FTT, as I have said, the RTM Company claimed the service charge sum of £616.60 and an administration charge of £3,240, made up of £840 for four letters sent in November 2016 and in February, March and July 2020, and £2,400 for the costs of the 2104 FTT. It is the appeal from the 2022 FTT that we are now determining.

The essential legislative provisions

25. The applicable legislation seems, at first sight, baffling because it is distributed between the 1985 Act (as amended) and the 2002 Act. The truth is that the parts of the legislation that are relevant to this appeal are really quite simple. They provide for three main things. First, service and administration charges are only to be payable if they are reasonable. Secondly, demands accompanied by a provision of information as to the leaseholders' rights to apply to the FTT must be served before payment needs to be made. Thirdly, the reasonableness, and hence payability, of both service and administration charges can be determined by the FTT.

Reasonableness

26. I have already noted at [2] above the legislation that provides for service charges only to be payable so long as they are reasonably incurred (section 19(1)(a) of the 1985 Act), and for variable administrations charges to be payable only to the extent that the amounts are reasonable ([2] of Part 1 of Schedule 11 to the 2002 Act). It is worth noting in this connection, however, that [1(3)] of Part 1 of Schedule 11 to the 2002 Act defines a "variable administration charge" as "an administration charge payable by a tenant which is neither — (a) specified in his lease, nor (b) calculated in accordance with a formula specified in his lease".

Material to accompany the demand

27. Section 21B of the 1985 Act provides as follows in relation to "Notice[s] to accompany demands for service charges":

> (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
>
> (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
>
> (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

> (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it. …

28. [4] of Part 1 of Schedule 11 to the 2002 Act provides in almost exactly the same form in relation to demands for administration charges:

> (1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.
>
> (2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
>
> (3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.
>
> (4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

29. [2] of the 2007 Regulations provide for the form and content of the "summary of the rights and obligations of tenants of dwellings in relation to administration charges". [2(b)] includes the contents of the statement that must be contained in that summary, including the following at [(4)]:

> You have the right to ask the First-tier Tribunal whether an administration charge is payable.
> You may make a request before or after you have paid the administration charge. If the tribunal determines the charge is payable, the tribunal may also determine—
> who should pay the administration charge and who it should be paid to;
> the amount;
> the date it should be paid by; and
> how it should be paid.
> However, you do not have this right where—
> a matter has been agreed to or admitted by you;
> a matter has been, or is to be, referred to arbitration or has been determined by arbitration and you agreed to go to arbitration after the disagreement about the administration charge arose; or
> a matter has been decided by a court.

Applications to the FTT

30. Section 27A of the 1985 Act provides as follows under the heading "Liability to pay service charges: jurisdiction":

> (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to — (a) the person by whom it

is payable, (b) the person to whom it is payable, (c) the amount which is payable, (d) the date at or by which it is payable, and (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made. …

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

31. [5] of Part 1 of Schedule 11 to the 2002 Act in relation to the "[l]iability to pay administration charges" is in similar, but not identical form, to section 27A of the 1985 Act in relation to service charges. It provides as follows:

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to — (a) the person by whom it is payable, (b) the person to whom it is payable, (c) the amount which is payable, (d) the date at or by which it is payable, and (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which —

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. …

There is a curious difference between the headings to the two provisions. The heading to [5] of Part 1 of Schedule 11 to the 2002 Act omits the addition ": jurisdiction" found in the heading to section 27A, yet [5(3)] and section 27A(7) contain identical provisions concerning the concurrent jurisdiction of the FTT and the court.

The 2014 FTT, the 2022 FTT, and the UT's decision

32. Against that background, I can deal with these three decisions quite briefly.

The 2014 FTT

33. I have explained the background to the 2014 FTT and what it decided at [20]-[23] above. The parties have, however, disagreed about the significance of the following paragraphs of the decision. [42] is repeated for ease of reference:

> 12. The hearing of the application took place on 28 August 2014. This was to determine the reasonableness of the service charge demand for the service charge year 2014 - 2015 in accordance with section 27A of the 1985 Act.
>
> 13. As this falls outside the original application the parties agreed at the hearing we held on 28 August 2014 that we should hear that claim as our decision could affect future service charge claims. This was also the approach taken at the case management conference which was attended by the parties, an approach they agreed to.
>
> 14. [Mr Davies] accepts that the demand we are considering is an interim demand and he does not question its validity except that he contends that [the RTM Company] was not properly constituted and as a result it cannot validly claim service charges.
>
> 42. As the demand for 2014 - 2015 was correctly made by [the RTM Company] through its appointed managing agents and as [Mr Davies] accepts in principle that the sums are reasonable and recoverable under the lease we determine that these sums (that is the sum of £1,279.02) is currently due and it should be paid by [Mr Davies] to the managing agents by 19 November 2014.

34. The question is whether Mr Davies's failure to question the validity of the 15 May 2014 demand in 2014 FTT prevents him from arguing now that there were no arrears before 19 November 2014.

The 2022 FTT

35. The 2022 FTT was, in form at least, a decision of both the FTT and the County Court. The 2022 FTT rejected all the defences raised by Mr Davies (though he had not argued limitation) to find at [11]-[19] that he was liable for service charges in the sum of £616.60. As to the administration charges claimed, the 2022 FTT accepted evidence

called by the RTM Company to the effect that they were recoverable under [33] of Part II of the Sixth Schedule to the lease, and found them reasonable in amount. In respect of the legal costs claimed at the end of the proceedings, the 2022 FTT said at [28] that it was satisfied that the RTM Company was "entitled to recover its costs contractually under [33] of Part II of the Sixth Schedule to the lease". It then said at [29] that: "[t]he assessment of the quantum of the costs by [the 2022 FTT] was carried out by way of a summary assessment", before reducing the costs claimed of £14,569.50 to £8,197.50.

36. It would seem that the exercise undertaken by 2022 FTT was a determination of payability by the FTT under section 27A of the 1985 Act (as to the service charges), and under [5] of Part 1 of Schedule 11 to the 2002 Act (as to both the administration charges and legal costs claimed). The County Court's jurisdiction was not engaged.

The UT's decision

37. It is not necessary to recite large parts of the UT's lengthy decision. The critical reasoning in relation to the arrears of service charge and the variable administration charge are as follows. I have added emphasis to highlight the most significant passages:

> 51. The RTM Company commenced these proceedings by issuing a claim form in the County Court on 13 May 2021 attaching a statement of account showing, as the opening balance, the sum of £1,279.02 which had been issued on 15 May 2014. The first payment from Mr Davies was the sum paid on 31 May 2015 which left the £616.60 which Mr Davies had withheld because he claimed a credit. **On the face of it, time for the recovery of that disputed sum began to run on 15 May 2014 and expired in May 2020**. The claim commenced on 13 May 2021would therefore have been too late. …
>
> 62. Mr Davies has always maintained that he has never been in arrears with his rent or service charges. I have already decided that he was mistaken in believing that he was entitled to a credit extinguishing his liability to pay the outstanding part of the 2014-15 interim service charge, nor was there any agreement discharging his liability for that sum. For those reasons, his assertion that he has never been in arrears cannot succeed. **From May 2014 until May 2020 he owed £616.60 and was therefore in arrears**; that history was not rewritten when, as I have also found, the RTM Company's right of recovery was barred by the expiry of the limitation period. …
>
> 70. Mr Davies' obligation was to pay the service charge in the manner stipulated in the Twelfth Schedule to the lease. The 2013 County Court claim was dismissed not only because the RTM Company could not prove that it was entitled to manage but also because it could not show that the Management Company had nominated dates for payment as required by paragraph 3 of that Schedule. **The demand served on 15 May 2014 did not cure that problem as it purported to require payment on a single date (which, oddly, was 1 April 2014, which had already passed) rather than by instalments**. **For that reason I am satisfied that it created no liability to pay and did not give rise to arrears**.
>
> 71. At the hearing before the FTT on 28 August 2014 Mr Davies did not dispute that, if the RTM Company was validly constituted and entitled to manage his property, he should pay the charge for 2014-15. The FTT found in the Company's favour and

directed that payment should of the £1,279.02 should be made by 19 November 2014. **It made no determination of the date at which that sum had become payable**. **In my judgment, neither Mr Davies' decision not to question the validity of the demand, nor the FTT's decision that the sum demanded was payable, caused the interim service charge retrospectively to have been in arrears at any time before 19 November 2014. It had not been in arrears before that date because it had not been properly demanded**. The FTT's determination that the sum was due was of course definitive and meant that any defences which could have been taken became irrelevant to Mr Davies liability. **But the FTT specified a date for payment in the future and it did not consider or determine when the sum had first fallen due**. **Its decision does not prevent Mr Davies from maintaining, correctly, in these proceedings that he was not in arrears at any time before 19 November 2014 and that the 2014 proceedings were not concerned with the recovery of arrears because there had been no arrears**.

72. The FTT was therefore wrong to find that the cost incurred in the 2014 proceedings were incurred in connection with the recovery of arrears of rent or service charges.

38. As to the question of legal costs, the UT concluded as follows. Again, I have added emphasis:

80. There are a number of difficulties with the way in which the FTT and the Court approached the question of costs.

81. The FTT was entitled to determine the sum which it was reasonable for Mr Davies to pay under paragraph 33(c) of the lease, because it was a variable administration charge over which the FTT is given jurisdiction by paragraph 5(1) of Schedule 11, [of the 2002 Act]. **Once it had made a determination, however, the charge would not become payable until it was properly demanded**. By paragraph 4 of Schedule 11, 2002 Act a demand for the payment of an administration charge must be accompanied by a summary of the tenant's rights and obligations and a tenant is entitled to withhold payment until that requirement is complied with.

82. In determining the sum payable, **the FTT assumed that the RTM Company had succeeded in respect of the full amount it was claiming in the proceedings. It is now clear that it should not have done**, and that it should have determined the costs recoverable under paragraph 33(c) on the basis that the £616.60 service charge, and the £2,400 administration charge dating from 2014 were not payable, and that the only sum payable was £840 for four debt collection letters. It cannot be said that its assessment would have been the same if it had appreciated that the RTM Company had succeeded in only a little over 20% of its claim. Its decision must therefore be set aside.

39. I will now turn to consider the grounds of appeal.

<u>Was the UT right to decide that there had been no arrears of service charge before 19 November 2014, so that the RTM Company's costs of the 2014 FTT could not be claimed under the lease?</u>

40. The first and most important thing to understand is the jurisdiction of the FTT under sections 19(1)(a) and 27A of the 1985 Act and [2] and [5] of Part 1 of Schedule 11 to the 2002 Act. In the end, there was no dispute between the parties on this point. These matching provisions, in respect of service charges and administration charges, allow the FTT to decide the reasonableness of the charges and whether, if reasonable, they are payable. Those decisions will, of course, be made on the basis of the provisions of the lease in question and the applicable statutory provisions. They do not, however, allow the FTT to give a judgment in respect of the charges, even if they are payable. That is for the court. Section 27A of the 1985 Act and [5] of Part 1 of Schedule 11 to the 2002 Act do, however, allow the FTT to determine who is to pay, who is to be paid, and when the payments are required to be made (under the terms of the lease) and by what method.

41. In *Termhouse (Clarendon Court) Management Ltd v. Al-Balhaa* [2021] EWCA Civ 1881, [2022] 1 WLR 1529, Newey LJ left these points open, when he said at [31]:

> Mr Cowen accepted that FTT decisions on applications under section 27A of the 1985 Act sometimes state what is due from the tenant rather than just whether the relevant service charges were properly imposed. He queried whether the FTT in truth has jurisdiction to make such decisions, but we do not need to resolve that question. **It seems to me that, even assuming that it is open to the FTT to say what a tenant actually owes rather than merely what has properly been charged, such a decision will be no more than declaratory, and in fact I should be surprised if the FTT went so far as to purport to order a tenant to make a payment in respect of outstanding service charges, let alone to require the tenant to do so within any particular time frame**. Even, therefore, in a case in which the FTT expresses a conclusion on what the tenant currently owes, the landlord will not be able to resort to either section 176C of the 2002Act or section 27of the 2007 Act for enforcement. If needs be, the landlord should issue new proceedings in the County Court in which the FTT's decision will be binding on the parties [emphasis added].

42. I respectfully agree with the thrust of Newey LJ's approach. But with the benefit of the assistance of specialist counsel in this case, we can now go further. It is indeed open to the FTT to determine both what has been reasonably charged and what is payable by the tenant and when. Those decisions will not, however, take effect as an enforceable judgment. Only the court can give such a judgment, leading, if necessary, to the processes of enforcement.

43. It was suggested that the distinction between the functions of the FTT and the court was the distinction between what is "payable" and what is "due". I do not find that distinction helpful. In one sense, if the FTT decides that a service charge amount is payable by X to Y on 1 January, it will be determining that that sum is "due" on 1 January. What the FTT cannot do is to make an enforceable order or judgment that the payment be made.

44. With those parameters in mind, I turn to the question raised by the facts of this case. The essential question is, as I have said above, whether the UT was right to decide that there had been no arrears of service charge before 19 November 2014. If arrears arose immediately on the demand being made on 15 May 2014, the RTM Company was entitled to the reasonable costs of the 2014 FTT. If not, then [33] of the Sixth Schedule

to the lease was not engaged because the RTM Company's 2014 FTT legal costs were not "costs … incurred by the [RTM Company] in connection with the recovery of arrears of … the Service Charge".

45. Both sides advanced persuasive arguments. The RTM Company submitted that [14] and [42] of the 2014 FTT were conclusive. Mr Davies had not questioned the validity of the 15 May 2014 demand. That demand was "correctly made by [the RTM Company]" and Mr Davies accepted that "the sums are reasonable and recoverable under the lease". There was no need for a demand that was compliant with section 21B of the 1985 Act to be served **before** the FTT could determine whether service charges were payable. Admittedly, here, the 15 May 2014 demand was not "accompanied by a summary of [Mr Davies's] rights and obligations … in relation to service charges". But that did not matter because Mr Davies had accepted the validity of the demand and the recoverability of the service charges claimed. Therefore, the RTM Company submitted that from 15 May 2014 to the end of 2014 FTT those service charges were in arrears, entitling the RTM Company to claim its costs in connection with their recovery.

46. Mr Davies submitted that the RTM Company's arguments misunderstood [14] of the 2014 FTT. All the 2014 FTT decided was what it had set out to decide, namely that the RTM Company was a properly constituted RTM company and that the interim service charges for 2014/2015 were reasonable (see [12] and [13] of the 2014 FTT at [33] above, and [23] above). Mr Davies argued that [42] of the 2014 FTT was deciding that "the demand for 2014-2015 was correctly made by [the RTM Company]", in that the RTM Company was the right person to make it. It was not deciding when arrears arose. Indeed, as the UT said at [71], the 2014 FTT "made no determination of the date at which that sum had become payable".

47. I accept that the RTM Company is correct to say that the FTT can decide the reasonableness and payability of service charges before a valid demand is served. Conversely, a court could not make an order or judgment in respect of that reasonable service charge before a demand, served in compliance with section 21B of the 1985 Act, had been made. The whole jurisdiction is intended to enable parties to leases to obtain rulings from the FTT as to various matters concerning service and administration charges, such as their reasonableness, at all stages, before, as well as after, they actually need to be paid.

48. [12] and [13] of the 2014 FTT (set out at [33] above) show that this was precisely what was going on in this case. The 2014 FTT hearing was "to determine the reasonableness of the service charge demand for the service charge year 2014-2015 in accordance with section 27A of the 1985 Act". Although it fell "outside the original application" the parties agreed to that question being heard "as [the] decision could affect future service charge claims".

49. The parties had not, in my judgment, agreed to the 2014 FTT deciding whether there were arrears between 15 May 2014 (the date of the demand) and either the date of the hearing (28 August 2014), the date of the decision (17 October 2014) or the date determined for payment (19 November 2014).

50. For these reasons, I am broadly in agreement with the way that the UT decided this issue. At [62], however, the UT said, perhaps inadvertently, in the context of arrears and in the context of whether, in 2014, the £616.60 was due, that "**[f]rom May 2014**

until May 2020 he owed £616.60 and was therefore in arrears" (emphasis added). I am not sure that is what the UT meant. But, in any event, it was not correct in the context of what we have to decide.

51. Leaving that point aside, the UT was, I think, broadly (though perhaps not wholly) correct at [70]-[71].

52. First, the UT was correct to say, at [70] that the 15 May 2014 demand did not comply with the mode of payment requirement in [3] of the Twelfth Schedule to the lease (see [18] above). It also did not comply with section 21B of the 1985 Act, in that it did not include a summary of Mr Davies's rights and obligations. For both those reasons, the 15 May 2014 demand did not give rise to arrears as at that date. I have already explained why Mr Davies had not agreed to the 2014 FTT determining whether or not there were arrears, and, therefore, the inherent validity of the demand itself (see [48]-[49] above).

53. Secondly, I agree with the UT, when it said at [71] that the 2014 FTT "made no determination of the date at which [the sum of £1,279.02] had become payable" and "did not consider or determine when the sum had first fallen due". I also agree with the UT that "neither Mr Davies' decision not to question the validity of the demand, nor the FTT's decision that the sum demanded was payable, caused the interim service charge retrospectively to have been in arrears at any time before 19 November 2014". I would, however, interpose that the determination of the reasonableness of the amount and the date for payment did not necessarily even put Mr Davies in arrears as at 19 November 2014. To have achieved that, the RTM Company would, at least, have had to have served a demand complying with section 21B of the 1985 Act in advance of that date.

54. Thirdly, I also agree with the UT when it said at [71] that the 2014 FTT did "not prevent Mr Davies from maintaining, correctly, in these proceedings that he was not in arrears [I would interpose, "at least"] at any time before 19 November 2014". I also agree with the UT's final comment in [71] that the 2014 FTT was "not concerned with the recovery of arrears because there had been no arrears". As the UT said at [72], the 2022 FTT was therefore wrong to find that the costs incurred by the RTM Company in the 2014 FTT were incurred in connection with the recovery of arrears of service charges.

55. The RTM Company submitted, as I have said, that [14] and [42] of the 2014 FTT were conclusive, because Mr Davies had accepted the validity of the 15 May 2014 demand. In my judgment, Mr Davies only accepted the validity of the demand for the purposes of the issues that the 2014 FTT was deciding. Those purposes were only whether the RTM Company was properly constituted and whether the 2014-2015 service charges were reasonable. As I have explained, the 2014 FTT did not decide when the service charge demanded on 15 May 2014 had first become payable. Accordingly, Mr Davies was not prevented or estopped from arguing in the 2022 FTT and the UT that there were no relevant service charge arrears before 19 November 2014.

56. For these reasons, I would hold that the UT was right to decide that Mr Davies was not in arrears of payment of his service charge before (at least) 19 November 2014. Accordingly, grounds 1 and 2 of the RTM Company's appeal must be dismissed.

<u>Was the UT right to decide that the RTM Company's costs of the 2022 FTT were not payable as variable administrations charges under [5] of Part 1 of Schedule 11 to the 2002 Act?</u>

57. As I have recorded at [11] above, the RTM Company accepted that this third ground could only survive if its first two grounds succeeded. Since they have not succeeded, there is no strict necessity to say more. And for the same reason, there is no need to consider the RTM Company's application to amend its Appellant's Notice. I do, however, wish to make four comments under this heading, bearing in mind that service and administration charges cases rarely reach this court.

58. First, I agree with the way that the UT put the matter at [80]-[81], which chimes with what I have said above about the need for compliant service charge demands under section 21B of the 1985 Act at [52]-[53] above. The same applies to administration charges by reason of [4] of Part 1 of Schedule 11 to the 2002 Act. As the UT said, once the 2022 FTT had made a determination of the reasonableness of the administration charge, it would not become payable (in the sense that a court could order it to be paid) until it had been properly demanded.

59. Secondly, I agree with what the UT said at [82] to the effect that the FTT 2022's determination of the costs could not stand because it was made on the basis that the RTM Company had succeeded, when it had failed on all its claims except the charge of £840 for four debt collection letters.

60. Thirdly, it is worth pointing out that the 2022 FTT created a confusion. It said correctly at [28] that (on the basis it had decided) the RTM Company was "entitled to recover its costs contractually under [33] of Part II of the Sixth Schedule to the lease". In respect of costs claimed by way of variable administration charges under a lease, the FTT's likely role is to assess their reasonableness under [2] of Part 1 of Schedule 11 to the 2002 Act (see [26] above). The 2022 FTT confused the matter by suggesting at [29] that **it** was assessing the quantum of those costs "by way of a summary assessment". The County Court transferred the 2022 FTT to the FTT because it was determining "payability" questions under section 27A of the 1985 Act and [5] of Part 1 of Schedule 11 to the 2002 Act. Thus, when the 2022 FTT came to consider the question of the costs of those proceedings, it ought to have been approaching the matter as one of the reasonableness of a variable administration charge, not as an assessment of the costs under the CPR. It is true that the 2022 FTT was sitting both as the FTT and as a county court, but all it had decided was in its FTT capacity. Accordingly, it should not have made a CPR costs assessment. The process of determining the reasonableness of a claimed variable administration charge, even when it relates to legal costs, is, of course, a quite different process from a summary assessment of costs under the CPR.

61. Fourthly, for the reasons I have already given at [52]-[53] and [58] above, a formal demand was indeed needed before the costs of the 2022 FTT could be the subject of a court order for payment. The argument that [4] of Part 1 of Schedule 11 to the 2002 Act and [2] of the 2007 Regulations are illogical and circular cannot run. The statutory form, requiring the tenant to be informed that they can apply to the FTT to determine if the administration charge was payable, will inevitably be more directly relevant to some tenants than to others. But the statutory provisions in section 21B of the 1985 Act and [4] of Part 1 of Schedule 11 to the 2002 Act are clear. They provide that a demand **must** be accompanied by a summary of the rights and obligations of the tenant, and that the tenant "may withhold payment of an administration [or service] charge which has been demanded from him if [that requirement] is not complied with in relation to the demand".

62. I, therefore, conclude that the UT was right to decide that the RTM Company's claim for its costs of the 2022 FTT as a variable administration charge was not payable by Mr Davies under [5] of Part 1 of Schedule 11 to the 2002 Act.

Conclusions

63. I should mention, for the sake of completeness, that I do not think it is necessary to deal with Mr Davies's Respondent's Notice, since he has anyway been successful in defeating the RTM Company's appeal in its entirety.

64. For the reasons I have given, I would dismiss the RTM Company's appeal.

LORD JUSTICE SINGH:

65. I agree.

LADY JUSTICE FALK:

66. I also agree.